THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 23/2020

In the matter between:

NEVILLE JAMES CHESTER **APPELLANT**

and

SNOWY OWL PROPERTIES 142 (Pty) Ltd **FIRST RESPONDENT**

ERICA ANN LEFSON **SECOND RESPONDENT**

Neutral citation: *Chester v Snowy Owl Properties & Another* (Case no 23/2020) [2021] ZASCA 30 (30 March 2021)

Coram: PONNAN, MOCUMIE and SCHIPPERS JJA, EKSTEEN and GOOSEN AJA

Heard: 2 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The time and date for hand down are deemed to be at 09h45 on 30 March 2021**.**

Summary: Contract – interpretation of the words 'subject to' certain condition precedents – non-fulfilment of a suspensive condition in a sale agreement.

ORDER

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

The appeal is dismissed with costs.

JUDGMENT

Mocumie JA (Ponnan and Schippers JJA, Eksteen and Goosen AJJ concurring)

[1] This appeal concerns an agreement concluded between the appellant, Mr Neville James Chester and the first respondent for the sale of immovable property situated in Oranjezicht, Cape Town at a price of R22 250 000 (the sale agreement). The immovable property comprises a 'Manor House' (a heritage property dating back to the 1760's) together with an adjacent property (collectively 'the property'). The property is situated within the Amphitheatre Sectional Title Scheme (the Scheme), regulated by the Amphitheatre Body Corporate (the Body Corporate) constituted in terms of s 36 of the Sectional Titles Act 95 of 1986 (the Act). The Scheme is part of a broader residential property development known as St John's Estate (the Estate). The owners of properties within the Estate, including the Body Corporate, are members of the St John's Home Owners Association (the HOA). Thulare AJ, sitting in the Western Cape High Court Division, Cape Town (the high court), dismissed the appellant's claims. The appeal is with leave of the court below.

[2] The appellant was the plaintiff in the high court. The first respondent is Snowy Owl Properties 142 (Pty) Ltd, a private company. The second respondent, Ms Erica Ann Lefson (Ms Lefson), is a shareholder in the first respondent and its sole director. She is also a homeowner in the Scheme.

[3] The appellant claimed, as against the first respondent, transfer of the property and, in the alternative, as against the first and second respondents jointlyand severally,

damages. In its plea, the first respondent asserted that clause 22.1 of the sale agreement constituted a suspensive condition, the fulfilment of which had become impossible when the HOA had resolved in a meeting of its trustees on 9 February 2016 not to sign the undertaking envisaged by that provision. Thus, the sale agreement was rendered void and the first respondent was released from its obligations.

[4] The issue for determination in the appeal will be best understood against the common cause factual background that follows. In 2013, before the sale of the property, Ms Lefson put in motion a plan to remove the property from the Scheme so that it would revert to the land register as a separate erf. This was to enable her to market the property for a sale unencumbered by the provisions of the Act and the Body Corporate's rules. The Act required an application for the subdivision and the consent of all the members of the Body Corporate. The Constitution of the Body Corporate also required the consent of all the members.

[5] To obtain the consent of the members of the Body Corporate the first respondent and Ms Lefson agreed to furnish the Body Corporate and the HOA with a series of undertakings. Ms Lefson also agreed to pay the Body Corporate the sum of R300 000 as consideration for its members agreeing to the removal of the property from the Scheme. She furnished the Body Corporate with the written Undertakings and Consents (the Undertaking) and the Body Corporate approved the removal of the property from the Scheme. The dispute between the parties turns on the refusal by the HOA to sign the envisaged undertaking.

[6] The appellant had instructed an attorney and conveyancer, Ms Debora Gouws (Ms Gouws),[1] to prepare the sale agreement. Ms Gouws prepared the sale agreement on the basis that transfer and payment of the full purchase price to Ms Lefson would take place when she had finalized the removal of the property from the Scheme. The sale agreement also provided that the appellant would have the right to resile from the agreement if Ms Lefson failed to complete the process within twelve months.[2]

[1] Ms Gouws is the attorney and conveyancer who drew up the Constitution of the Estate in November 2002 practising at Mallinicks Inc at that time and specialised in the field of sectional title development.
[2] Clause 10 of the sale agreement.

