HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED: Yes

29-06-2021 P.A. Meyer

Case No: A5047/2020

In the matter between:

GOLDEN HI-WAY INVESTMENTS (PTY) LTD Appellant

and

GEORGE SNYMAN MONYANE First Respondent
LYDIA MADIFEDI MONYANE Second Respondent
REGISTRAR OF DEEDS, JOHANNESBURG Third Respondent

***Case Summary*: Contract – Sale of land – whether suspensive condition timeously fulfilled – whether contract cancelled in accordance with its terms upon breach by purchaser.**

JUDGMENT

MEYER J (KATHREE-SETILOANE and MANOIM JJ concurring)

[1] This is an appeal by Golden Hi-Way Investments (Pty) Limited (the appellant), against the whole of the judgment and order of the Gauteng Local Division of the High Court, Johannesburg (Matsemela AJ) on 27 September 2019, granting judgment in favour

of the first and second respondents, Mr George Snyman Monyane and Mrs Lydia Madifedi Monyane (the respondents), in motion proceedings that they had instituted against the appellant. Therein they, as purchasers, claimed specific performance of a written sale of land agreement (the contract) from the appellant, as seller, or, in the alternative, if it was found that the sale of land agreement was validly cancelled, repayment of the 'full purchase price of R115 000, together with the costs of developing the land to the value of R450 000'. The court *a quo* granted their claim for specific performance. The third respondent is the Registrar of Deeds, Johannesburg, against whom no relief was claimed. The appeal to the full court of this division is with the leave of the Supreme Court of Appeal (Ponnan JA and Ledwaba AJA).

[2] The facts pertinent to the determination of this appeal are essentially uncontroversial. The core issues that were raised before the court *a quo*, and before this court on appeal, as far as the respondent's claim for specific performance of the contract is concerned, are whether the suspensive condition relating to the payment of the purchase price had been timeously fulfilled, and, if so, whether the appellant had cancelled the contract in accordance with its terms. These issues call for a proper interpretation of the relevant contractual provisions in accordance with the contemporary settled approach to interpretation, as enunciated by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F-604E and in *Bothma-Batho Transport (Pty) Ltd v S Bothma & Seun Transport (Pty) Ltd* 2014 (2) SA 494 (SCA) para 12.

[3] The appellant and the respondents concluded the contract on 23 January 2013. In terms thereof, the appellant sold a vacant stand - Erf 484 Golden Gardens, Emfuleni measuring 250 m² (the property) - to the respondents. The presently relevant provisions of the contract are the following:

'The purchase price is R115 000 (one hundred & fifteen thousand rand) and EXCLUDES any VAT and or rates or any imposts payable to the local council in lieu of the property and, also any and all costs incidental to transfer of the property into the name of the purchaser.

The contract is subject to the suspensive condition that the purchaser pays the deposit and the purchase price upon the following terms:

A deposit of R115 000 (one hundred and fifteen thousand rand) to be paid by 01 February 2013. And thereafter minimum monthly instalments of no less than R N/A (N/A RAND) per month, payable on the first of every month starting on N/A.
Notwithstanding anything to the contrary herein, the Purchaser shall pay the full purchase price to the seller by no later than 10 February 2013.

. . .

TRANSFER OF THE PRPERTY

Transfer of the property shall be affected by the Seller's Attorneys . . . after the securing of the purchase price. The purchaser shall be liable for all costs in connection with transfer. The costs do NOT form part of the Purchase price herein and shall be payable directly and separately to the attorney by the purchaser upon demand from the attorney.

. . .

RATES, TAXES, LEVIES AND IMPOSTS

The purchaser shall be liable for all rates and taxes and imposts levied on the property, from date of signature hereof by the parties.

. . .

THE RIGHTS OF THE SELLER

In the event that the Seller has notified the purchaser by registered post to the address as stated in this contract, of any default on the part of the purchaser in terms of this contract, the seller shall have the right to cancel this contract forthwith.

. . .

