THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 297/12

In the matter between:

EUGENE BERNHARD DE KLERK **FIRST APPELLANT**

TANYA DE KLERK **SECOND APPELLANT**

And

STEVEN-LEE PROPERTIES (PTY) LTD **FIRST RESPONDENT**

THE REGISTRAR OF DEEDS **SECOND RESPONDENT**

Neutral citation: *De Klerk v Steven-Lee Properties* (297/12) [2013] ZASCA 54 (04 April 2013)

Coram: Mthiyane DP, Brand, Lewis JJA, Van der Merwe, Saldulker AJJA

Heard: 15 March 2013

Delivered: 04 April 2013

Summary: Whether clause in an agreement for the sale of immovable property creates a suspensive condition- Tacit term- proper formulation- Local authority.

ORDER

On appeal from: Appeal from South Gauteng High Court, Johannesburg (Maluleke J):

The appeal is dismissed with costs.

JUDGMENT

SALDULKER AJA (Mthiyane DP, Brand, Lewis JJA, Van der Merwe AJA concurring):

[1] At the heart of this dispute is the interpretation to be placed on clause 15.1 of two identical sale agreements entered into by the appellants and the first respondent in respect of two properties, situated within a development (the development) in the municipal jurisdiction of Vanderbijlpark which in turn forms part of the Emfuleni Local Municipality (the municipality). The development is within the Vaal River Barrage area as defined in the Vaal River Guide Plan.

[2] This appeal, with the leave of the court below, is against the judgment by Maluleke J in the South Gauteng High Court. In the court below the appellants sought an order declaring that clause 15.1 of the sale agreements created a true suspensive condition and that the non-fulfilment thereof had rendered the sale agreements unenforceable. In the alternative they claimed that the appellants were as a result of the non-performance entitled to, and in fact had lawfully cancelled the two sale agreements. The relief sought was the re-transfer of the properties to the first respondent against payment or refund of the purchase prices and interest thereon to the appellants. Maluleke J dismissed the application with costs.

[3] I turn to consider the facts giving rise to this appeal. During March 2007, the appellants and the first respondent entered into two sale agreements for the purchase of the two properties. Pursuant to the obligations arising from the sale agreements, the immovable properties were registered in the names of the appellants on 31 May 2007 and 8 June 2007. The purchase prices of the two properties were respectively R261 000 and R271 000.

[4] The relevant clause 15.1 reads as follows:

'Clause 15 – Special Conditions

15.1 *The DEVELOPER shall make the arrangements to the satisfaction of the appropriate local authority for the provision of essential services to the street border of the property.*

15.5 The construction of the dwelling and outbuildings is to be completed prior to occupation and within 24 months from date of registration.'(My emphasis)

[5] Prior to the sale of the immovable properties the first respondent applied for approval of the proposed township from both the municipality and Rand Water Board (Rand Water). Both the municipality and Rand Water would have to be satisfied with the proposed sanitation system of the proposed township. Rand Water, which is responsible for ensuring that proper sanitation systems are in place for any new developments to protect the ecosystem of the Vaal River, approved the plans for the proposed sanitation system, subject to the proposed upgrading of existing pump stations and service lines by the municipality. On 16 February 2006, the municipality granted such consent as set out in Annexure C1, and the township was proclaimed on 22 March 2006. Annexure C1 reads as follows:

'We would hereby like to confirm that all criteria set with regard to the water and sanitation services to the abovementioned development have been met and the clearance for registration can now be issued.'

[6] However, after the establishment of the township, towards the end of 2009, a dispute arose between the municipality and Rand Water, as a result of failures that occurred at the municipality's pump stations eight and ten. These pumps deal with

the effluent waste of the development, and the responsibility for their proper functioning falls under the sphere of the municipality. Rand Water was of the opinion that the upgrade had not been adequate, and formed the opinion that the municipality would not be able to deal with the effluent waste of the development and refused to approve further building until the municipality had upgraded their pump stations.

[7] Before us, the appellants contended that the sale agreements contained a suspensive condition in clause 15.1 that the first respondent had to make arrangements to the satisfaction of the appropriate local authority for the provision of essential services to the street border of the properties, and this condition had not been met, alternatively not met timeously. Additionally they contended that the term 'appropriate local authority' meant Rand Water. Alternatively, the appellants contended that there was a tacit term of the agreement 'that the applicants would be entitled to construct dwellings and outbuildings on the properties within a reasonable time from date of registration of the properties into the names of the applicants, alternatively within 24 months from date of registration as envisaged in clause 15.5 of the sale agreement'.

