REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 11408/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

DATE _____ SIGNATURE _____

In the matter between:
AVBOB MUTUAL ASSURANCE

SOCIETY Plaintiff

and

WILLIE JONAS MKHONZA 1st Defendant

QUEEN ELIZABETH MKHONZA 2nd Defendant

THE REGISTRAR OF DEEDS, PRETORIA 3rd Defendant

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10: 00 am on 27 June 2024.*

Summary: Breach of a warranty clause is not a breach of a material condition of a contract of purchase and sale. Warranty clause is severable from the agreement of the purchase and sale of the immovable property. The plaintiff is not entitled to the remedy of rescission (*actio redhibitoria*) of the agreement of the purchase and sale. The first defendant is in breach of the warranty clause relating to the zoning of the premises and the remedy available to the plaintiff is one of claiming for damages. The plaintiff has failed to quantify and prove any damages it suffered. Held: (1) The plaintiff's claim is dismissed. Held: (2) The

plaintiff is ordered to pay the costs of the defendants on a party and party scale to be taxed or settled at scale B.

JUDGMENT

MOSHOANA, J

Introduction

[1] These are action proceedings instituted by Avbob Mutual Assurance Society (Avbob). The action is instituted against Willie Jonas Mkhonza and his wife Queen Elizabeth Mkhonza (hereafter collectively referred to as the "Mkhonzas"). In this action, Avbob claims an amount of three million rands, being in respect of the purchase price paid to acquire the immovable property (*restitutio in intergrum*) and in respect of the alleged suffered consequential damages against the Mkhonzas.

[2] Additionally, Avbob sought an order directing the registrar of deeds to cancel the transfer and registration of the immovable property in the name of Avbob and return it to the name of the Mkhonzas. The registrar did not defend the action.

[3] The order against the registrar is dependent upon an order of rescission of the purchase and sale agreement (*actio redhibitoria*). An order refusing a rescission denotes a refusal to reverse the transfer process (*restitutio in intergrum*). At the conclusion of the trial, during closing argument, the claim for consequential damages was abandoned due to lack of evidence in support of any damages claim.

[4] The instituted action is duly defended by the Mkhonzas. The Mkhonzas led no evidence in defence of the action. The genesis of this action is the alleged breach of two clauses (namely 19.3 and 19.4) included in the agreement for the purchase and sale of an immovable property. In both the clauses, a warranty was given by the Mkhonzas that (a) there were plans in place which were approved by the local authority and (b) that the immovable property was properly zoned for the business of conducting a funeral parlour and mortuary.

[5] Despite the breach of the warranties having been discovered, that there are no approved plans in place and that the property was not zoned for a funeral parlour business, the immovable property was transferred from the names of the Mkhonzas to Avbob. At the time when this action was instituted, Avbob was the registered owner of the immovable property and has been for a considerable while.

Background facts and evidence

[6] Avbob is a registered mutual assurance society. Around 2018, Avbob developed an interest to purchase a funeral parlour business which was a going concern and was operated by the Mkhonzas. Negotiations for the contemplated sale of business commenced in earnest with the Mkhonzas. Those negotiations only culminated in a conclusion of a written agreement of the purchase and sale in respect of the immovable property to wit, Portion 4 of Erf 2006 Soshanguve-G Township, Registration Division J.R. Province of Gauteng, measuring approximately 1867 SQM ("the property"). The contemplated purchase of the business as a going concern fell by the way side.

[7] On or about 14 June 2019, the property was registered and transferred into the name of Avbob under the deed of transfer number T36553/2019. After the said transfer, Avbob took occupation but was unable to conduct a business of a funeral parlour and mortuary due to the fact that the property was not properly zoned for that.

[8] On or about 20 December 2021, Avbob directed a written notice to the Mkhonzas advising them of the contended breach of the warranties and required of them to remedy the breach within 10 days of that notice. The notice also advised them that should the breach not be remedied, the purchase and sale agreement shall be cancelled. I interpose to remark, how does a party remedy the breach of a warranty? Once the promised warranty does not materialize, water runs quietly under the breach unless a new promise is made.