[7] Clause 22 of the sale agreement, upon which the appeal turns, provides:

'22. *The whole of this Agreement is subject to the following condition[s] precedent being met* prior to the transfer date (and prior to the Purchaser having to furnish the balance of the payment of the purchase price in cash to the Conveyancers as set out above):

22.1 The Seller furnishing the Purchaser with a copy of the *signed* Undertakings and Consents ("Undertaking") provided by the Seller and Ms E Lefson to and in favour of the Amphitheatre Body Corporate and the St John's Home Owners Association (theAssociation);

22.2 The Seller furnishing the Purchaser with proof of the seller having met each and every condition in the Undertaking, including the payment of the R300 000,00 to the said Body Corporate

22.3 The Seller obtaining the written confirmation from the Association that the Purchaser, as the owner of Property "A", shall, in perpetuity, be allowed unfettered access to Property "A", through the main security entrance for St John's Estate (ie: over land/roads owned by the Association). The Seller is to ensure, at its cost, that this right of access is embodied in the title deeds of both property "A" (once the erf has been created for the Manor House) as well as in the title deed for the road erf belonging to the Association; alternatively, that this right of access is embodied in the Constitution of the Association.

22.4 The Seller obtaining the written confirmation from the Association that upon transfer of Property "A", as a separate erf to the Purchaser, that such erf shall remain a part of the Association and accordingly the Purchaser shall become a member of the Association and shall be bound by its Constitution, upon taking transfer of the erf. To this end, the Seller shall, in obtaining such written confirmation from the Association, also obtain the Association's confirmation that it shall amend its Constitution to include the erf (Property "A").

22.5 The Seller simultaneously with or before the transfer of the Properties to the Purchaser, sells and transfers parking bays 13 and 16 and store room 34 to other members of The Amphitheatre sectional title scheme, as provided for in paragraph B1.5 in theUndertaking.' (Emphasis added.)

[8] Prior to the signing of the sale agreement, Ms Gouws requested Mr Blackenberg to provide her with a copy of a fully signed Undertaking for her file. On

28 October 2014 the appellant asked Ms Gouws if the Undertaking had been signed by the Body Corporate and HOA. Ms Gouws enquired of Mr Blackenberg, who assured her on the same day that it had been signed. But, subsequently, on 6 November 2014, she was informed that the copy that was signed by both the Body Corporate and HOA could not be found and that Ms Lefson would table the matter at the next meeting of the Board of Trustees of the HOA.

[9] On 21 November 2014 Ms Gouws, possessed of the Undertaking signed only by the Body Corporate, addressed an email to Mr Blackenberg with a draft agreement of sale attached in which she said:

'Herewith [the] draft agreement for you to go over and consider all conditions and terms . . .'

On 27 November 2014, Mr Truter, one of the trustees confirmed that the Undertaking was not signed by the HOA. Armed with this information and knowledge, on the same day, Ms Gouws forged ahead and emailed the offer to purchase the Manor House to Mr Blackenberg. Ms Lefson accepted the offer by signing the sale agreement on 3 December 2014.

[10] The appellant paid the required deposit and Ms Lefson initiated the process of removing the property from the Scheme by briefing a town planner to attend to obtaining the necessary regulatory approvals, including the subdivision of the property. This process proved to be slower than Ms Lefson anticipated. She became frustrated and asked the appellant on various occasions during 2015 to take transfer of the property before the subdivision was completed. The appellant declined on each occasion.

[11] On 30 October 2015 Mr Blackenberg formally informed Ms Gouws that the HOA had never signed the agreement as the parties contemplated. On 9 November 2015, according to the minutes of the trustees of the HOA, a resolution was adopted not to sign the agreement at that stage, pending legal advice. In a letter dated 27 November 2015, Mr Blackenberg informed Ms Gouws of that decision of the HOA.

