25/6/2010
NOT REPORTABLE

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(1) RAPPORTEERBAAR: JA/NEE.
(2) VAN BELANG VIR ANDER REGTERS: JA/NEE.
(3) HERSIEN.
16/6/2010
DATUM HANDTEKENING

IN THE HIGH COURT OF SOUTH AFRICA

(Transvaal Provincial Division)

In the matter between: CASE NO. 32641/07

MO FO PROPERTY INVESTMENTS CC	**Applicant**
and	
CASA DI PAGLIA CC	**First Respondent**
KORZIA VIVIENNE	**Second Respondent**
THE REGISTRAR OF DEEDS, PRETORIA	**Third Respondent**

JUDGMENT

PRELLER J :

The applicant applies for an order declaring a certain deed of sale of an immovable property that was concluded between it and the first respondent to be of full force and effect and for certain consequential relief. No relief is claimed against the second and third respondents and for the sake of convenience I shall hereinafter refer to the first respondent simply as the respondent.

The deed of sale contains in clause 13 thereof the usual suspensive condition that the sale shall be subject to the suspensive condition that the purchaser "....**obtains approval of a loan upon the security of a first mortgage bond to be registered over the property for a sum of not less than R 4 050 000 ..... at such rate of interest and on such terms as are stipulated by the said financial institution.**" The loan was to be approved within21 days of acceptance of the offer to purchase, which period would be automatically extended for a further period of 14 days, subject to certain conditions that are not relevant for present purposes. A letter informing the applicant that its application for a loan had been approved was received by the applicant within the period

stipulated in clause 13. The contents of the letter will be considered more fully later in this judgment.

The respondent raised the following defences in its answering affidavit:

1. The identity of the seller and the authority of the signatory on its behalf. It appears that in the offer to purchase (which was accepted) the letters "CC" have been omitted after the name of the seller. The respondent contended that the deed of sale had thus been concluded with a non-existent entity. Furthermore it was contended that the signatory who purportedly represented the respondent at the time had not been authorised in writing to conclude the contract on behalf of the respondent and that the requirements of Section 2 of the Alienation of Land Act,68 of 1981 had not been complied with.

2. That the suspensive condition in clause 13 had not been met. There were two legs to this argument, which will be considered in more detail later.

When the offer to purchase was submitted to the respondent, the name of the seller, of which the proposed purchase had no certainty, was left blank for the addressee to be inserted. That name was indeed inserted by one of the two members of the respondent, the purchase price offered by the applicant was amended and initialled by both, and certain "additional clauses" were inserted which are of no further relevance. The offer was returned to the applicant who initialled the amendments, thereby accepting the counter offer.

In its answering affidavit the respondent concedes that it inadvertently omitted the letters "CC" when the name was inserted, but nevertheless contended that the offer was not accepted by the respondent, but by a non-existent entity.

There are two answers to this argument: In the first place Sec 46(b)(iv) of the Close Corporations Act provides that immovable property of the close corporation can be sold with the consent in writing of 74% of its members. In this case 100% of them signed the offer on behalf of the close corporation, and it was in fact the close corporation itself that was acting and not its agents. That also disposed of the need for any written authorisation.

Secondly Mr Carstensen on behalf of the applicant submitted that this was as clear a case for rectification as one can hope to come across, and accordingly applied for the accepted offer to be rectified so as to reflect the name of the seller (the respondent) correctly. And amended notice of motion was handed up which included a prayer to this effect.

There can be no doubt that the applicant, who did not know the correct name of the owner of the property in which it was interested, accepted the name inserted by the two members in the genuine belief that it was correct. The respondent admitted in the answering affidavit filed on its behalf that the letters "CC" were omitted in error. The common intention is accordingly clear, as is the fact that the clear intention of the parties was not correctly reflected in the document. In my view the application for rectification must succeed.

