THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
CASE NO: 268/07

In the matter between :

FAIROAKS INVESTMENT HOLDINGS (PTY) LIMITED	First Appellant
WILLOW FALS ESTATE	Second Appellant

and

SUZETTE OLIVER	First Respondent
HIGHLAND KNIGHT INVESTMENTS 140 (PTY) LIMITED	Second Respondent
T L JANSE VAN RENSBURG INCORPORATED	Third Respondent
THE REGISTRAR OF DEEDS, PRETORIA	Fourth Respondent

Before:	**STREICHER, MTHIYANE, PONNAN JJA, HURT & KGOMO AJJA**
Heard:	**11 MARCH 2008**
Delivered:	**28 MARCH 2008**
Summary:	**Sale of land – agreement of sale lapsed because of non-fulfilment of suspensive condition – agreement to revive agreement of sale with amendments has to comply with provisions of Act 68 of 1981.**
Neutral citation:	**Fairoaks Investment v S Oliver (268/07) [2008] ZASCA 41 (28 March 2008)**

STREICHER JA

STREICHER JA:

[1] In an action instituted by the appellants against the respondents in the Transvaal Provincial Division, the appellants claimed an order interdicting the first respondent from transferring a property described as the Remaining Extent of Portion 171 Wilgespruit 190 IQ ('the property') into the name of any person or entity other than the first or the second appellant and an order directing the first respondent to transfer the property to the first appellant ('the second appellant's nominee) alternatively the second appellant. The first respondent took various exceptions to the appellants' particulars of claim on the ground that they do not disclose a cause of action. The court a quo upheld the exceptions but granted leave to the appellants to appeal to this court.

[2] In their particulars of claim the appellants alleged:

2.1 The second appellant and the first respondent, on 9 April 2002, concluded a written agreement of sale in terms of which the first respondent sold the property to the second appellant for a purchase price of R2 150 000.

2.2 In terms of the agreement of sale they agreed

(a) that the purchase price would be secured by a bank guarantee payable against registration of transfer;

(b) that the agreement would be subject to the fulfilment of three suspensive conditions contained in clause 13 of the agreement and that should any suspensive condition not be timeously fulfilled the entire agreement would automatically lapse and be of no force or effect.

2.3 The suspensive condition recorded in clause 13.2 of the agreement of sale required that the property be rezoned and that the approval by the relevant town planning authority of a site development plan for a residential development of at least fifteen housing units per hectare be

obtained within twelve months of the date of signature of the agreement.

2.4 The suspensive condition contained in clause 13.2 was not fulfilled within a period of twelve months from the date of signature of the agreement in consequence whereof the agreement lapsed.

2.5 The second appellant, represented by its attorney, on or about 8 August 2003, in a letter to the first respondent's attorney (annexure B1 to the particulars of claim), offered to revive the lapsed agreement and, by way of a letter from her attorneys (annexure C1 to the particulars of claim), the first respondent, on or about 20 August 2003, accepted the offer.

[3] Paragraphs 11 to 16 of the particulars of claim read as follows:

'11 On or about 8 August 2003, the Second Plaintiff, represented by its attorneys Izak Minnie Inc, who acted on the Second Plaintiff's written authority, offered to revive the lapsed agreement of sale by addressing a letter bearing the said date to the First Defendant's attorneys, Dykes van Heerden Inc.

11.1 A copy of the said letter together with the undertaking therein referred to is annexed hereto marked "B1"

11.2 A copy of the aforesaid written authorization of the Second Plaintiff's attorneys is annexed hereto marked "B2".

12 On or about 20 August 2003 the First Defendant represented by her said attorneys, Dykes van Heerden Inc, who acted on her written authority, accepted the aforementioned offer to revive the lapsed agreement of sale by way of a letter bearing the aforesaid date.

