

SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA STATEMENT – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd and another

From : The Registrar, Supreme Court of Appeal
Date : 14 May 2008
Status : Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal today upheld an appeal against a judgment of the Durban and Coast Local Division of the High Court in terms of which an application to enforce an agreement of sale of immovable property was dismissed with costs. The court below had held that the first respondent (the seller) had been entitled to cancel the agreement because the appellant (the purchaser) had failed to provide an irrevocable guarantee for the payment of the deposit. This Court held that the seller was not entitled to cancel the agreement as the purchaser had complied with the obligations set out in the agreement of sale and had provided a guarantee in terms of the said agreement.

The purchaser and the seller had concluded a written agreement of

sale in terms of which certain immovable property was sold for R12 million plus value added tax. The purchaser was required to provide a guarantee of R1 million for the deposit and another of R11 million in respect of the balance of the purchase price. The appeal turned on the meaning and effect of a clause in the agreement of sale in terms of which a bank guarantee *acceptable to the seller* must be provided by the purchaser to the seller failing which the agreement would be cancelled. The seller rejected the guarantee on the ground that it contained 'a right to withdraw' and demanded an irrevocable guarantee. The purchaser failed to provide the said guarantee whereupon the seller deemed the agreement to be null and void. The purchaser contended that the right of withdrawal contained in the guarantee was a long-standing and general practice of financial institutions and that the agreement could not be interpreted so as to subject the purchaser to the unreasonable whim of the seller. The seller rejected this contention, alleging that this only applied where a purchase is conditional on the purchaser obtaining a mortgage bond and, that the present was not such a case.

The Supreme Court of Appeal held that clause 3.2 of the agreement merely referred to a guarantee acceptable to the seller and neither a provision for irrevocability nor a provision that the guarantee provide security was expressly stipulated in the agreement. The Court went on to say that it was evident that the guarantee provided only for the payment of the deposit and the balance of the purchase price. The contract was not in a standard form but specially drafted and if this was what the seller intended, irrevocability should have been expressly stated. The Court accordingly held that the seller was not contractually entitled to insist on an irrevocable guarantee.

In determining whether the seller acted reasonably in rejecting the

guarantee, the Court held that the bank would not be entitled to a 'whimsical' withdrawal as contended for by the seller, but would have been limited to a withdrawal that was factually based and related to its security. Furthermore, as the seller would be responsible for the timeous transfer of the property, it would thus be within its powers to ensure maximum reduction of delay. The Court concluded that the right to withdraw was not as wide as contended for and was not liable to be employed capriciously. It accordingly found that the seller was not entitled to reject the guarantee and that the said guarantee complied with the obligations set out in the agreement of sale between the parties.