It was common cause that the letter from the financial institution concerned (Imperial Bank) was received by the applicant within the stipulated time period., but the exact meaning and import thereof was disputed.

The legal position of this type of provision is trite: it has repeatedly been held that a provision making the sale subject to the granting (or "obtaining") of a loan is for the benefit of both parties and cannot be unilaterally waived by the purchaser. The interest of the latter is clear - he would find himself in an invidious position indeed if he were bound to purchase a property for which he cannot pay without the financial assistance of a banking institution. He needs to know that the necessary financing will be available before he proceeds with the transaction. The benefit for the seller lies in the fact that he would have certainty that the sale concerned will go through and that he will not need to look for another purchaser. His need is less pressing than that of the purchaser, and he needs to know no more than that his purchaser has been able to make the necessary arrangements and is proceeding with the transaction. The conduct of the purchaser in the present case was such that he could not possibly at a later stage have turned around and relied on his own failure to communicate to the bank his acceptance of the terms in the letter as an excuse to escape liability in terms of the deed of sale.

The exact meaning of the requirement that the purchaser must obtain a loan has been the subject of many reported judgments. In this regard I was referred to the judgment in **Remini v. Basson,**

1993(3) SA 204 (N), which is a judgment of the full court of that division.

In that case the relevant clause of the agreement provided that the sale was subject to the suspensive condition that the purchaser ".... **is able to raise a loan .... at prevailing building society rates and terms with Saambou Building Society**.....". The building society wrote to the purchaser, informing him that his application for a loan had been approved subject to certain conditions which seem to have been accepted as falling within the ambit of the "**prevailing .... terms**" of the society. Paragraph 11.1 of that letter contained the provision that the society could at any time withdraw from the loan agreement if any of the information in the application should turn out to be incorrect, if the conditions in the letter were not complied with, or "..... **om watter rede ookal, sonder enige opgawe van redes."** Interestingly enough, the purchaser was in terms of the letter required to sign an acceptance of the terms and conditions thereof, which he failed to do. The court held that his failure was of no consequence due to his concession that there was nothing in the letter to which he was not prepared to agree. Likewise, in the present case, every indication is that the applicant was prepared to, and in fact did, accept all the conditions in the letter.

McLaren J, who delivered the judgment on behalf of the court came to the conclusion that the terms of the agreement required the conclusion of a binding loan agreement between the building society and the purchaser for the suspensive condition to be fulfilled. It should also be kept in mind that the term in the present deed only requires the applicant to "**obtain(s) approval of a loan".** I shall revert to this aspect shortly. As to the apparent free choice of the building society to resile from the loan agreement for whatever reason, he found that the building society could only cancel the loan for a reason that could be tested against the standard of the *arbitrium boni viri*,or at least was not unreasonable. I am respectfully in full agreement with that view.

The learned judge also found that the common law principle that the purchaser's acceptance of the loan has to be communicated to the bank before a binding loan agreement comes into existence, applied in view of the facts of the case. Because of the incidence of the onus in the case, however, he found that the purchaser (the applicant *a quo* for an order that the agreement had lapsed *a quo*) had not shown that the acceptance of the loan had not been communicated to the

building society in time and that the agreement had accordingly not lapsed.

Thirion J agreed with the finding of McLaren J, but added that he wished to guard himself against assenting to the proposition that the wording of the agreement required that a loan agreement had to be actually concluded before the suspensive condition was fulfilled. If I may say so with due deference to the judgments which seem to hold the contrary view, I have always preferred the view that if the actual conclusion of a binding loan agreement is required before the sale becomes final and binding, the deed of sale should say so clearly.

The third member of the court, Levinsohn J, is merely reported as having concurred. On my understanding of the judgment this means that he concurred with the qualification expressed by Thirion J. The effect thereof is that the majority of the court did not require the actual conclusion of a binding loan agreement for the suspensive condition to be fulfilled.