12.1 A copy of the said letter of acceptance is annexed hereto marked "C1".

12.2 The aforesaid written authorization, properly construed, is comprised of clause 2.2 of annexure A hereto, a letter by Dykes van Heerden Inc. dated 18 July 2003 as well as the First Defendant's written response thereto dated 20 August 2003, true copies whereof are hereunto annexed marked "C2" and "C3".

13 In the premises, the second plaintiff and the First Defendant, represented as aforesaid, agreed in writing, by way of annexures "B1" and "C1" hereto, on 20th August 2003, to revive the said lapsed agreement of sale.

14.1 It was an express term of the revived agreement of sale as constituted by Annexures "B1" and "C1" hereto that clause 13.2 was thereby amended to the effect that compliance therewith was to occur upon or before transfer of the property into the name of the Second Plaintiff or its nominee.

14.2 It was an implied term of the revived agreement of sale constituted by Annexures "B1" and "C1" hereto, that such revived agreement further embodied all of the terms contained in Annexure "A", save for the aforesaid amendment of the provisions of clause 13.2.

14.3 The provisions of the amended clause 13.2 operated for the benefit of the Second Plaintiff (or its nominee), whose nominee advised the First Defendant on 27 October 2004 in writing that it waived the benefit of such condition.

14.4 A true copy of the aforesaid document containing the waiver is hereunto annexed marked "C4".

15. Alternatively to paragraphs 11 to 14 above:

15.1 On or about 20 August 2003, the First Defendant represented by her attorneys, Dykes van Heerden Inc, advised the Second Plaintiff orally and in writing that such attorneys were sending transfer documents to the Second Plaintiff in order to enable the First Defendant to transfer the property in accordance with the provisions of the agreement of sale, annexure "A" hereto.

15.2 On or about 20 August 2003, the First Defendant prepared and produced copies of her identity document an antenuptial contract for purposes of preparing documentation for the transfer of the immovable property in terms of the agreement of sale, annexure "A" hereto.

15.3 On or about 21 July 2004, the First Defendant, represented by her said attorneys, addressed a letter to the second plaintiff's attorneys, a copy whereof is annexed hereto marked "D", in terms whereof the First Defendant called upon the Second Plaintiff to produce guarantees in relation to the payment of the purchase price in terms of the agreement of sale, annexure "A" hereto.

15.4 In conducting herself as set out above, the First Defendant waived any right to rely on the failure of the suspensive conditions recorded in clause 13 of the agreement of sale, annexure "A" hereto.

16. In the premises, the Second Plaintiff became entitled, by no later than 20 August 2004, to enforce the provisions of the agreement of sale, annexure A hereto, alternatively, the revived agreement embodied in annexures "B1" and "C1" hereto, against the First Defendant.'

[4] The first respondent took a number of exceptions to the particulars of claim. The third of these exceptions is to the effect that in so far as the appellants' claim is based on paragraphs 11 to 14 and 16 of the particulars of claim it fails to disclose a cause of action in that the new contract for the sale of land does not comply with the provisions of s 2(1) of the Alienation of Land Act 68 of 1981 ('the Act'). The fifth of these exceptions is to the effect that in so far as the appellants' claim is based on paragraphs 15 and 16 of the particulars of claim, no cause of action is disclosed in that the contract of sale was void *ab initio* by operation of law and no rights existed between the first respondent and the appellant which were capable of being waived.

[5] Section 2(1) of the Act provides:

'No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

It would appear from a reading of paragraphs 11 and 12 of the particulars of claim that the drafter thereof was of the view that the alleged agreement by way of B1 and C1 had to comply with the provisions of the section in that in respect of both letters the allegation is made that the attorney who signed the letter acted on the written authority of his client. However, in the court a quo and before us the appellants conceded that C1 and B1 did not comply with these provisions.