[9] The breach was not remedied as demanded (in my view irremediable) and on 22 February 2022, Avbob issued a notice seeking to cancel the purchase and sale agreement. Following the effected cancellation, which in my view was meaningless at

the time it was effected, on 24 February 2022, Avbob caused a combined summons to be issued against the Mkhonzas and the registrar. As indicated above the action was duly defended by the Mkhonzas.

[10] For the purposes of context, the provisions of clause 19 alleged to be, in parts, offended by the Mkhonzas was introduced into the agreement of the purchase and sale by Avbob given its previous melancholic experience of leasing a property in the same township of Soshanguve which was not suitably zoned.

[11] Prior to the conclusion of the purchase and sale agreement, a due diligence exercise was performed by Avbob. The employee who performed the due diligence exercise assumed that since the Mkhonzas were already operating a funeral parlour business, there were proper plans in place and that the property was suitably zoned.

[12] The allegedly offended clause 19 was drafted by Avbob and it labelled it "other or special conditions". The pertinent portions read thus:

> "This offer to purchase is subject to the suspensive conditions that:
>
> 19.3 The Seller warrants that all alterations and improvements to the Property have been approved by the Local Authority and that all plans which are required have been submitted to and approved by such Local Authority. Copies of the approved plans to be provided to the purchaser.
>
> 19.4 The seller hereby warrants that the property is zoned for business with specific approval from the local authority to use the premises for a funeral parlour with a mortuary, failing which this offer to purchase shall be cancelled and be of no further force or effect. This clause is for the benefit of the Purchaser who may unilaterally waive at any time prior to the fulfilment of the condition."

[13] In this Court, Avbob contended that its case is predicated on the breach of the above warranties as opposed to the non fulfilment of any suspensive conditions. Upfront, a stance was adopted by Avbob that clause 19 does not amount to suspensive conditions. Ironically, this it did despite it, as the author, having labelled it as such.

[14] In support of its case, Avbob presented evidence of four witnesses, namely Mr Peter John Dacomb; Ms Thando Mlangeni; Mr Ettiene Burger; and Mr Ernest Mokoena. Given the fact that this matter revolves around an interpretation of the offended clauses, it is unnecessary to regurgitate the testimony of all those witnesses in this judgment.

[15] Interpretation is a matter of law as opposed to fact. I do however hasten to mention that performance of the terms of an agreement is a matter of fact. A brief summation of the testimony of each witness shall, in the present circumstances, suffice.

[16] Mr Dacomb is a Professional Planner (Town and Regional Planning). He was mandated by Avbob to investigate whether there are approved plans in place for the property and whether the property was zoned for a funeral parlour business. His investigations revealed that although the property was zoned for other business uses, it was not zoned for funeral parlour business use.

[17] The investigation also revealed that no plans approved by the City of Tshwane were in place. The plans or sketches, as he termed them, that he perused bore stamps and signatures of Garankuwa Hospital and some other government department. Those stamps and signatures were affixed and appended around 1985/6.

[18] Having made those discoveries, he concluded that the sketches provided by the Mkhonzas were not, in his opinion, approved building plans and do not comply with the applicable regulations. He further concluded that the property being zoned for "Business 2" is not permitted to be used for the purposes of a funeral undertaker or a mortuary.

[19] Ms Mlangeni is an employee of the City of Tshwane in the health department. As a functional head she deals with certification and compliance with regulations. She confirmed that the funeral parlour business conducted by the Mkhonzas had a certificate of competency that was issued by her department. However, she testified

that such certification did not exempt them from complying with the other requirements like zoning and submission of building plans for approval.