CANCELLATION AND REFUNDS

In the event that the parties hereto agree that the sale will be cancelled, then the parties agree that the Seller will then refund all monies paid by the Purchaser by 90 days after date of cancellation. No interest will be payable by the purchaser as no interest is charged to the purchaser by the Seller.

[4] On 5 February 2013, the respondents paid the purchase price in the amount of R115 000. Upon having made such payment, the parties concluded a written addendum to the contract, which regulates the right to build a dwelling on the property and the right to occupy the property. The respondents agreed and accepted *inter alia* that the purchase price stipulated in the contract excludes VAT and transfer costs, they accepted full liability for the payment of VAT and transfer costs and they undertook to pay these amounts on demand, failing which they agreed that they would be in breach of the

contract (clause 2). The right afforded to the respondents to occupy the dwelling to be built on the property was made subject to the fulfilment of certain conditions, *inter alia* that '[t]he complete purchase price, VAT and costs incidental to the transfer of the property must be paid in full to the seller or the conveyancer prior to occupation' (clause D).

[5] On 8 February 2013, the conveyancing attorneys demanded payment of the amount of R23 845 from the respondents, being an amount of R7 745 in respect of the costs incidental to the transfer of ownership of the property to the respondents and an amount of R16 100 in respect of the VAT amount levied on the purchase price for the property. The respondents failed to pay these amounts demanded from them. The appellant over a prolonged period unsuccessfully engaged with the respondents to secure payments of the VAT amount and transfer costs. By letter dated 3 December 2014, the appellant's attorneys of record demanded that the respondents remedy their breach of the contract. The respondents failed to comply with that demand too. By letter dated 11 August 2015, the appellant's attorneys of record communicated the appellant's election to cancel the contract to the respondents as a result of their breach. The appellant neither repaid nor tendered to repay the purchase price.

[6] On 2 August 2016, the appellant instituted an application for the eviction of the respondents from the property in the Sebokeng Magistrate's Court. On 6 June 2017, that court made an order staying the eviction application until 31 July 2017, to enable the respondents to institute the present proceedings. On 25 July 2017, the respondents instituted the present application against the appellant, wherein they claimed an order in the following terms:

'1. That Notice of cancellation of Contract of sale of immovable property fully described as Erf 484 Golden Gardens, Sebokeng dated 11th of August 2015, attached as "GSM -007" is declared invalid, of no legal force and effect.
2. That the Offer to Purchase property described as Erf 484 Golden Gardens Sebokeng signed by both the applicants and the First Respondent dated the 23rd of January 2013, is declared effective, valid and binding to the Applicants and the First Respondent.
3. That the Applicants are allowed to pay the transfer costs of this property within 30 days from the date of this order, to a conveyancer duly appointed by the first Respondent.

4. That in the event the First Respondent refuses to sign the documents to effect transfer of the property mentioned in prayer 1 above, the Sheriff and/or his Lawfully appointed deputy be authorised to sign the transfer documents into the names of the Applicants.
5. That in the event that this Honourable Court finds that the contract was property cancelled, order the First Respondent to refund the applicants the full purchase price of R115 000.00, together with costs of developing the land to the value of R450 000.00.
6. The First Respondent be directed to pay costs of this application on the attorney and client scale.'

[7] The basis upon which the respondents sought the declaration of invalidity of the appellant's notice of cancellation and the declaration of validity of the contract, specific performance by the appellant of its obligation to cause transfer of ownership of the property into the names of the respondent and the ancillary relief, is that, in cancelling the contract the appellant failed to comply with the provision of the contract under the heading 'CANCELLATION AND REFUNDS', which I have quoted in para 3 *supra*. The appellant resisted the relief sought by the respondents on the grounds that the contract is null and void due to the non-fulfilment of the suspensive condition relating to the payment of the purchase price, or, if it was held that the suspensive condition had been timely fulfilled, that the provision in the contract under the heading 'CANCELLATION AND REFUNDS' on which the respondents rely only finds application to a consensual cancellation of the contract, and not a unilateral cancellation by the seller due to a material breach of the contract by the purchaser, which situation is governed by the cancellation provision under the heading 'THE RIGHTS OF THE SELLER'.

