IN THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION

Date: 02/02/2007
Case no: 9858/2005
UNREPORTABLE

In the matter between:

Case no: 9858/2005

FAIROAKS INVESTMENT HOLDI GS (PTY) LTD	First Plaintiff
WILLOW FALLS ESTATE	Second Respondent

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

JUDGMENT

JOOSTE, AJ:

INTRODUCTION:

In this action the first, alternatively the second plaintiff prays for an order in the following terms:
[']

1.1 Interdicting the First Defendant from transferring or taking steps to transfer the 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, alternatively the second plaintiff.

1.2 Directing the First Defendant to sign all necessary documents and to take all necessary steps in order to procure transfer of the property into the name of the First, alternatively the Second Plaintiff.

[2] The First, alternatively Second Plaintiff's entitlement to the prohibitory interdict and the mandatory interdict is premised on the alleged existence of a clear right to the transfer of the property into the name of the First, alternatively the Second Plaintiff. The clear right is alleged to arise from the existence of a valid and enforceable contract of sale between the First Defendant and the First, alternatively Second Plaintiff in regard to the property.

[3] On or about 9 April 2002 a contract of sale was concluded between the first defendant and the second plaintiff, who was subsequently substituted by the first plaintiff. A copy of the contract of sale is annexed to the particulars of claim as annexure "A", The contract of sale was subject to the fulfilment of the conditions set out in clause

13 thereof, including the condition that the property be rezoned and that the approval by the relevant town planning authority of the site development plan for a residential development of at least 1 5 housing units per hectare be obtained on or before 9 April 2003, failing which the entire contract of sale would automatically lapse and be of no force and effect. The condition was not fulfilled on or before 9 April 2003 in consequence whereof the contract of sale lapsed and was of no force or effect from 10 April 2003.

[4] Notwithstanding the lapsing of the contract, the plaintiffs allege that the contract of sale is valid and enforceable at the instance of the first, alternatively the second plaintiff on the basis that:

4.1 The first defendant and the second plaintiff agreed in writing to revive the contract of sale on the same terms and conditions as set out in annexure "A" to the particulars of claim, excluding those contained in clause 1 3 ("the main claim"); alternatively

4.2 The first defendant waived her right to rely on the failure of the conditions contained in clause 13 and the contract of sale as set out in annexure" A" to the particulars of claim *extant* ("the alternative claim").

[5] The first defendant has taken exception to the particulars of claim on the basis that no cause of action is disclosed for several reasons. Central to the exceptions raised by the first defendant is the acknowledgement by the plaintiffs that the contract of sale lapsed on 10 April 2003 because of non fulfilment of the condition contained in clause 13.2. The latter condition reads as follows:

"13. <u>*Suspensive conditions:*</u>

This agreement is subject to:

13.1 ...

13.2 *The rezoning of the property* as *residential* 1, 2 *or* 3 *and the approval by the relevant town planning authorities of* a *site development plan (to be submitted by the purchaser) for* a *residential development of at least* 15 *housing units per hectare within* 12 *months after date of signature of this contract. Such rezoning application to be submitted at the cost of the Purchaser".*

[6] 6.1 As to the nature of the condition, Mr Lane, who appeared for

the excipient, referred to it in argument as being a resolutive condition, whilst Mr Du Plessis, on behalf of the first and second plaintiffs referred to it as being a suspensive condition, more so having regard to the heading of clause 13.

6.2 The effect in our law of the non fulfilment of a resolutive condition was stated as follows by Coetzee, J (quoting from Wessels on Contracts): in **Amoretti v Tuckers Land and Development Corporation 1980(2) SA 330** at 332H:

"If the resolutive conditions is fulfilled, the law regards the whole transaction inter partes as if the absolute contract had never existed and the parties must therefore be restored to their formal position. Abigatio resolvitur nunc ex tunc. Thus, in the case of a sale subject to resolutive condition, the Romans said that, when the condition was fulfilled, the subject matter of the sale was to be regarded as if it had never been bought or sold. The resolutive condition therefore has a retrospective effect".
(emphasis added).

6.3 In law the non fulfilment of a suspensive condition has the same effect and the contract terminates automatically and is *void ab initio.*

Dirk Fourie Trust v Gerber 1986 (1) SA 763 (A);
Benkenstein v Neisius & Others1997 (4) SA 835 (CPD).