[20] Mr Burger is an employee of Avbob employed as an investment specialist. He was involved in the process leading to the acquisition of the property. He was instrumental in the generation and inclusion of clause 19 into the agreement of the purchase and sale. He testified that Avbob was unhappy with the transferring attorney for not having ensured that the provisions of clause 19 were met before transfer of the property was effected.

[21] He testified that, in his view, the warranties had to be satisfied before transfer could take place. He confirmed that Avbob did not waive compliance with the warranties. He further confirmed that Avbob attempted to regularise the zoning issue but he was unaware as to why did the regularisation not materialize. He also confirmed that clause 19 was introduced late into the agreement and was drafted by the legal department of Avbob.

[22] Mr Mokoena is an employee of Avbob employed as a provincial manager. He was intimately involved in the negotiations that led to the purchase of the property. Although he did not see any certificates, he assumed that the property was suitably zoned since the premises of the Mkhonzas were already operating as a funeral parlour. He confirmed that he received the plans exhibited in C1 and C2 respectively as well as the certificates of compliance from the Mkhonzas.

[23] The Mkhonzas closed their case without calling any witness.

Analysis

[24] It is, in my view, obsolete for the purposes of this judgment to engage in an elaborate interpretative exercise given the clear language employed in clause 19. Although, clause 19 is labelled as “suspensive conditions”, in truth it contains separable and severable warranties made by the Mkhonzas. In contract parlance, a suspensive condition is a one which prevents an obligation from arising unless and

until a specific future event, certain or uncertain, occurs. The fact that the drafter of clause 19 chose to label it a suspensive condition does not make it one. The warranties given by the Mkhonzas did not amount to conditions which will prevent an obligation from arising. A warranty is distinct from a condition in a contract.

[25] Typically, a contract is formed where one party makes an offer and the other accepts that offer. On the available evidence, Avbob made an offer to purchase immovable property and that offer was accepted by the Mkhonzas. Thus, a contract for the sale of the immovable property was consummated.

[26] The supposed suspensive conditions are attached to an offer to purchase as opposed to any obligations arising from the purchase and sale agreement. Ordinarily, a proper offer is incapable of being cancelled. An offer is either accepted or withdrawn before acceptance. Once an offer is withdrawn there can be no contract consummated. Similarly, once an offer is accepted a contract shall be consummated.

[27] In my view, clause 19 constitutes a separate and severable warranty agreement and not a true suspensive condition. Accordingly, this Court agrees with a submission by Avbob's counsel to that effect. If they were suspensive conditions, the fact that the conditions were not met would entail that an agreement of the purchase and sale did not come into existence. Such is absurd in view of the fact that transfer happened and Avbob belatedly sought to cancel a consummated agreement.

[28] A sale agreement is consummated if (a) *emptor et venditor* (buyer and seller capable of entering into an agreement of sale); (b) the *merx* or *res vendita* (the thing or things which form the subject matter of the agreement of sale)[1]; (c) the *pretium* (the price in money or which is readily ascertainable in terms of money)[2]; and (d) *consensus ad idem* (the mutual consent of the contracting parties) are all present.

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[1] See *Kriel and Another v Le Roux* [2000] 2 All SA 65 (SCA).

[2] See Lubbe in 2000 *Annual Survey* pp 213-221.

[29] The warranties are not the essential to the formation of a valid purchase and sale agreement. On the other hand, a warranty is merely a contractual statement of fact by one party to another, asserting that a specific state of affairs is true. It is an innominate term that does not go to the root of the contract and as it shall later be demonstrated, it entitles the innocent party to damages claim if it is breached.

[30] In *casu*, there can be no doubt that the Mkhonzas stated as a true fact that there are approved plans and that the property is zoned for a funeral parlour use. It had turned out that the statement of zoning status is untrue. With regard to the statement of the approved plans, the clause refers to a "Local Authority" as the body to approve those plans. No evidence was led that during the negotiations or so soon thereafter there were on-going alterations and or improvements to the property.