[8] In finding in favour of the respondents, the court *a quo* held that the provisions of the contractual clause under the heading 'CANCELLATION AND REFUNDS' finds application to the appellant's cancellation of the contract and that '[t]he purchase amount to date has not been returned'. The court *a quo* then concludes as follows:

'33. I am of the view that the purported cancellation of the agreement was not valid in the sense that such purported cancellation was not strictly in accordance with the provisions of the cancellation clause of the agreement. Accordingly, I cannot, under these circumstances, find that the agreement concluded between the applicant and the first respondent was validly cancelled.

34. It therefore follows, in my view, that the Applicants had established a clear right arising from the deed of sale concluded between them and the first respondent; that the deed of sale is valid and binding on the parties.'

[9] The court *a quo* made no finding in respect of the appellant's defence that the suspensive condition, relating to the payment of the purchase price to which the contract was made subject, had not been timeously fulfilled and that the contract, therefore, fell away. Nevertheless, I am of the view that this defence is unmeritorious on a proper contextual interpretation of the relevant contractual provisions. Those provisions, self-standing and in context, make it plain that the purchase price for the property was the sum of R115 000 (exclusive of VAT, rates or any imposts payable to the local council and all costs incidental to the transfer of the property into the name of the purchaser).

[10] The suspensive condition commences by stipulating that the contract was subject to the respondents paying a deposit of R115 000 by 01 February 2013, but it continues to state that *notwithstanding anything to the contrary* in that condition, the respondents shall pay the full purchase price to the seller by no later than 10 February 2013. The amount of R115 000 paid by the respondents on 5 February 2013, was clearly not a deposit in the true sense, but rather the full purchase price, which, in terms of the suspensive condition, was to be paid by no later than 10 February 2013.

[11] The payment of VAT levied on the purchase price, rates or any imposts payable to the local municipality, and all costs incidental to the transfer of the property into the names of the purchasers, were expressly excluded from the purchase price of R115 000. Other provisions of the contract and the addendum thereto placed independent obligations upon the respondents to pay the VAT, municipal imposts and the costs incidental to transfer. The contract provides that transfer of the property was to be effected by the appellant's attorneys after the securing of the purchase price. The costs incidental to transfer do *not* form part of the purchase price, but the purchasers were liable to pay such costs directly and separately to the conveyancing attorney upon demand from the attorney. The addendum spells expressly out that the respondents agreed and accepted that the purchase price stipulated in the contract excludes VAT and transfer costs, and that they accepted full liability for the payment of VAT and transfer costs and

undertook to pay these amounts on demand, failing which they agreed that they would be in breach of the contract. There is also nothing in the broader context presented in the application that, in my view, detracts from this interpretation.

[12] I now turn to the appellant's cancellation of the contract due to the purchasers' default in making payment of the VAT amount payable on the purchase price and their default in making payment of the costs in connection with the transfer and registration of the property into their names, despite payment of these amounts having been demanded from them. It is trite that if a contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective. (See *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) paras 31-35; *Bekker v Schmidt Bou Ontwikkelings CC* [2007] 4 All SA 1231 (C) paras 11 and 13-17; *Standard Bank of SA Ltd v Hand* 2012 SA 319 (GSJ) paras 31-35.)

[13] On a proper contextual interpretation of the cancellation provisions of the contract, I am respectfully unable to endorse the court *a quo's* interpretation of the procedure laid down in the contract for cancellation, by the seller, as a result of a breach by the purchasers. The court *a quo's* interpretation conflates consensual termination with unilateral cancellation as a result of breach as laid down in the contract and it ignores the clear and unambiguous language used in the two relevant clauses of the contract.

[14] The contractual clause under the heading 'CANCELLATION AND REFUNDS' in clear and unambiguous terms only finds application in the event that the parties to the contract 'agree that the sale will be cancelled'. It does not prescribe any procedure that must be followed for such consensual cancellation. It merely places an obligation on the appellant, as seller, in such event to refund all monies paid by the purchasers within 90 days after the date of the consensual cancellation, and it affords the respondents, as purchasers, the concomitant right to receive such repayment within 90 days of the consensual termination. It furthermore affords the appellant, as the seller, the right not to pay interest on such monies that are to be refunded in the event of a consensual cancellation of the contract since no interest was to be charged under the contract by the appellant, as seller, to the respondents, as purchasers.

