

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

Case No:EL188/05;ECD488/05

Date Heard:8/6/07

Date Delivered:19/6/07

Not Reportable

In the matter between:

H.C.W. JORDAAN

FIRST PLAINTIFF

G. JORDAAN

SECOND PLAINTIFF

and

Z. MSWELI

DEFENDANT

In a special plea, the defendant (the seller) pleaded that two clauses of an agreement of sale were suspensive conditions in his favour and that they had not been fulfilled or waived by him. It was held that the first – a so-called subject-to-bond clause – was inserted into the agreement in favour of the plaintiffs, as purchasers, and that they were entitled to waive reliance on it as they had done. It was held that the second, which related to the furnishing of guarantees for purposes of payment of the purchase price, was not a suspensive condition but a term. Consequently, the agreement did not fail on account of its non-fulfilment. The special plea was dismissed. Finally, the defendant failed to plead over on the merits. It was held that he should have done so, as this was the practice in this and other Divisions (although the practice in the Cape Provincial Division was somewhat different). An application for leave to plead over on the merits, which was not opposed by the plaintiffs, was granted.

JUDGMENT

PLASKET, J:

[1] On 24 February 2005, the plaintiffs, on the one hand, and the defendant, on the other, entered into an agreement of sale in terms of which the plaintiffs undertook to purchase from the defendant a piece of immovable property described as Riverside Farm, Erf 433, East London, for a purchase price of R360 000.00. It is common cause that transfer from the defendant to the plaintiffs has not occurred. The plaintiffs claim an order directing the defendant to sign all necessary documents and to take all steps necessary for the registration and transfer of the property, or in his default, an order authorising the sheriff to do so. In these proceedings a special plea will be decided upon. It is to the effect that the agreement is not enforceable due to the plaintiffs failing to comply with two provisions of the agreement that the defendant allege are suspensive conditions.

[A] THE PLEADINGS

[2] The salient aspects of the plaintiffs' particulars of claim are the following: first, in paragraph 7, the plaintiffs stated that they were and have 'at all times been ready, willing and able to perform all of their obligations in terms of the agreement and to take transfer of the property into their names'; secondly, in paragraph 8 they alleged that they were and have at all material times 'been ready, willing and able to pay the purchase price and/or furnish guarantees in respect of their financial obligations under the said agreement and the suspensive conditions contained within the agreement have been fulfilled'.

[3] Then, the particulars of claim proceed to state the following:

8.1 The aforesaid agreement of sale was subject to a suspensive condition as set out in clause 2a thereof in terms of which the sale was subject to the suspensive condition that the plaintiffs raise a loan upon the security of a mortgage bond on or before the 31st May 2005.

8.2 The aforesaid suspensive condition was for the sole benefit of the plaintiffs.

8.3 By written letter dated 01st March 2005 the plaintiffs' authorised representatives, Messrs Drake, Flemmer and Orsmond advised the defendant in writing that the plaintiffs waived their entitlement to rely on the provisions of the aforesaid suspensive conditions and elected to proceed with the agreement of sale unconditionally.

8.4 Alternatively to the foregoing the plaintiffs plead that the defendant and/or the defendant's representative deliberately frustrated the plaintiffs' attempts to have the property valued by the plaintiffs' chosen financial institution for the purposes of obtaining a bond and accordingly the aforesaid suspensive condition is deemed to have been fictionally fulfilled.

8.5 The plaintiffs are and have at all material times been ready, willing and able to pay the purchase price and/or furnish guarantees in respect of the financial obligations in terms of the said agreement.'

[4] Paragraph 9 embodies a tender on the part of the plaintiffs 'to take transfer of the said immovable property and to pay the purchase price and/or to provide suitable guarantees in respect thereof in terms of the said agreement'. Finally, before the order sought is set out, the plaintiffs, in paragraph 10, allege a breach of the agreement on the part of the defendant, that breach being his failure or refusal to transfer the property to the plaintiffs and his continued refusal to do so despite demand having been made in writing on 11 March 2005.