[31] The clause does not specifically refer to the City of Tshwane. The agreement provides no special definition to the phrase local authority. By grammatical definition, a local authority means an administrative body in local government. The plans submitted by the Mkhonzas entered into evidence as C1 and C2 respectively bear stamps from amongst others, the chief civil engineer of control inspector of works. This stamp was affixed on 18 June 1985. A signature was also appended assumedly by the civil engineer.

[32] This Court must take judicial notice of the fact that in June 1985, the City of Tshwane was not in existence. Accordingly, it cannot be correct to assume that the alterations or improvements effected in 1985 required the approval of the City of Tshwane or its predecessor in law.

[33] There was no cogent evidence led that Soshanguve, being the area where the property is situated, fell under the authority of the City of Tshwane or its predecessor in law in 1985. Mr Dacomb was himself uncertain as to under which local authority Soshanguve fell.

[34] Clause 19 was drafted in 2019. It may be assumed that Avbob when inserting the undefined phrase local authority in the clause, it had in mind the City of Tshwane. However, as a matter of fact there were no alterations or improvements that were taking place in 2019. Therefore, on application of the *contra proferentem* rule, the relevant clause must be interpreted against Avbob.[3] The legal department of Avbob had all the opportunity to make the language employed clearer. The stamp affixed by the chief civil engineer of the control inspector of works is preceded by the words "approved by".

[35] Therefore, there can be no doubt that *ex facie* the plans duly submitted, there was an approval. The approval is from a local authority or an authority in charge of Soshanguve identified as control inspector of works. With such evidence, it cannot be correct that the Mkhonzas breached the warranty by providing an untrue statement. There were plans in place which were approved by the relevant authorities in 1985. Accordingly, this Court concludes that the warranty in respect of the plans was not breached.

[36] With regard to the zoning warranty, the Mkhonzas specifically warranted that the property is zoned for business with specific approval from the local authority to use the premises for a funeral parlour with a mortuary. The certificate that was unearthed by Mr Dacomb zoned the property differently. Therefore, the fact that the property was zoned for use as a funeral parlour is not true.

[37] The Mkhonzas advisedly chose not to testify. All the versions put during cross-examination which suggested that documents may have been burned and obliterated when "*Munitoria*" burned down amount to no evidence to rebut the uncontested version of Mr Dacomb. There is no evidence to remotely suggest that the perspicuous misrepresentation was innocent.

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[3] See *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (AD) at 108C and *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (AD)

[38] It may well have been so that the Mkhonzas innocently believed, owing to the fact that they operated a funeral parlour business without any hindrance, that the premises are appropriately zoned. Having not testified such a conclusion is incapable of being made in favour of the Mkhonzas. Accordingly, the conclusion this Court reaches is that the warranty was indeed breached by the Mkhonzas.

[39] What then is the effect of such a breach? Avbob contends that the breach entitles it to a rescission of the agreement of the purchase and sale. I disagree. Although clause 19 was inserted in the same document embodying the agreement of the purchase and sale, it is, in my view, severable from the purchase and sale agreement. The warranties are clearly separate and independent from the purchase and sale agreement. Their late inclusion into the drafted agreement bears testimony to their discrete nature and purpose. It must have not dawned on the drafters of clause 19 that the stage of offer and acceptance had long passed.

[40] In both *Middleton v Carr*[4] and *Nash v Golden Dumps (Pty) Ltd*[5], the Supreme Court of Appeal, particularly in *Nash* held that a sale of the future office unit created reciprocal rights and obligations which were entirely unrelated and separate from the option to purchase additional office space, which on its own, also initiated a different independent set of rights and obligations. It followed that, although the sale of future office unit and the option to purchase additional office space were incorporated in the same document, two separate and independent contracts were concluded.[6] In *Carr* it was concluded that an undertaking by a husband to pay his estranged wife a substantial sum of money was severable from a collusive agreement for divorce.