[8] The following issues arise in interpreting clause 15.1. Does clause 15.1 create a suspensive condition? Who is the local authority? Does an interpretation of this clause require more from the developer than what it can do?

Was clause 15.1 a suspensive condition?

[9] The most important characteristic of a condition is that it relates to a future uncertain event. In *Design and Planning Service v Kruger*,[1] Botha J stated as follows:

[1] *Design and Planning Service* v *Kruger* 1974 (1) SA 689 (T) at 695; *Tuckers Land and Development Corporation (Pty) Ltd* v *Strydom* 1984 (1) SA 1 (A) at 10B-G.

'[I]n the case of a suspensive condition, the operation of the obligations flowing from the contract is suspended, in whole or in part, pending the occurrence or non-occurrence of a particular specified event . . . . A term of the contract, on the other hand, imposes a contractual obligation on a party to act, or to refrain from acting, in a particular manner. A contractual obligation flowing from a term of a contract can be enforced, but no action will lie to compel the performance of a condition.'

[10] The sale agreements were concluded in 2007 and the township was proclaimed in 2006. Whatever conditions there might have been no longer existed at the time of the transfer of the properties into the appellant's names in 2007. It was a past event. There is also nothing conditional about the formulation of the provisions of clause 15.1. It is simply a term of the agreement which requires the developer to do whatever it can to get the approval from the local authority. There is nothing uncertain about this term, nor is it dependent on the happening of any uncertain future event. It does not say that the seller must comply with the local authority's obligations, only that it must 'make arrangements to the satisfaction of the appropriate local authority'.

[11] Significantly, in their letter of demand to the first respondent to comply with clause 15.1, the appellants referred to the first respondent as not having complied with two conditions of the sale agreements and that the first respondent had failed 'to secure the permission of Rand Water to approve residential developments of several stands'. The appellants did not refer to the non-fulfilment of any suspensive condition in the sale agreements.

Non-performance

[12] The appellants contend that the first respondent failed to make arrangements to the satisfaction of the appropriate local authority (on their version Rand Water) for the provision of essential services to the street border of the property as per clause 15.1. The question is whether the first respondent did in fact do so. In my view, it did. This much is clear from Annexure C1, which the first respondent has provided

as proof of its compliance with the obligations set out in clause 15.1. Annexure C1 is a letter from Metsi-a-Lekoa, the Water Services Unit of the municipality confirming that all criteria in regard to the water and sanitation services have been met. The developer clearly made arrangements which satisfied the municipality. The response of the appellants to these averments is to merely deny that the terms of clause 15.1 had been complied with.

[13] It makes no difference to suggest, as the appellants do, that Annexure C1, which is dated 16 February 2006, was sent prior to them entering into the agreements for the sale of the properties. Clearly, standard agreements for the conclusion of the sale of the properties were used, at a time when certain conditions of the sale had already been met. Transfer and registration of both properties in the names of the appellants were effected. The contract was performed. Upon transfer of the properties to the appellants the risk in the properties was transferred to the appellants. The registration of the properties into the names of the appellants could not have taken place without the first respondent having made the arrangements as per clause 15.1.

[14] In fact, at the time of the registration, the appellants did not complain that clause 15.1 had not been complied with. Furthermore, any interpretation of the word ‘arrangements’ in my view, could never have included a guarantee that the seller would make some ‘future plan’ to provide the services to the appellants. No further contractual obligation rested on the first respondent to ensure that the local municipality complied with its undertakings to upgrade their existing infrastructure.

Status of Rand Water

[15] According to the appellants the parties intended that the ‘appropriate local authority’ was Rand Water and not the local municipality. For this contention, which they submit was common cause, the appellants sought to rely on two

documents: the Services Agreement entered into between the first respondent and the local authority and Annexure C to the Guide Plan. The Services Agreement is an agreement between the first respondent and the municipality in regard to various services, as set out in that agreement, to be rendered for the whole proposed township for the mutual benefit of the relevant parties, which does not include the appellants. Not being a party to the Services Agreement, the appellants cannot in such circumstances rely on the Services Agreement to determine the content of the sale agreements in question. Furthermore, the relevant section 2.2 of the Guide Plan which reads '[e]xcept with the written consent of the Rand Water Board no habitable buildings. ..sewage pumping installations or sewage works shall be permitted below the flood control line, as defined', does not bolster their argument any further. It is clear that the appellants are placing store on documents that they are not party to, and may not have seen, and documents which state what Rand Water will or may not allow in the development.