[5] The defendant has filed a special plea but has not pleaded over. Thereafter a replication was filed by the plaintiffs. These proceedings concern only the special plea. I was informed by Mr Notshe, who appeared for the defendant, however, that despite the fact that the pleadings have closed, the

defendant intended to plead over in the event of the special plea not succeeding in putting an end to the dispute. I shall say something more of this later in this judgment.

[6] The special plea reads as follows:

‘1. The agreement between the parties was subject to the following suspensive conditions:

1.1 that the plaintiffs are able to raise a loan of R360 000.00 from a recognised bank or other financial institution on or before 31 March 2005; and

1.2 that the plaintiffs provide the seller (the defendant) a guarantee issued by a recognised financial institution for a sum of not less than R360 000.00 on or before 31 March 2005.

2. The aforesaid agreement was for the sole benefit of the defendant.

3. The defendant did not waive his entitlement to rely upon the aforesaid terms of the agreement.

4. The plaintiffs failed to provide the defendant a guarantee issued by a recognised financial institution for a sum [of] not less than R360 000.00 on or before 31 March 2005.

5. As a result thereof they failed to fulfil the suspensive conditions of the agreement.

6. In the premises the agreement between the parties became unenforceable.’

[7] A replication was filed by the plaintiffs. They admit paragraph 1.1 of the special plea, that the raising of a loan by the plaintiffs on the security of a mortgage bond, as contemplated by clause 2a, is a suspensive condition. They deny, however, that clause 2.2 ‘to which defendant apparently herein refers, was part of the suspensive condition which is clause 2a’. Clause 2.2 provides that, in order to secure payment, the purchasers ‘shall provide to the seller and the transferring attorneys, a guarantee issued by a recognised financial institution for a sum of not less than R360 000.00 ... on or before the 31st of March 2005’.

[8] The plaintiffs deny the averment in the special plea that the 'aforesaid agreement' – presumably intended to be a reference to the 'aforesaid term' – was for the defendant's sole benefit. They admit that the defendant did not waive his reliance on 'the aforesaid terms of the agreement' (as it was put in the special plea) but proceed to state that they 'deny that the defendant was entitled to waive any entitlement in terms of clause 2a'.

[9] Paragraph 5 of the replication deals with the allegation in the special plea that the plaintiffs failed to furnish the guarantee contemplated by clause 2.2. It states:

'5.1 The averment is admitted.

5.2 Plaintiff[s] plead that by letter dated 11 March 2005, which was sent to the defendant by pre-paid registered post, the full purchase price was tendered on transfer of the property.

5.3 Such tender was made prior to the date of 31 March 2005.

5.4 Defendant refused to sign the transfer documents prior to 31 March 2005.

5.5 In the circumstances plaintiff[s] plead that clause 2.2 should be deemed to be fulfilled.

5.6 Defendant failed to place plaintiff[s] in *mora* arising out of a failure to comply with clause 2.2 of the agreement, nor did the plaintiff[s] invoke the remedies provided in the agreement to cancel the agreement on the basis of a failure to perform in terms of clause 2.2 of the agreement.

5.7 In the circumstances plaintiffs plead that defendant is not entitled to rely upon the plaintiffs' failure to provide a guarantee from a registered financial institution for a sum not less than R360 000.00 on or before 31 March 2005.'

[10] Finally, in answer to the defendant's averment that they failed to 'fulfil the suspensive conditions of the agreement', and that the agreement is consequently unenforceable, the plaintiffs repeat their pleadings as set out in the particulars of claim and deny that the agreement is, indeed, unenforceable.

[B] THE ISSUES TO BE DECIDED

[11] Rule 22(2) of the Uniform Rules provides that in a defendant's plea, he or she shall either 'admit or deny or confess and avoid all the material facts' alleged by the plaintiff in his or her summons and particulars of claim or 'state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts' upon which he or she intends to rely. This rule must be read with rule 22(3) which states:

'Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be not admitted, shall be deemed to be admitted. If any explanation or qualification of any detail is necessary, it shall be stated in the plea.'

