

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO: 5516/2006

IN THE MATTER BETWEEN:

MICHAEL RONALD CLIFFORD ASHINGTON

FIRST APPLICANT

PAULA LYNN ASHINGTON

SECOND APPLICANT

AND

THE BODY CORPORATE OF DRYDEN HALL

FIRST RESPONDENT

THE REGISTRAR OF DEEDS

SECOND RESPONDENT

JUDGMENT

MSIMANG, J:

The first applicant is described in the founding affidavit as a businessman and he and the second applicant are husband and wife who are married in community of property. The first respondent is a body corporate of Dryden Hall duly registered as such in accordance with the Sectional Titles Act 95 of 1986 ("the Act"). On 30 or 31 July 2002 the applicants concluded a written agreement of sale ("the main agreement") with the first respondent in terms of which the latter sold to the applicants a real right, reserved in terms of Section 25 of the Act, to erect and complete five additional residential sectional title units and eight additional garages on its common property. The agreed purchase price was a sum of R175 000,00, payable by way of a deposit of R17 500,00 within fourteen days from the date of signature of the agreement and the balance payable upon registration of transfer of the real right. It is common cause between the parties that the amount of deposit was duly paid.

The operation of the agreement was subject to the fulfilment of four conditions which, in view of their importance in the determination of the issues before me, I quote in full as follows :-

“1.13.1.1 Within one hundred and eighty (180) days after receipt by the Seller of the documentation and information referred to in 1.12, all the members of the Seller and all mortgagees of any sectional units in Dryden Hall scheme furnish their written consents to the Seller reserving the right in terms of Section 25 of the Act to extend the Dryden Hall scheme by the erection of five additional residential sectional units as more fully set out and upon the terms and conditions set out in 1.5, and furthermore to alienating and transferring the Real Right to the Purchaser for the purchase price and upon the terms and conditions set out in this Agreement. It is recoded that the members and mortgagees shall not be entitled to withhold approval without good cause in law.

1.13.1.2 WITHIN THE TIME PERIOD REFERRED TO IN 1.13.1.1 THE SELLER PASSES THE SPECIAL RESOLUTIONS ANNEXED MARKED ‘B’ WHICH MODIFY THE CONTRIBUTIONS OF MEMBERS.

1.13.1.3 Within ninety (90) days after the fulfilment of conditions 1.13.1.1 and 1.13.1.2 approval is obtained from the local authority permitting the erection of five additional residential sectional units on the common property as set out and defined in the Real Right in 1.5. The Seller makes no warranties insofar as the available F.A.R. or the coverage for development purposes on the common property.

1.13.1.4 WITHIN A REASONABLE TIME AFTER THE FULFILMENT OF CONDITION 1.13.1.3 A CERTIFICATE OF REAL RIGHT IS ISSUED TO THE SELLER IN TERMS OF SECTION 25(6) OF THE ACT.”

Clause 1.13.2 of the agreement provides that :-

“Should the conditions precedent referred to in 1.13.1 not be fulfilled within the prescribed time limits or within a reasonable time and the period for fulfilment has not been extended in writing by the parties prior to the expiry thereof, this Agreement shall become null and void.”

THE DOCUMENTATION WHICH, IN TERMS OF CLAUSE 1.13.1.1, HAD TO BE RECEIVED BY THE SELLER HAD, PURSUANT TO CLAUSE 1.12, TO BE FURNISHED BY THE

PURCHASER WITHIN SIXTY (60) DAYS AFTER THE DATE OF SIGNATURE OF THE AGREEMENT.

NO DOUBT, AS A RESULT OF THE FACT THAT SOME OF THE SUSPENSIVE CONDITIONS HAD NOT BEEN FULFILLED WITHIN THE PRESCRIBED PERIOD, ON 27 AUGUST 2003, THE PARTIES CONCLUDED ANOTHER WRITTEN AGREEMENT HEADED "NOVATION OF SALE OF REAL RIGHT" ("THE NEW AGREEMENT"). THE NEW AGREEMENT PROVIDED THAT ALL THE TERMS OF THE ORIGINAL AGREEMENT WERE DEEMED TO BE INCORPORATED THEREIN, SUBJECT TO THE AMENDMENTS SET OUT IN CLAUSE 3 THEREOF. THE AMENDMENTS WHICH ARE RELEVANT TO THE ISSUES BEFORE COURT ARE AS FOLLOWS :-

“3.3 AD PARA 1.12.1

The words 'date of signature' in 1.12.1 of the previous agreement shall be deemed to be the date of signature of this Agreement.

3.4 Ad Para 1.13.1.1

THIS PARAGRAPH HAVING NOW BEEN COMPLIED WITH, IS DELETED.