[16] In terms of Chapter 7, s 151 of the Constitution, the local sphere of government consists of municipalities which have the right to govern the local government affairs of their communities in accordance with national and provincial legislation. Water and sanitation fall under local government matters. The municipality is the appropriate local authority. The Rand Water is a statutory public water authority which exercises its authority in terms of s 84 of the Water Services Act 108 of 1997.[2] It cannot be regarded as a municipal structure, and is therefore not a local authority. The appellant's reasoning is therefore flawed. It is clear from *Ehlers* v *Rand Water Board,*[3] that the function of Rand Water includes environmental protection and the determination of floodlines in the Vaal Barrage Area. It does not qualify as a municipality or a local authority.

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[2] *Rand Water Board* v *Milner* (2003) JOL 10841 (SCA) para 2.
[3] *Ehlers* v *Rand Water Board* 2006 (3) SA 299 (SCA) paras 7.4 and 7.9 ; *Rand Water Board* v *Rotek Industries* (*Pty) Ltd* 2003 (4) SA 58 (SCA) para 2; See s 84 of the Water Services Act 108 of 1997.

[17] It has also been contended by the appellants that even if this court finds that the 'appropriate local authority' is the local municipality, there still has not been compliance with clause 15.1 by the first respondent. In this regard the appellants submit that there is an essential difference between what is contained in Annexure C1, the letter of approval from the municipality, and what the first respondent states it has complied with. The first respondent states that it has made arrangements to provide essential services to the street border of the properties. In contrast, the appellants point out that in terms of Annexure C1 the municipality has provided bulk services to the entire development, but has not done so to the individual erven. In my view the appellants have not advanced such a case on these papers. When the first respondent defended its stance that it had in fact made arrangements to the satisfaction of the local authority, and attached Annexure C1, the appellants simply denied this averment without any explanation of the kind now being raised in argument. In their papers, the appellants sought to blame the municipality for failing to upgrade the entire reticulation system, and stated that Annexure C1 confirmed only that water and sewage services were installed to the township.

Tacit Term

[18] A tacit term is not easily inferred by the courts. It has been contended by the appellants, correlative to clause 15.5, that it was a tacit term of the sale agreements that the appellants would be entitled to construct dwellings and outbuildings on the properties within a reasonable time from date of registration of the properties into the names of the appellants, alternatively within 24 months from date of registration. The difficulty for the appellants is that this so-called 'tacit term' that they seek to rely on in their alternative argument has not been formulated in precise or exact terms[4] in their founding affidavit. In the absence of an obligation on the part of the first respondent to ensure that Rand Water approves building plans, specifically after registration, no such tacit term can be inferred in the sale agreements.

[4] *Desai* v *Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 522H-523A; *Consol Ltd t/a Consol Glass* v *Twee Jonge Gezellen (Pty)Ltd* 2005 (6) SA 1 (SCA) para 51.

[19] It is clear that the first respondent cannot be blamed for the municipality's shortcomings in regard to its sewage system. Rand Water adopted the stance that the dwellings could be constructed only if proper sewage treatment works and a pump station was constructed that would service the properties. It is because of this dispute between Rand Water and the local authority that the appellants who have taken transfer of the properties now bear the risk, and must now deal with Rand Water.

[20] The requirement by Rand Water, a statutory body, that the municipality upgrade its infrastructure, and any failure to do so by the municipality, cannot vest a claim for cancellation of the agreement against the first respondent. There is nothing more that the first respondent could do in terms of its obligations as per clause 15.1 of the sale agreements. The first respondent has no authority over the municipality nor over Rand Water. There was no contractual obligation on the first respondent to ensure that consent be granted by Rand Water for the approval of building plans. The first respondent was not in breach of any of its contractual obligations, and therefore no valid cancellations of the sale agreements could follow.

[21] In regard to the question of costs of the appeal, the first respondent seeks the costs of two counsel. In the court below, the matter was argued by junior counsel on its behalf. The issues involved were not complicated, nor were any complex legal issues traversed, requiring the services of two counsel. Accordingly costs of two counsel are not warranted.

[22] In the result the following order is made:
The appeal is dismissed with costs.

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H SALDULKER
ACTING JUDGE OF APPEAL

APPEARANCES

For Appellants : HP Nieuwenhuizen

Instructed by: Scholtz & Scholtz

Correspondents : Schoeman Maree

For First Respondent: M C Erasmus SC with Advocate N C Hartman

Instructed by : F Van Wyk Inc

Correspondents : TLI INC (Matus Michael Garber)