[12] On 30 November 2015, the appellant proposed a written amendment to the sale agreement to the effect that he takes transfer of the property as sections, exactly

as Ms Lefson had proposed unsuccessfully much earlier in the year; and that the reversion of the land register only occurs thereafter subject to certain new terms. On 3 December 2015, Ms Lefson rejected the proposal and asserted that clause 22.1 was a suspensive condition and that the sale agreement had lapsed because it had become impossible for her to furnish the appellant with a copy of the Undertaking signed by the HOA. She advised the appellant that '[i]n view of the fact that St John's Home Owners Association will not sign the Agreement of the Undertaking in its present format, the seller is unable to perform in terms of the suspensive conditions due to the circumstances beyond her control and the sale, in its present format, has therefore lapsed . . .'.

[13] On 9 February 2016 the trustees of the HOA formally resolved that the sale agreement was not in the interests of the homeowners in the Estate and that the Undertaking will not be signed. This precipitated the proceedings before the high court.

[14] In its judgment, the high court found in favour of the respondents. It found that:

"(a) clause 22.1 constitutes a suspensive condition; (b) the HOA's decision not to sign the Undertakings and Consents Agreement rendered the fulfilment of the condition impossible; (c) clause 22.1 was not solely for the benefit of the plaintiff and therefore not susceptible to waiver by him; (d) the plaintiff had not proved fictional fulfilment of the condition in clause 22.1; and (e) the HOA as the body vested with the interests of all home owners in the Scheme had to sign the Undertakings and consent agreement for the sale agreement to be enforceable between the parties. As a result, it dismissed the appellant's claim."

[15] A good place to start is the introduction to the sale agreement. It stipulates that '[t]he whole of this agreement is *subject to* the following condition precedents being met prior to the transfer date (and prior to the purchaser having to furnish the balance of the payment of the purchase price in cash to the conveyancers . . .)'. (Emphasis added.)

[16] Clause 22.1 cannot be read in isolation but must be read in conjunction with clauses 22.2 and 22.3 which provide respectively, that the seller must meet each and

every condition in the Undertaking and obtain confirmation from the HOA. The two clauses cater for the interests of the other owners and the HOA. It must also be read with Part C1 of the Undertaking, which states unequivocally that [s]he [Ms Lefson] *shall* take all the steps and do all the things necessary in her capacity as a Director of the company and in her personal capacity to ensure that the company and all persons who purchase or acquire from the company any part of the land to be removed from the Scheme comply with their obligations towards the Body Corporate and the HOA as set out in paragraph B above. . .'. (Emphasis added.)

[17] Also by making provision for three signatures the parties evidently contemplated that it had to be signed by the three parties i.e. Ms Lefson (on behalf of the first respondent), the Body Corporate and the HOA. The latter is the body that represented homeowners and was responsible to oversee the interests of all its members. Thus, the HOA is the most appropriate body to approve or give consent to the sale of the property under conditions that were beneficial to the members.

[18] Moreover, Part B3.9, B3.10 and B 3.11 of the Undertaking provided that:

'B3.9 They [the parties to the agreement] shall signify the individual acceptance by the Body Corporate of the benefits conferred upon it in this document, whereupon the Body Corporate shall be individually entitled to enforce the provisions hereof against the company and each and every subsequent successive owner in perpetuity of any part of the land to be removed from the Scheme irrespective of whether or not the HoA also accepts such benefits. For this purpose, and to the extent necessary, the Chairman for the time being of the Body Corporate shall at any time in the future be entitled to accept the benefits conferred upon the Body Corporate in this document as against any such subsequent successive owner; whereupon it shall be individually entitled to enforce the provisions hereof against any such subsequent owner . . .

B3.10 They [the parties to the agreement] consent and agree that the provisions of paragraph B3.9 above shall also apply to the Chairman of the HOA and to the HOA *mutatis mutandis* as if they were the Chairman of the Body Corporate and the Body Corporate respectively.

B3.11 They [the parties to the agreement] consent and agree that this document constitutes the sole memorial of the agreement hereby constituted between the parties hereto in relation to the subject matter hereof, and that the terms hereof

> shall only be capable of subsequent variation by way of written agreement concluded between the Body Corporate, the HOA and all of the current owners of all the land to be removed from the Scheme . . .'

[19] In short, on a straight forward interpretation of clause 22.1, read in context, the logical conclusion must be, absent the Undertaking signed by all the parties, there could be no valid and enforceable sale agreement. To interpret the words 'subject to' other than as contemplated by the parties, would give the clause a construction which is not commercially sensible.