[12] The following material averments have either been admitted by the defendant or are, in terms of rule 22(3), deemed to have been admitted by the defendant: that the parties entered into the agreement of sale; that the plaintiffs were at all material times willing and able to perform their obligations in terms of the agreement, including the taking of transfer and the payment of the purchase price or the furnishing of guarantees; that, prior to 31 May 2005, the plaintiffs informed the defendant that they waived their right to rely on clause 2a of the agreement; and that, in any event, the suspensive condition contained in clause 2a was fictionally fulfilled as a result of the defendant having frustrated the plaintiffs' attempts to value the property for the purposes of applying for a mortgage bond.

[13] Mr Notshe, in his argument, attempted to make something of two documents that were discovered by the plaintiffs. These, he said, showed that they were not in a position to meet their obligations. The problem he faces, however, is that he did not plead over as he should have, and had to accept the consequences of not doing so: that every averment that the defendant did not deny is admitted, by default as it were. The documents that he relied upon, therefore, have no relevance to these proceedings and, of course, no evidence was led to prove them.

[14] As a result, two crisp issues must be decided. The first is whether the plaintiffs were entitled to waive reliance on clause 2a and whether clause 2.2 is a suspensive condition. It is common cause on the pleadings that the plaintiffs have not furnished guarantees but have, instead, tendered payment.

(a) Clause 2a

[15] Clause 2a of the agreement provides that the agreement of sale 'shall be subject to the suspensive condition that the purchaser is able to raise a loan upon the security of a mortgage bond of R360 000.00 ... being granted by a recognised bank, or other financial institution on or before the 31st of May 2005.' It is not in dispute that this is a suspensive condition – as it claims to be. The defendant appears to allege, if I understand the special plea, that clause 2a could not be waived by the plaintiffs because it was for the benefit of the defendant, and that reliance on it could only be waived by him.

[16] The defendant has not disputed that the plaintiffs waived their right to rely on clause 2a and that they did so before the date mentioned therein. The question is whether they were entitled to do so. That is to be determined by deciding whether a suspensive condition such as clause 2a – a so-called subject-to-bond-clause – was inserted in the agreement in favour of the plaintiffs as purchasers or the defendant as seller.

[17] The proposition that such a clause operates solely for the benefit of the purchaser is now trite. It was accepted to be so in *Van Jaarsveld v Coetzee*¹ although, in that case, no cut-off date was stipulated. In *Westmore v Crestanello and others*² Marais J stated that the proposition that subject-to-bond clauses with a cut-off date for fulfilment are for the benefit of purchasers

¹ 1973 (3) SA 241 (A), 244C-G.

² 1995 (2) SA 733 (W).

only 'have not to my knowledge been expressly dissented from'.³ He summarised the effect of a clause such as clause 2a as follows:⁴

'As I have indicated, if it was so worded, it would have exactly the same meaning and effect as the present clause, and it would then be clear that the "subject to bond" clause could be waived by the purchaser as it is for her sole benefit. All that the applicant has to waive is that portion of the condition relating to the obtaining of the bond; she does not have to waive the date (which she cannot); the effect of the insertion of the date ... is merely to provide a date by which she must comply with the clause or waive it.'

[18] The position was re-affirmed more recently in *Mia v DJL Properties (Waltloo) (Pty) Ltd and another*.⁵ De Villiers J stated emphatically that a subject-to-bond clause was 'only intended for the protection of the purchaser', that its purpose was to 'create a facility of which the purchaser could avail himself if he wished' and that it was 'not intended at all to protect the seller'.⁶ He then held:⁷

'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 therefore, he would thereby breach the contract.'