[41] Similarly, this Court takes a view that the warranties and the purchase and sale agreement although embodied in the same document are unrelated and separate. The warranty seeks to regulate and insulate, as it were, the offer to purchase. Whilst the purchase and sale seeks to embody the already orally agreed terms of the sale of an

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[4] 1949 2 SA 374 (A).

[5] 1985 3 SA 1 (A).

[6] See also *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 2 SA 282 (SCA).

immovable property. The requirement to conclude a written and signed agreement is not an *essentialia* of the agreement but a legal requirement of the Alienation of Land Act.

[42] Thus, the validity of the purchase and sale agreement was not dependent on the warranties made by the Mkhonzas. It was within the powers of Avbob as the author of clause 19 to make it related and dependent on the purchase and sale agreement. Instead, reference is made to cancellation of an offer to purchase, in the circumstances where, the stage of offer and acceptance had passed already. Ordinarily if an offer is cancelled, which must mean withdrawn, an agreement does not come into existence.

[43] It seems to me that the drafters of the clause contemplated an impossible situation of unscrambling the egg as it were. This is so because when the agreement was drafted for signature, in compliance with the Alienation of Land Act, the stage of offer and acceptance had happened as a sequel of the detailed negotiations process. The warranty clearly brings to the fore separate and unrelated rights and obligations.

[44] *Actio ex empto* is an *aedilitian* remedy where a claim for damages with or without a cancelation of sale occurs where a purchaser can prove that the property had latent defect when it was sold and that the seller knowingly concealed the latent defect or knowingly represented the absence thereof. On the other hand, *actio redhibitoria* – rescission - is a remedy only available where the defects either destroys or impair the usefulness of the thing sold.[7] Differently put, the defect must go to the root of the agreement.

[45] The zoning of the property does not destroy nor impair the usage of the property. The zoning is a regulatory process to ensure additional business use of the property. Avbob had already commenced a process to ensure that the property is suitably zoned, however evidence around that process was for reasons better known

[7] See *Dihbley v Furter* 1951 (4) SA 73 (C).

to Avbob inchoate. Had Avbob proceeded with the regulatory process, it would have had a claim for damages against the Mkhonzas.

[46] In *Landbou-Tegniese Dienste v Scholtz*[8] it was found that an action for failure to deliver a fertile bull was an *actio ex empto* as opposed to *actio redhibitoria*. It would have been *actio redhibitoria* if no bull was delivered at all. Similarly, a failure by the Mkhonzas to deliver a suitably zoned property entitles Avbob to *actio ex empto* particularly in an instance where the Mkhonzas warranted the existence of the relevant zoning.

[47] Absence of a zoning certificate does not render the property to be unfit for the purpose an immovable property is commonly used for. Avbob did not purchase a funeral parlour business. It is accepted that a funeral parlour business is not useful to the purchaser where the necessary permission to conduct it is absent. Avbob managed to take occupation of the immovable property.

[48] This is testimony to the fact that the property served the purpose which properties are commonly used for, which is to ensure occupation, as the saying goes "a roof above the head". There was no scintilla of evidence led by Avbob to suggest any latent defects on the property (buildings and land).

[49] Accordingly, this Court concludes that the breach of the zoning warranty does not entitle Avbob to a rescission of the purchase and sale agreement, particularly where Avbob had taken occupation and a transfer, which has occurred two years before the purported cancellation, took place. Avbob is entitled to claim damages for the breach of the zoning warranty.

[50] Before I turn my attention to the question of damages claimable, I must deal with the issue of the cancellation notice that commenced in December 2021. At that time, the sale was already perfected in that the transfer and the risk attendant to the

[8] 1971 (3) SA 188 (A).

property had been passed to Avbob. There was effectively nothing to cancel. The proverbial horse had bolted already. Clause 19.4 entitled Avbob to cancel the offer to purchase and not the purchase and sale agreement. As discussed above, an offer to purchase is incapable of being cancelled but only capable of being withdrawn.