[6] The court a quo stated that the only issues to be determined in deciding whether the particulars of claim disclosed a cause of action were whether there had been a consensual revival of the agreement of sale with written

amendments or whether the first respondent waived any right to rely on the failure of the conditions recorded in clause 13 of the agreement of sale. It held that because of the non-fulfilment of the condition recorded in clause 13.2 the sale lapsed by operation of law and was deemed to be void *ab initio*. The agreement of sale could not be revived without amendments in that it would automatically self destruct as a result of the non-fulfilment of the condition which brought about its demise in the first place. An agreement to revive it with the necessary amendments would constitute a new agreement of sale which had to comply with the provisions of s 2(1) of the Act. The agreement to revive relied upon by the appellants was, therefore, not a valid agreement and in so far as the appellants' claim is based on that agreement no cause of action is disclosed.

[7] In so far as the appellants' claim is based on an alleged waiver by the first respondent to rely on the failure of the suspensive conditions in clause 13 of the agreement of sale, the court a quo held that, as the agreement of sale had lapsed and was void *ab initio*, there were no rights and obligations flowing from the agreement of sale which were capable of being waived by the first respondent. The court a quo accordingly held that in so far as the appellants' claim is based on a waiver by the first respondent, no cause of action is disclosed.

[8] According to the particulars of claim the agreement of sale lapsed upon the non-fulfilment of the condition contained in clause 13.2 of the agreement but was revived by agreement in writing, by way of annexures B1 and C1, in its original form save for an amendment of clause 13.2 thereof. The amendment is alleged to have been to the effect that fulfilment of the condition had to occur upon or before transfer of the property into the name of the second appellant or its nominee.

[9] Annexure B1 consists of a letter by the second appellant's attorneys and an undertaking by the attorneys to pay to the first respondent's attorney, for the credit of the first respondent, the amount of R2 150 000 against –

(a) transfer of the property;

(b) cancellation of all existing bonds; and

(c) 'receipt of confirmation that all the suspensive conditions as is evident from the Deed of Sale between the respective parties, and with specific reference to rezoning of the property as residential and the approval of the town planning authorities, have been complied with'.

The letter to which the undertaking was attached refers to the transfer of the property and in paragraphs 2 to 4 thereof it is said:

'2 We confirm our advice that, under cover herewith, the attorneys undertaking agreed to is transmitted to you.

3 We further confirm your advice that same is in order and that we will, as per your Ms Oliver's instructions, convey to Willow Falls Estate's Mr Hartzer that the process must be proceeded with immediately.

4 We will also in consultation with him and Dykes van Heerden, work out a time table for finalisation of the outstanding issues and transfer of the property.'

Of importance is the fact that in terms of the letter read with the undertaking to pay –

(a) the terms of the undertaking had been approved by the first respondent's attorneys;

(b) the rezoning of the property had to precede transfer of the property; and

(c) the process had to be put in motion immediately.

[10] Annexure C1 is a letter by the first respondent's attorneys to the second appellant's attorneys. It refers to the transfer of the property and reads:

'We refer to the above matter and to the telephone conversation between Gillian of our offices and yourself on the 20th August 2003 and confirm the following:

1 You will furnish us with the necessary company documentation, to enable us to draw the relevant transfer documents.

2 We are to proceed without the re-zoning.'

[11] Counsel for the appellants submitted that the allegation in paragraph 14.1 of the particulars of claim was clearly wrong in that it is apparent from a reading of C1 that the rezoning condition had been waived in terms of the agreement to revive the agreement of sale. He submitted, furthermore, that the allegation in paragraph 14.3 that the benefit of the rezoning condition was waived on 27 October 2004 should be understood as an allegation that the waiver of the rezoning condition on 20 August 2003 was confirmed on 27 October 2004. Asked whether the matter did not have to be decided on the basis alleged in the particulars of claim he contended that if a valid cause of action, although at variance with the cause of action alleged in the particulars of claim, could be constructed from documents annexed to the particulars of claim, the exception had to be dismissed. If that cause of action differed from what is alleged in the particulars of claim the excipient's complaint may be that the particulars of claim are vague and embarrassing but not that they fail to disclose a cause of action, so he submitted. For these reasons the matter should, according to counsel for the appellants, be decided on the basis that the agreement of sale had been revived without the condition that it be subject to the rezoning of the property sold.