[7] As far as the main claim is concerned, Mr Du Plessis, correctly in my view, conceded that on the papers he could not argue that a written agreement was established. Accordingly the only issues to be determined in deciding whether the pleading discloses a cause of action, are whether there has been a consensual revival of the agreement with written amendments or whether the first defendant waived any right to rely on the failure of his suspensive conditions recorded in clause 13 of the agreement of sale, annexure "A" to the particulars of claim.

[8] Mr Du Plessis submitted that even in the absence of a new contract, the informal consensual revival of the lapsed agreement was possible in law in that the parties could by informal consent nullify the "dissolutive facts". He relied on the decision of Nicholas, J in D.S. Enterprises Limited v Northcliff Townships Limited 1972 (4) SA 22

(WLD) at 28 E-F where it was held that the parties could by agreement nullify the dissolutive facts.

[9] Mr lane argued that apart from being distinguishable from the present matter, that the decision in the D.S Enterprises-matter was clearly wrong. To this end he pointed out that Nicholas, J relied on **Neethling v Klopper & Andere 1967 (4) SA 459 (AD)** as authority for the principal expounded by the learned Judge. I agree with the submission by Mr lane that the Neethling-case, on closer examination, is no authority for the principal. In that case the court was concerned with the question whether a contract for the sale of land which had been validly cancelled, could be reinstated by an agreement which failed to conform with the requisites of section 1 (1) of Act 68 of 1957 (the precursor of section 1 (1) of Act 71 of 1969). After referring to the correspondence which had passed after the lawful cancellation by the appellant, Steyn, CJ at 467G stated the following"

"Vir sover hier ter sake kom die briewe eerder neer op 'n verweë versoek dat die appellant afstand van sy aanspraak op geldige opsegging en 'n aanvaarding van die versoek deur die appellant. Daaruit sou volg dat die appellant die gevolge van sy terugtrede, in ag genome dat dit 'n geldige terugtrede was, met die goedkeuring of

instemming van die respondente, waarvan hul verswee versoek getuig, tot niet gemaak het met die gevolg dat die kontrak herleef. Daarmee is egter geen nuwe koopkontrak gesluit nie. Die kontrak wat herleef het is die kontrak van 23 *Junie* 1962 *soos vervat in die geskrif".*

And on 468C:

"*Om genoemde redes wil dit my voorkom dat 'n herinstelling van 'n opgesegde koopkontrak ten opsigte van grand deur afstanddoening van die regte wat uit die opsegging van die kontrak onstaan het, nie aan die voorskrifte van die onderhawige artikel hoef te voldoen nie, en dat die herlewing van die kontrak in hierdie geval nie uit hoofde van bedoelde voorskrifte verwerp kan word nie".*

[10] In Cronje v Tuckers Land and Development Corporation 1981 (1) SA 256 at 259 B-F, Cilliers, AJ also dealt with the Neethling-decision and the reliance thereon by Nicholas, J in the DS Enterprises-decision and stated the following:

"*..., it is apparent that the decision in Neethling v Klopper (supra) went no further than to recognise the valid revival of an already terminated contract in the following limited circumstances. Firstly, the*

revival was brought about by the withdrawal of the earlier (valid) act of cancellation and its consequences and this withdrawal related to matters extraneous to the writing of the contract. Secondly, the revival of the contract in no way affected its terms, or if it did, the variation resulting from the revival did not relate to a *material term of the contract.*

The decision in ***Neethling v Klopper (supra)*** *is therefore not authority for the proposition that contracts in respect of a sale of land, which have come to an end, because of the fulfilment or non fulfilment of* a *condition, whether suspensive or resolutive, embodied in the written contract itself, can be revived without complying with the provisions of section* 1 (1) *of Act* 71 *of* 1969, *in any event not where the continued presence in the writing of the condition which caused the agreement to terminate which, if the writing were effectively revived in toto, again caused the agreement to terminate (or,* as *counsel graphically put it, to "self destruct").* ***Neethling v Klopper (supra) is*** *more over authority against the proposition that such a revival process can effect any changes to the material terms of the written agreement, unless, of course, the requisites of section* 1 (1) *of Act* 71 *of* 1969 *are met",*

[11] Similarly, Coetzee, J in the Amoretti-case (supra) at 233 D-G stated:

"Tacit revival is apposite where there has been a lawful cancellation of the contract by one of the parties and it is therefore revived ... In such cases, unlike in the former class, the contract expires at the date of cancellation. There is indeed something which can be "revived".

If in Neethling's case (supra) the position were not that one of the parties had lawfully resiled from the contract and if it had indeed been a case like the present where a resolutive condition was fulfilled as a result whereof in law the position was to be regarded is if there never had been an agreement at all, I incline to the view that the result would have been different and that the Appellant Division would probably have held that it was necessary for the parties, in such event to re-enter into a contract for the sale of the land in writing before there would be a valid and enforceable contract at all".