[51] Clause 15 of the purchase and sale agreement contained a cancellation clause (*lex commisari*). That right of cancellation vests on a party only in the event of the breach of the agreement and most importantly, it avails to the aggrieved party two options; namely; (a) to sue for specific performance or; (b) cancel the agreement. These are known remedies in contract law that are available for a breach often known as malperformance. It is trite law that where the contract is cancelled, the only residual remedy available to the aggrieved party is that of claiming and proving damages against the offending party.

[52] The right to cancel does not prescribe in terms of the Prescription Act, since it is not a debt, but it must be exercised within a reasonable time. In *Stewart v Wrightson Ltd v Thorpe*[9] it was held that cancellation is a unilateral juristic act performed by an innocent party and does not require consent of the guilty party. To make that choice to cancel is a subject of reasonableness.[10]

[53] A delay in electing a cancellation would lead the other party to believe that the injured party has elected to condone the breach. As far back as June 2019, Avbob got wind that the warranties are not true, yet it cancelled or gave notice to do so almost three years later.

[54] Cancelling an agreement after passage of such a considerable period of time is certainly unreasonable and must have given the Mkhonzas a believe that their breach was condoned by Avbob. Steps taken to regularise the zoning is objectively also suggestive of condonation.

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[9] [1977] (1) PH A15 (AD).

[10] See *Segal v Mazzur* [1920] CPD 634 at 644-5.

[55] Condonation does not amount to a waiver *per se* but it is more an acquiescence. Acquiescence as a defence is very much part of our law since the case of *Dabner v South African Railways and Harbour.*[11]

[56] In the circumstances of this case, Avbob has actually perempted its right to cancel. It cannot approbate and reprobate at the same time. It cannot blow hot and cold at the same time. It had commenced a process of regularising the zoning issue, which action suggests a condonation and or peremption on its part. So, on application of the doctrine of election, having made that election, it cannot make a *volte face* and return to the cancellation option. Accordingly, in my view, Avbob is not entitled to the cancellation of the purchase and sale agreement.

[57] I now turn to the damages claim. Avbob has prayed for consequential damages to the tune of three million rands. At the conclusion of the matter, during argument, this claim for consequential damages was abandoned due to lack of evidence in quantification thereof. As a general rule the purchaser is entitled to be placed in the same position it would have been if the contract had been performed.[12]

[58] In *casu*, the Mkhonzas' warranties may or may not have influenced the purchase price. In other words, if the warranty was true, the value of the property would have been three million rands still, then Avbob would remain in the same position even if the warranty was untrue[13]. On the other hand, if evidence was led that the actual price without the warranty would have been two million five hundred rands for instance, then the amount of five hundred thousand rands would have been the damages suffered by Avbob. Since no evidence of any loss as a direct consequences of the

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[11] 1920 AD 583. See also *SARS v CCMA and others* (2017) 38 ILJ 97 (CC) at para 26.

[12] See *Clark v Durban and Coast SPCA* 1959 (4) SA 333 (N).

[13] See *Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors Ltd* 1936 TPD 209.

false warranty was led, Avbob is not entitled to any damages[14]. It did not prove any damages.

[59] For all the above reasons, I make the following order:

Order

1. The claim of Avbob is dismissed
2. Avbob is ordered to pay the costs of the Mkhonzas on a scale of party and party to be settled or taxed at scale B.

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GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

[14] See *Holz v Thurton & Co* 1908 TS 158; *Vivian v Woodburn* 1910 TPD 1285; *Bower v Sparks, Young and Farmers' Meat Industries Ltd* 1936 NPD 1 at 13-15.

APPEARANCES:

For Plaintiff:	Mr B L Manentsa
Instructed by:	Adams & Adams, Pretoria.
For Defendants:	Mr E Janse Van Rensburg
Instructed by:	S J Van Den Berg attorneys, Pretoria.
Date of the hearing:	11, 12, and 14 June 2024
Date of judgment:	27 June 2024