3.5 Ad Para.1.13.1.2

THE WORDS 'THE TIME PERIOD REFERRED TO IN 1.13.1.1' SHALL BE DELETED AND REPLACED WITH 'ONE HUNDRED AND EIGHTY (180) DAYS AFTER RECEIPT BY THE SELLER OF THE DOCUMENTATION AND INFORMATION REFERRED TO IN 1.12.'

ON A PROPER CONSTRUCTION OF THE AGREEMENT, AS AMENDED, IT IS EVIDENT THAT, FOR THE SAME TO TAKE EFFECT AND OPERATE, ALL FOUR SUSPENSIVE CONDITIONS HAD TO BE FULFILLED WITHIN THE PRESCRIBED PERIOD AND THAT FAILURE TO FULFIL ANYONE OF THEM WITHIN THE SAID PERIOD, WOULD RENDER

THE AGREEMENT NULL AND VOID.

THOUGH CLAUSE 3.4 OF THE NEW AGREEMENT DELETED THE WHOLE OF CLAUSE 1.13.1.1 OF THE MAIN AGREEMENT, A PORTION OF THE LATTER CLAUSE WAS RETAINED BY CLAUSE 3.5 OF THE NEW AGREEMENT, NAMELY, THE PERIOD OF “ONE HUNDRED AND EIGHTY (180) DAYS AFTER RECEIPT BY THE SELLER OF THE DOCUMENTATION AND INFORMATION REFERRED TO IN 1.12”, WHICH PORTION WAS INCORPORATED IN CLAUSE 1.13.1.2 OF THE MAIN AGREEMENT REPLACING THE WORDS “THE TIME PERIOD REFERRED TO IN 1.13.1.1” CONTAINED THEREIN. THE EFFECT OF THIS AMENDMENT TO CLAUSE 1.13.1.2 WAS THAT, FOR THE AGREEMENT TO TAKE EFFECT, THE SELLER MUST PASS THE SPECIAL RESOLUTIONS WHICH MODIFY THE CONTRIBUTIONS OF MEMBERS WITHIN THE PERIOD OF ONE HUNDRED AND EIGHTY (180) DAYS AFTER RECEIPT OF THE DOCUMENTATION AND INFORMATION REFERRED TO IN CLAUSE 1.12.

IT IS COMMON CAUSE THAT THE SPECIAL RESOLUTIONS REFERRED TO IN CLAUSE 1.13.1.2 CONSTITUTE A SPECIAL RESOLUTION OF THE MEMBERS OF THE BODY CORPORATE CONTEMPLATED IN SECTION 32(4) OF THE ACT. THE TERM “SPECIAL RESOLUTION” IS DEFINED AS FOLLOWS IN SECTION 1 OF THAT ACT :-

“..... A RESOLUTION PASSED BY A MAJORITY OF NOT LESS THAN THREE-FOURTHS OF THE VOTES (RECKONED IN VALUE) AND NOT LESS THAN THREE-FOURTHS OF THE VOTES (RECKONED IN NUMBER) OF MEMBERS OF A BODY CORPORATE WHO ARE PRESENT OR REPRESENTED BY PROXY OR BY A REPRESENTATIVE RECOGNISED BY LAW AT A GENERAL MEETING

It is common cause that the documentation and information referred to in clause 1.12 had been furnished by 16 December 2002. It therefore accordingly follows that, by the time the new agreement was concluded, namely, on 27 August 2003, a period of one hundred and eighty (180) days within which the seller was required, in terms of clause 1.13.1.2, to have procured the special resolution, had expired. However, to put such a construction on these clauses would make the conclusion of the new agreement nonsensical. Clearly, such an absurdity could not have been contemplated by the parties. I therefore agree with a submission made by Mr. **Olsen**, who appeared for the first respondent in this matter, that a

proper construction of clause 1.13.1.2, as amended, is that the period mentioned therein would start running on the date of the conclusion of the new agreement.

IN THE ANSWERING AFFIDAVIT FILED ON BEHALF OF THE FIRST RESPONDENT IT IS STATED THAT THE SPECIAL RESOLUTION CONTEMPLATED IN THE AMENDED CLAUSE 1.13.1.2 WAS PASSED ON 24 JUNE 2004 AFTER NOT LESS THAN 75% OF THE MEMBERS RECKONED IN NUMBER AND IN VALUE HAD RETURNED THEIR CONSENTS. IN RESPONSE TO THIS ALLEGATION, IN HIS REPLYING AFFIDAVIT, THE FIRST APPLICANT DISCLAIMED ALL KNOWLEDGE OF THE SAME. HE, HOWEVER, DID NOT SPECIFICALLY DENY THE ALLEGATION. WHAT HE SAID HE DENIED WAS WHAT WAS STATED ABOUT THE CONDITIONS. HE DID NOT STATE WHICH CONDITIONS HE WAS REFERRING TO. IN ANY EVENT, THE ALLEGATION PERTAINS TO A SPECIAL RESOLUTION. ALSO, IN THE RELEVANT PARAGRAPH OF FIRST RESPONDENT'S ANSWERING AFFIDAVIT NO MENTION IS MADE OF CONDITIONS. IN ANY EVENT, DURING ARGUMENT I DID NOT UNDERSTAND MR. **MARNEWICK**, WHO REPRESENTED THE APPLICANTS, TO DENY THIS ALLEGATION. IT MUST ACCORDINGLY BE ACCEPTED (AND I FIND) THAT THE SPECIAL RESOLUTION WAS INDEED PASSED ON 24 JUNE 2004 WHICH WAS FAR BEYOND THE PERIOD OF ONE HUNDRED AND EIGHTY (180) DAYS PRESCRIBED IN THE AMENDED CLAUSE 1.13.1.2.