[20] I therefore conclude that clause 22.1 is a suspensive condition. When the HoA refused to sign the Undertaking, it became impossible for Ms Lefson to transfer the property. It was contended, in the alternative, that the condition which was for the sole benefit of the appellant, had been waived by him. I cannot agree. In my view, the requirement that the Body Corporate and HOA had to signify their assent had obviously been inserted for the benefit of their members. Thus assuming that the evidence established the waiver (which to my mind it did not), the condition was not solely for the benefit of the appellant and therefore not his to waive. The result is that the obligations never came into operation.[3] This conclusion disposes of the appeal.

[21] In conclusion it is necessary to reiterate what was stated in *KPMG Chartered Accountants (SA) v Securefin Ltd & another*[4]:

'First, the integration (or parol evidence) rule remains part of our law.[5] However, it is frequently

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[3] Generally speaking, a suspensive condition suspends the operation of all obligations flowing from a contract until occurrence of a future uncertain event. If the uncertain future event does not occur, the obligations never come into operation. See *Swart v Starbuck and Others* [2017] ZACC 23; 2017 (5) SA 370 (CC) with reference to *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office* [2012] ZASCA 160; 2013 (2) SA 133 (SCA) para 21; *Diggers Development (Pty) v City of Matlosana* [2011] ZASCA; [2012] 1 All SA 428 (SCA) para 29; *Southern Era Resources Ltd v Frandell NO* [2009] ZASCA 150; 2010 (4) SA 200 (SCA) para 11.

[4] *KPMG Chartered Accountants (SA) v Securefin Ltd & another*[4] [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39.

[5] The essence of parol evidence rule, is explained in R H Christie and G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 226 as follows:

'Despite its difficulties, it serves the important purposes of ensuring that where the parties have decided that their contract should be recorded in writing and that such contract shall be the sole, complete record of their agreement, their decision will be respected, and the resulting document, or documents, will be accepted as the sole evidence of the terms of the contract.'

ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za), 1985 Burrell Patent Cases 126 (A)). Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "*one must use it as conservatively as possible*" (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is nomerit in trying to distinguish between "background circumstances" and "surrounding circumstances". The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or "factual matrix" ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) (SCA) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd & another* [2008] (6) SA 654 (SCA) para 7.).' (Emphasis added.)'[6]

At page 228, the rule is qualified as follows:

'One does not need a very fertile imagination to see how, necessary as the rule is, it can lead to injustice if rigorously applied, by excluding evidence of what the parties really agreed. It has therefore been the courts' constant endeavour to prevent the rule being used as an engine of fraud by a party who knows full well that the written contract does not represent the true agreement. In the nature of things, this endeavour to achieve a fair result without destroying the advantages inherent in written contracts has led to some decisions that are difficult to reconcile. Perhaps the best way to look at the rule is to see it as a backstop that comes into operation only in the absence of some more dominant rule, giving way to the rules concerning misrepresentation, fraud, duress, undue influence, illegality or failure to comply with the terms of a statute, mistake, and rectification. If it did not do so, none of these rules would apply to written contracts, which would be absurd. In all such cases, of course, the burden is on a party who has signed a written contract to displace the maxim *caveat subscriptor* by proving lack of the necessary *animus*.'

For a useful discussion on the parol evidence rule, including criticisms relating to its application and exceptions thereto, see S W J van der Merwe et al *Contract General Principles* 4 ed (2012) at 148 et seq.

[6] *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) para 64 and 65.

[22] In this matter, despite the case turning on a narrow point of interpretation, the parties succeeded in generating a record in excess of a thousand pages. Much of the evidence was irrelevant to that narrow point.

[23] In the result, the appeal is dismissed with costs.

BC MOCUMIE

JUDGE OF APPEAL

Appearances

Counsel for Appellant:	J G Dickerson SC and L C Kelly Instructed by Werksmans Attorneys, Cape Town Lovius Block, Bloemfontein
Counsel for Respondents:	R J Howie Instructed by Matthew Walton & Associates Inc. Westlake Honey Attorneys, Bloemfontein