[19] The plaintiffs had the right to waive their reliance on clause 2a, as long as they did so before 31 May 2005. It is not in dispute on the pleadings that they did so on 1 March 2005. Waiver is a unilateral act⁸ and so the plaintiffs' waiver did not require an acceptance on the part of the defendant in order for it to

³ At 735l.

⁴ At 738C-D.

⁵ 2000 (4) SA 220 (T).

⁶ At 228l.

⁷ At 229B-C.

⁸ *ABSA Bank Ltd v Master and others NNO* 1998 (4) SA 15 (N), 28B.

have been effective. To the extent that the defendant relies on the plaintiffs' non-compliance with clause 2a as a ground for the unenforceability of the agreement of sale, the special plea must fail.

(b) Clause 2.2

[20] In order to place clause 2.2 in context, it is necessary to cite clause 2 in its entirety. It reads:

'2. Purchase Price

2.1 The purchase price is the sum of R360 000.00 ... payable by the purchaser to the seller as follows:

(i) The full purchase price on date of transfer of registration into the purchaser's name.

(a) This agreement of sale shall be subject to the suspensive condition that the purchaser is able to raise a loan upon the security of a mortgage bond of R360 000.00 ... being granted by a recognised bank, or other financial institution on or before the 31st of May 2005.

2.2 In order to secure payment of the purchase price, the purchaser shall provide to the seller and the transferring attorneys, a guarantee issued by a recognised financial institution for a sum of not less than R360 000.00 ... on or before the 31st of March 2005.'

[21] It was argued by Mr Notshe that clause 2.2 creates a suspensive condition. It has not been fulfilled, the time period for its fulfilment has passed and the defendant, for whose benefit it was inserted, has not waived reliance on it. Mr De La Harpe, on the other hand, argued that clause 2.2 is merely a term of the agreement and if it has not been complied with by the plaintiffs, the defendant is required to place them in *mora* and proceed against them in terms of clause 9, which deals with breaches of the terms of the agreement. In order to resolve this issue, it is necessary to interpret clause 2.2 in the context of the agreement as a whole.

[22] The first point that stands out is that, unlike clause 2a, clause 2.2 does not claim in express terms to be a suspensive condition. While I accept that the substance rather than the form must prevail, it is, in my view, an indication of the intention of the parties that they defined the clause immediately above clause 2.2 as a suspensive condition, but did not define clause 2.2 in the same way.

[23] Secondly, clauses like clause 2.2 are common features in agreements for the sale of land. No case of which I am aware – and Mr Notshe referred me to no authority – has suggested that such a provision is a suspensive condition. To the contrary, there are cases that have treated such a provision as a term: *Jurgens Eiendomsagente v Share*⁹ is a case in point.

[24] In the result, there is, in my view, no merit in the argument that clause 2.2 is a suspensive condition, the non-fulfillment of which has led to the failure of the agreement of sale. The special plea must fail on this basis too.

[C] PLEADING OVER

[25] As indicated above, the defendant filed a special plea but did not plead over on the merits. He appears to have taken the view that as his plea was labelled a special plea, the plaintiffs (and the court) ought to have known that more was to come. This is an unacceptable way of pleading. In this Division as well as most others in the country the practice that is followed is that a defendant is required to plead to the merits as well when taking a special plea. It is only the Cape Provincial Division that appears to allow defendants to forego pleading over, but that only in limited circumstances.¹⁰

⁹ 1990 (4) SA 664 (A), 675B-I.

¹⁰ Erasmus *Superior Court Practice* Cape Town, Juta and Co: 1994, B1-142. For an example of the practice in the Cape, see *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C), 674A-C, in which Thring AJ held: 'In this Division the practice as regards pleading over has differed somewhat from that in some other Divisions. In the Cape, especially where a defence such as want of jurisdiction or *lis pendens* has been raised by way of a special plea, pleading over on the merits has usually not been insisted on. ... In such a case, where the special defence has failed, the Court entertains an application by the defendant to plead over on the merits.'