Mr. **Marnewick**, however, argued that, notwithstanding the expiry of the said period, the agreement had not been rendered a nullity as, in terms thereof, fulfilment of the suspensive condition set out in the amended clause 1.13.1.2 had to take place within a reasonable

time. By the time the first respondent repudiated the agreement, citing non-fulfilment of the suspensive condition, the said reasonable period had not yet expired. He relied on the provisions of clause 1.13.2 of the agreement for his submission and argued that the words “within a reasonable time” mentioned therein also applied to the suspensive condition mentioned in clause 1.13.1.2, with the result that, so he argued, such a condition could be fulfilled within a reasonable time.

A CAREFUL PERUSAL OF THE WORDS USED IN THE AGREEMENT SHOWS THAT THE INTENTION OF THE PARTIES SUGGESTS OTHERWISE AND THEREFORE THAT MR. **MARNEWICK’S** SUBMISSION CANNOT BE SUSTAINED. AS ALREADY STATED IN THIS JUDGMENT, THE OPERATION OF THE AGREEMENT WAS MADE SUBJECT TO THE FULFILMENT OF FOUR CONDITIONS AND EACH CONDITION IS SET OUT IN A SEPARATE CLAUSE IN THE AGREEMENT, WITH THE CORRESPONDING PERIOD WITHIN WHICH EACH SUCH CONDITION MUST BE FULFILLED. IN THREE CLAUSES, RELATING TO THREE CONDITIONS, SPECIFIC TIME PERIODS ARE PRESCRIBED AND IN ONE CLAUSE, NAMELY, CLAUSE 1.13.1.4, NO SPECIFIC PERIOD IS PRESCRIBED. IN RESPECT OF THE CONDITION MENTIONED IN THAT CLAUSE IT IS STATED THAT SUCH A CONDITION NEED ONLY BE FULFILLED WITHIN A REASONABLE TIME. THEN FOLLOWS CLAUSE 1.13.2, THE PROVISIONS OF WHICH DECREE THAT, SHOULD THE CONDITIONS NOT BE FULFILLED “WITHIN THE PRESCRIBED TIME LIMITS OR WITHIN A REASONABLE TIME”, THE AGREEMENT WOULD BECOME NULL AND VOID. IT IS CLEAR THAT WHAT THE PARTIES INTENDED IS THAT THE WORDS “WITHIN THE PRESCRIBED TIME LIMITS” CONTAINED IN CLAUSE 1.13.2 WOULD APPLY IN THE CONDITIONS IN RESPECT OF WHICH

SPECIFIC TIME LIMITS HAD BEEN PRESCRIBED AND THAT THE WORDS “WITHIN A REASONABLE TIME” WOULD APPLY IN THE EVENT OF THE ALLEGATION OF NON-FULFILLMENT OF THE CONDITIONS SET OUT IN CLAUSE 1.13.1.4.

There is yet another reason why Mr. **Marnewick’s** submission cannot be sustained. Clause 1.2, which is contained in the preamble of the new agreement, reads as follows :-

“1.2 The previous agreement lapsed in that all the members of the seller failed to agree in writing to the sale within a period of 180 days in terms of 1.13.1.1”.

The clause makes it clear that it had been the intention of the parties that those conditions which, for their fulfillment, required the consents of the members of the seller, had to be fulfilled within a period of one hundred and eighty (180) days.

Having found that the suspensive condition set out in the amended clause 1.13.1.2 had not been fulfilled within the prescribed time limit, I have found it unnecessary to determine whether there was fulfilment in respect of the other three suspensive conditions. Proof of non-fulfillment of that one condition is sufficient to render the agreement a nullity.

I accordingly dismiss the application with costs.

For the applicants: Adv. C G Marnewick SC (instructed by van Onselen Holing & Dlamini Inc)

For the respondents: Adv. P J Olsen SC (instructed by Livingston Leandy

Incorporated)

Matter argued: 21 September 2007

Judgment delivered: 28 November 2007