[12] In short, a distinction is to be drawn in the "revival" of a contract that came to an end due to one of the parties exercising the right in terms of the contract and the instance where a contract comes to an end due to the operation of law, i.e. the non fulfilment of a resolutive or suspensive condition. By the "revival" in the first instance, the act of

one of the parties is undone by agreement, which is not the case where a contract comes to an end because of the operation of law.

[13] In all the authorities cited, it is clear that what ought to have happened was that a written agreement complying with the provisions of section 2(1) of the Alienation of Land Act, 68 of 1981 ought to have been signed by the parties which could have incorporated terms of the lapsed agreement and varied those terms as necessary, such as those contained in clause 13.2, which, if left unamended would have resulted in the automatic self destruction thereof. This is what the parties did in **Benkenstein v Neisius & Others** (supra).

[14] As far as the waiver is concerned, the plaintiffs' first alternative is a complete alternative to the pleaded revival of the agreement of sale. It presupposes that annexure "A" remained extant and is not influenced by annexures "81" and "C1" to the particulars of claim. In his heads of argument Mr Du Plessis stated that the essence of the waiver, was not a waiver of a contractual right, but a waiver of the rights arising from the termination of the contract and that the waiver revives the contract. This is contrary to the pleaded case. In this regard it is important to also recognise that the alternative claim presupposes that annexure "A" remained extant. In other words, that

the contract of sale between the parties as contained in annexure "A" is not influenced or represented at all by annexures "B" and "C" to the particulars of claim. Because of the non fulfilment of the condition the sale lapsed by operation of law and was deemed *void ab initio.* The events pleaded in paragraph 15 of the particulars of claim allegedly substantiating the waiver, took place under the contract of sale had already lapsed and was *void ab initio.* Consequently there were no rights or obligations flowing from the contract of sale which were capable of being waived by the first defendant. It follows that the argument advanced by Mr Du Plessis cannot be sustained.

[15] 15.1 Furthermore the plaintiffs pleaded *case ignores* the provisions of

clause 11.1 of the agreement of sale, which reads as follows:

"Any latitude or extension of time which may be allowed by the Seller to the Purchaser in respect of any payment provided for herein, or any matter or thing which the Purchaser is bound to perform, or observe in terms hereof shall not in any circumstances be deemed to be a waiver of the Seller's right at the time, to require strict and punctual compliance with each and every provision or term hereof".

15.2 On the basis as pleaded, namely that the agreement remained extant then such clause expressly prohibits the waiver of the first defendant's rights, which includes the right to rely on the non fulfilment of the conditions contained I clause 13. It is thus legally untenable for the plaintiffs to advance a case which is inconsistent with the express provisions of the contract of sale as pleaded by them.

[16] As far as the first plaintiff is concerned, it is alleged that pursuant to clause 21 of the agreement of sale, the first plaintiff was substituted for the second plaintiff as the purchaser to the contract of sale. This substitution is alleged to have occurred on or about 22 October 2004, that is on a date after the contract of sale lapsed by operation of law and was deemed *void ab initio.* I have already found that the contract of sale was not revived and that the first defendant did not waive any of her rights. The substitution of the first plaintiff was therefore of no force and effect. It follows that the first plaintiff is not entitled to any relief by virtue of the alleged substitution of the first plaintiff as the purchaser in terms of the contract of sale.

[17] The individual exceptions raised by the first defendant were not dealt separately in view of the approach and the conclusions as appear from

the above. It is clear that the plaintiffs' particulars of claim does not disclose a cause of action, inter alia, the interdicts claimed.

[16] In the premises, the following order is made:

18.1 The exceptions are upheld with costs, such costs to include the costs of two counsel, jointly and severally, the one paying the other to be absolved;

18.2 Paragraphs 11 to 14 and the prayers in the plaintiffs' claim are struck out;

18.2 The plaintiffs are afforded an opportunity to amend their particulars of claim within 10 days of the service of this order on them.

Plaintiff's counsel: S J du Plessis, se P Sieberhagen

Instructed by: Izak Minnie Attorneys clo Hack Stupel & Ross, Pretoria

First defendant's counsel: P M N Lane, se e J McAslin

Instructed by: Singer Horwitz Attorneysclo S Gerber Attorneys, Pretoria

F J JOOSTE
ACTING JUDGE OF THE HIGH COURT