[26] In this Division, it was held by O'Hagan J in *Thyssen v St. Francis Township (Pty) Ltd*¹¹ that when rules 22 and 23 are read together, 'one gains the impression that Rule 22 envisages the pleading of all defences at one and the same time'¹² although he proceeded to say that cases may arise 'with unusual and special features' which could justify a more flexible approach.¹³ Much the same position had been adopted in the Free State in *Pretorius v Fourie NO en 'n ander*¹⁴ in which Smuts JP held that '[a]fgesien van wysigings word 'n verweerder slegs een verweerskrif toegelaat. Reël 22 bepaal dat 'n verweerder binne sewe dae na aantekening van verskyning 'n skriftelike verklaring, bekend as 'n verweerskrif, moet indien. Daarin moet hy al sy verweere uiteensit'.¹⁵ The practice set out in the above cases was re-affirmed by Flemming J, in the following forthright terms, in *David Beckett Construction (Pty) Ltd v Bristow*:¹⁶

'The intended effect of the Rules, as conveyed by the actual wording and scheme thereof, is that, irrespective of a preference to add the label "special plea" to portion of the plea, every defence must be raised as part and parcel of the plea required by Rule 22. A "special plea" will constitute either part of or the whole of that plea. Except when a defendant is prepared to have his case stand or fall by the "special" defence which is pleaded, there is no action in which "no plea over is necessary". It must also be remembered that a plaintiff has an entitlement to a plea complying with Rule 22 and an accompanying aspect such as to serve a notice of bar. Such rights are given by the Rules of Court which have the force of law. Courts cannot alter the law and accordingly cannot devise or follow a contrary practice. This consideration reinforces the message contained in Rule 22 and the resultant conclusion that there can be no automatic or generally followed practice that the Court will, after disposing of a special plea, "then allow the defendant a further opportunity to deliver a plea canvassing the merits".'

¹¹ 1966 (2) SA 115 (E).

¹² At 116H.

¹³ At 116H-117A.

¹⁴ 1962 (2) SA 280 (O).

¹⁵ At 283B.

¹⁶ 1987 (3) SA 275 (W), 280C-E.

[27] The reason for requiring a defendant to plead over is apparent from the circumstances of this case. The entire case was pleaded, the pleadings were closed and the matter was set down without anyone but the defendant being aware that more was to come. Now the defendant wants to plead again. The time, effort and cost involved in the running of this matter has been multiplied for both plaintiffs and defendant. There are certainly no unusual or special features in this case to justify a departure by the defendant from the accepted practice in this Division. It may well be, that as a result of this irresponsible and unfair way of pleading, and irrespective of the outcome of the trial on the merits, a special costs order against the defendant is justified.

[28] Mr Notshe took the view that it was not necessary to seek leave to plead to the merits. On a belt and braces type of approach, he made such an application in any event. I am of the view that it is indeed necessary to obtain the court's leave. The cases I have cited (taken with the court's power, in terms of rule 27(3), to condone non-compliance with the rules) are adequate authority for that. Mr De La Harpe did not oppose the application, taking the view that, in the circumstance, basic fairness dictated that the defendant should be granted leave to plead over. The defendant can consider himself extremely fortunate that such a tolerant attitude was taken of his unacceptable conduct of his case and that I have decided to allow him the opportunity to plead over.

[D] THE ORDER

[29] In summary, the defendant's special plea has failed, he will be allowed to plead over on the merits, subject to a time limit, but he will be ordered to pay the plaintiffs' costs. The matter will also have to be postponed *sine die*. I had indicated, during argument, that I thought that it may have been necessary to formally separate the issues in terms of rule 33(4). In retrospect, I am of the view that this would be an exercise in empty formalism: there was in fact only one issue before me and that was the special plea.

[30] The following order will issue.

- (a) The special plea is dismissed with costs.
- (b) The matter is postponed *sine die*.
- (c) The defendant is granted leave to plead over on the merits, which he must do within 10 days of the date of this order.

C. PLASKET

JUDGE OF THE HIGH COURT