On behalf of the respondent Mr Vetten argued firstly that the suspensive condition had not been met, since it appeared from the letter from the bank that the loan was only granted for an amount of R 2 050 000 and not for the stipulated sum of R 4 050 000.

The letter to the applicant commences as follows:

> **"Dear sir/madam**
>
> **FACILITY WITH IMPERIAL BANK ("IBL")**
>
> **We have pleasure in advising that your application for a facility has been approved on the terms and conditions set out below.**
>
> **1. Facility:**
> **1.1.....**
> **1.2 Amount: R4 421 357.97**
> **1.3 Purpose of finance: To finance the purchase of land and installation of infrastructure for 19 residential full stands."**

This is followed by ten numbered paragraphs of terms, conditions and other requirements which are divided into many numbered sub-paragraphs and are spread over more than two long pages of fine print. Paragraph 11 reads as follows:

"11.<u>Acceptance:</u>
This proposal remains valid until 22 March 2007 where after it will become null and void."

In the next subparagraph (which, unlike the rest of the document, is not numbered separately) the bank sets out it right to resile from the agreement in the event of a breach of its terms or changed circumstances. The next paragraph, still not numbered, reads:

"Please indicate your acceptance of the terms and conditions of the facility by initialling each page and completing section 11 below. Kindly forward this letter to IBL's offices before the expiry date.
Should you require any further explanation with (sic) the contents of this letter, kindly communicate with the writer.

Yours faithfully.
....."

As will be noted, the amount granted is well in excess of the amount of R 4 050 000 stipulated in clause 13. No explanation for the higher amount appears from the affidavits, but that there must have been some other negotiations between the applicant and the bank is apparent from inter alia clause 8 of the letter. This clause provides that the bank will pay R 2 050 000 to the seller against transfer and that the purchaser will pay the balance of R 2 000 000. After registration of the bond the bank will pay the balance of the facility in accordance with annexure "A". The contents of the annexure is not explained, but it seems as if the balance would be paid by way of progress payments and the payment of professional fees as the proposed development progressed. I do not know why the applicant arranged with the bank that the payments would be made in this manner. It may well be that the bank wished the applicant to first make his contribution to the purchase price and then to advance the balance of the loan as the work progressed. However, the fact remains that in terms of the express wording of the initial paragraph of the letter and according

to the arrangement set out in the latter part thereof, the bank would advance an amount in excess of the stipulated amount to the applicant. Whether the applicant used the amount of its contribution to pay part of the purchase price or to finance the development of the residential stands is of no consequence.

The second leg of the objection against the granting of the loan was that the applicant had failed to indicate to the bank its acceptance of the loan before the expiry date thereof. Unfortunately the affidavits, lengthy as they are, are silent on this issue.

I have already indicated that the applicant had made it clear by its conduct that it was satisfied with the terms offered by the bank and that it could not at a later stage rely on its own failure to inform the bank of its acceptance as a reason for resiling from the sale. It seems to me that the applicant has an even stronger argument based on the wording of paragraph 11 of the letter. Unlike most of the other requirements set out in the letter and which could clearly be used by the bank as a reason for refusing to pay out the money if they are not complied with, the provision that the applicant should indicate his acceptance is couched in the form of nothing more than a polite request. The bank may well have withheld payment until such time as the acceptance is signed, but could never have cancelled the agreement unless the acceptance was received before the stated deadline. The express wording of clause 11 does not make the survival of the facility dependant on the receipt of the acceptance before the stated deadline and I do not think that any proper construction of its meaning could lead to that conclusion either.

My conclusion is therefore that there is nothing before me to indicate that the agreement is not of full force and effect.

I make the following order:

1. **The agreement between the applicant and the first respondent, annexure "C" to the founding affidavit, is declared to be of full force and effect;**

2. **Orders are made in terms of prayers 2, 4, and 6 of the Notice of Motion;**

3. **The first respondent is to pay the costs of the application.**

F G PRELLER
JUDGE OF THE HIGH COURT