[12] It is for an excipient who alleges that a summons does not disclose a cause of action to establish that, upon any construction of the particulars of claim, no cause of action is disclosed.[1] However, in the present matter there can be no uncertainty as to the pleader's intention. The particulars of claim are clear. Moreover, counsel for the appellants did not contend that the particulars of claim could be construed in different ways, he contended that

[1] See *Theunissen and Others v Transvaalse Lewendehawe Koop Bpk* 1988 (2) SA 486 (A) at 500E; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) 891 (C) at 893; *Callender-Easby and Another v Grahamstown Municipality and Others* 1981 (2) SA 810 (E) at 813A; *Klerck NO v Van Zyl and Maritz NNO and Another and Related Cases* 1989 (4) SA 263 (SE) at 288D-G; and *South African National Parks v Ras* 2002 (2) SA 537 (C) at 542B-E.

the particulars of claim were wrong and argued the matter on a factual basis that had not been pleaded. In my view it cannot be required of an excipient to establish that such a factual basis does not disclose a cause of action. In any event there is no way that B1 and C1 can be interpreted, as the appellant's counsel urged us to do, to embody an agreement in terms of which the second appellant no longer required the rezoning of the property as a precondition to the payment of the purchase price. The undertaking to pay the purchase price was specifically made subject to the condition that rezoning had to take place.

[13] Read with paragraph 3 of B1 and with the undertaking to pay the purchase price against fulfilment of the condition requiring rezoning of the property, the statement in C1 that the first respondent was to proceed without the rezoning, can be interpreted to mean that the process of transferring the property should be set in motion, not finalised, even though the property had not been rezoned yet. This is the interpretation pleaded in the particulars of claim. In para 14.1 it is alleged that it was an express term of the revived agreement of sale as constituted by B1 and C1 that clause 13.2 was thereby amended to the effect that compliance therewith was to occur upon or before transfer of the property. In para 14.3 it is alleged that the provisions of the amended clause 13.2 operated for the benefit of the second appellant (or its nominee) whose nominee advised the first respondent on 27 October 2004, more than a year after the alleged agreement in terms of B1 and C1, in writing, that it waived the benefit of the condition.

[14] Counsel for the appellants submitted that it was held in *Neethling v Klopper and Others*[2] that a contract for the sale of land which had been cancelled could be revived by waiver of the rights created by the cancellation of the agreement and that an agreement to do so does not constitute a fresh agreement of sale which has to comply with the formalities prescribed by

[2] 1967 (4) SA 459 (A).

s 2(1) of the Act. He submitted that the same principle is applicable in a case where the contract of sale lapsed through the non-fulfilment of a condition. The parties could likewise agree to waive the rights created by the lapsing of the agreement and such agreement would not constitute a fresh agreement of sale which had to comply with the formalities. In this regard he relied on the judgment in *D S Enterprises (Pty) Ltd v Northcliff Townships (Pty) Ltd*[3].

[15] In *Neethling v Klopper*, Neethling sold a farm to Klopper and others ('Klopper'). The purchase price was payable in instalments. Subsequent to the sale Neethling claimed that he had validly cancelled the sale but Klopper disputed his right to do so. In a letter dated 6 January 1966, Klopper claimed transfer of the farm against payment of the full balance of the purchase price and threatened to apply to court for an order that transfer be effected to him should Neethling not take steps to transfer the farm to him. On 7 February 1966, Neethling accepted Klopper's offer to pay the balance of the purchase price against transfer of the farm but later refused to pass transfer and contended that the contract for the sale of the farm had lapsed and that the subsequent arrangement was invalid as it did not comply with the formalities prescribed by s 1(1) of Act 68 of 1957, the precursor of s 2(1) of Act 68 of 1981. The arrangement did not comply with such formalities in that the letters were signed by the attorneys without the written authority of their clients. This court held that the agreement reached in terms of the two letters did not have to comply with these formalities.

[16] Dealing with an argument that the contract for the sale of the farm had been amended in that it was agreed that payment of the purchase price had to be effected earlier than in terms of the contract, Steyn CJ reasoned that amendments of material provisions of an agreement of sale of land had to

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[3] 1972 (4) SA 22 (W).

comply with the formalities,[4] but, that the letter of 6 January should not be seen as a proposal that the agreement be amended, as an amendment of the contract was not required in order to claim transfer against payment of the purchase price.[5]

[17] Assuming that the contract had been validly cancelled the question was whether the contract was revived by the letters of 6 and 7 January 1966.[6] Dealing with this question Steyn CJ said that at common law, a party who validly cancelled a contract, may with the consent of the other party undo his cancellation with the result that the contract is no longer affected by such cancellation.[7] The question then arose whether the common law position was affected by the provisions of s 1(1) of Act 68 of 1957 ie whether the agreement embodied in the letters of 6 and 7 January should have complied with the provisions of the section. In order to answer this question Steyn CJ considered it necessary to determine what the nature of the transaction was and proceeded to do so.[8] He stated that, notwithstanding the assumed validity of Neethling's cancellation of the contract it should be borne in mind that Klopper consistently disputed that the contract had been cancelled.[9] In the light of this attitude the letters could not be regarded as a fresh offer to purchase and an acceptance of such an offer. It could not have been the intention of Klopper to conclude a new contract to purchase and Neethling could not have understood that to have been Klopper's intention. Klopper's letter of 6 January rather amounted to a tacit request that Neethling waives his claim to have validly cancelled the contract and accepts Klopper's request that transfer be effected to him.[10] It followed that Neethling undid the consequences of his cancellation, assuming that it was a valid cancellation,

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[4] At 464G.
[5] At 46D-G.
[6] At 466B.
[7] At 466C-467C.
[8] At 467D.
[9] At 467D-G.
[10] At 467G-H.

with the consent of Klopper thereby reviving the cancelled contract. No new contract of sale had however been concluded. This agreement between Neethling and Klopper was not to be equated with a contract of sale of land as intended by the section and to not so equate it would not frustrate the purpose of the section.[11]

[18] Steyn CJ concluded that for these reasons the revival of a cancelled contract in respect of land by waiver of the rights arising from the cancellation of the contract need not comply with the formalities prescribed in respect of agreements for the sale of land.[12] Referring to this passage in the judgment counsel for the appellant submitted that this court decided that whenever parties agree to the revival of a contract of sale of land by way of a withdrawal of a cancellation of the contract, compliance with the formalities is not required.

[19] I do not think that Steyn CJ's concluding words were intended to be read in isolation. It is in my view clear from his reasoning that in order to determine whether an agreement should comply with the prescribed formalities one has to determine what the intention of the parties was. In that case there was a valid cancellation (so he assumed). But, the validity of the cancellation was disputed by Klopper. There was, therefore, a dispute as to whether the contract had been validly cancelled and that dispute was settled on the basis that Neethling would waive his claim to have validly cancelled the contract. In those circumstances he found that there was no intention to enter into a new contract of purchase and sale. It does not follow that an agreed waiver of a cancellation of an agreement of sale would not constitute a new agreement of sale where the parties were agreed that the contract had been validly cancelled. In each case the true nature of the transaction will

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[11] At 467H-468B.
[12] At 468C.

have to be investigated in order to determine whether it constitutes an agreement of purchase and sale. If the intention was to buy and sell ie to enter into a new contract on the same terms as the cancelled contract, the agreement will have to comply with the prescribed formalities even though the mechanism employed to give effect to that intention was the withdrawal of the cancellation.

[20] In the present case we are of course dealing with a contract which lapsed because of the non-fulfilment of a suspensive condition and not with an alleged revival of a cancelled contract. In *D S Enterprises* a sale of land was subject to the condition that the purchaser would be able to obtain permission to subdivide the property within a period of six months. The agreement provided that the 'seller shall accordingly advise the purchaser in writing, within a period of six months of date of signature hereof, whether this condition has been fulfilled; in the event that the seller does not do so, then, unless the purchaser shall in writing waive such notice and/or fulfilment within 14 days of expiration of such period, this sale shall fall away and be of no force or effect whatsoever, and any payments made by the purchaser to the seller shall be refunded without deduction and together with interest thereon at 7 per cent per annum'. The condition was not fulfilled and the purchaser did not within 14 days waive the non-fulfilment thereof. The parties nevertheless continued to act as if nothing had happened. Accounts were rendered to the purchaser in respect of instalments payable in terms of the agreement and the purchaser paid these accounts, but the seller eventually adopted the attitude that the agreement had lapsed because of the non-fulfilment of the condition. Nicholas J held that the provision regarding waiver of notice by the purchaser was part of the machinery designed to procure certainty, within a period of six months and 14 days, on the question whether the agreement would remain in force. That provision, he found was inserted in the interests of both parties, who could waive it by agreement

between them. He found that they did so and said that their conduct amounted to an affirmance of the contract and a dispensation of the termination of it.[13] In dealing with the argument that the parties had concluded a new agreement which had to comply with the formalities prescribed by s 1(1) of Act 68 of 1957 he referred to *Neethling v Klopper* and concluded that the factual differences between the two cases were not such as to render the principle in *Neethling v Klopper* inapplicable. He added:

'In both cases the parties agreed that the dissolutive fact should be nullified, and this had the result that the contract was revived. In *Neethling's* case the parties did not conclude a new contract of sale; and in the present case their conduct makes it clear that all that the parties intended to do was to continue with their written contract of sale.'[14]

[21] It is not necessary to consider whether *D S Enterprises* was correctly decided. The facts in the present matter are quite different. Not only is it alleged that the parties by way of the letters B1 and C1 'agreed in writing . . . to revive the lapsed agreement of sale' it is alleged that it was an express term of the revived agreement that clause 13.2 thereof be amended to the effect that compliance therewith was to occur upon or before transfer of the property. The amendment is material as the time allowed in clause 13.2 for the fulfilment of the condition was inserted in order to create certainty as to the fate of the contract and affected both parties. The contract which had lapsed because of the non-fulfilment of the condition had become, as a result of the amendment, subject to a new material condition, the time for fulfilment of which had not been stipulated. It follows that the parties by agreeing to revive the lapsed agreement with amendments, entered into an agreement to buy and sell on terms different from the terms previously agreed to. Such an agreement has to comply with the provisions of s 2(1) of the Act. Even if the amendment had been agreed to prior to the lapsing of the agreement of sale it would, in order to be valid, have had to comply with the provisions of s 2(1)

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[13] At 26F-H.
[14] At 28E.

of the Act.[15] It follows that in so far as the appellants' claim is based on the allegations contained in para 14 of the particulars of claim no cause of action is disclosed.

[22] The fifth exception is on the basis that the lapsing of the agreement of sale did not give rise to a right capable of being waived by the first respondent. The condition contained in clause 13.2 was clearly a condition inserted for the benefit of the purchaser. When it was not fulfilled the agreement lapsed. The lapsing of the agreement could not possibly have given rise to a right on the part of the seller which could unilaterally be waived by the seller, thereby resurrecting the agreement, without the condition which had been inserted for the benefit of the purchaser. It follows that in so far as the appellants' claim is based on the allegations contained in para 15 of the particulars of claim, no cause of action is disclosed either.

[23] For these reasons the appeal is dismissed with costs including the costs of two counsel.

P E STREICHER
JUDGE OF APPEAL

CONCUR:

MTHIYANE JA)

PONNAN JA)

HURT AJA)

KGOMO AJA)

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[15] See Neethling v Klopper at 464G.