[15] The clause in the contract that finds application *in casu* and lays down the procedure for cancellation that is to be followed by the seller in the event of a breach of contract by the purchasers, is the clause under the heading 'THE RIGHTS OF THE SELLER'. This clause requires the appellant, as seller, to notify the respondents, as purchasers, by registered post sent to their address stated in the contract of any default on their part in terms of the contract, whereafter the appellant, as seller, shall have the right to cancel the contract forthwith. That is precisely what the appellant did. It was accordingly entitled to cancel the contract forthwith. The contract, therefore, has a cancellation clause (*lex commissoria*) and its provisions have been complied with. (See *De Wet NO v Uys NO en andere* 1998 (4) SA 694 (T) at 706.)

[16] I am of the view, therefore, that the court *a quo* should have dismissed the relief claimed in paragraphs 1, 2, 3 and 4 of the notice of motion which I have quoted in para 6 of this judgment. The court *a quo* accordingly did not grant the alternative relief claimed in paragraph 5 of the notice of motion, which is a claim for the appellant to refund to the respondents the purchase price that they had paid to the appellant in the amount of R115 000.00, and a claim for the appellant to pay to them the 'costs of developing the land to the value of R450 000.00', in the event of the court *a quo* finding 'that the contract was properly cancelled'. There is no conditional counter-appeal for payment of these amounts should this court of appeal find that the contract was lawfully cancelled by the appellant.

[17] However, the appellant in argument before us has tendered to repay the purchase price in the amount of R115 000 to the respondents if its appeal is upheld. I am of the view that the court *a quo* should have found that the appellant's cancellation is valid and effective, and that the appellant must repay the purchase price which the respondents had paid. Its costs award should have reflected such partial success on the part of the respondents. The duty to restore on either side arises on cancellation of a contract simply as a matter of law, although it may be excluded by agreement, for example a forfeiture clause. (See *Baker v Probert* 1985 (3) SA 429 (A) at 446; *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd en Andere* 1974 (1) SA 414 (NC) at 424-425; *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) at 198; *LAWSA* 2 ed Vol(1) § 258n2.) The contract *in casu* does not have a provision to the contrary. The appellant

and the respondents were thus bound to restore to the other that which they had received in terms of the contract.

[18] The only allegations made by the respondents in their founding papers in support of their claim for payment of the 'costs of developing the land to the value of R450 000.00' are the following:

'17. From the date upon which the Applicants were granted the addendum, they have worked hard and developed the property and is currently estimated to the value of R450 000.00 and/or more, to this effect the Applicants pray that should this Honourable Court find that cancellation was done properly then order the refund of both purchase price and improvements made to the immovable property.

. . .

33. In the alternative the Applicants submit that should this Honourable court find that cancellation was proper and stands, then find that the Applicants be given all the purchase price as well as improvements made on the property herein a subject matter.'

[19] Apart from the fact that the appellant in its answering affidavit takes issue with these allegations of the respondents and maintains that the improvements are structurally defective and should be demolished, a case has not been adequately made out to support this relief claimed by the respondents. No order should be made in respect thereof. This will enable the respondents to pursue such relief by way of action proceedings, if they are so advised. The founding affidavit should have set out all the evidence that would have been necessary at a trial. (See *SA Diamond Workers' Union v Master Diamond Cutters' Association of SA* 1948 (2) PH A83 (T) at 283; *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) at 269G-H; *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T) at 149C.)

[20] As was said by Miller J in *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) 464 (D) at 469C-E,

'where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition

such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

[21] Finally the matter of costs. The appellant seeks costs of the appeal and of its opposition of the application in the court *a quo* on a punitive scale. The court *a quo*, in my view, should have ordered the appellant to repay to the purchasers the purchase price which they had paid and for the parties each to pay their own costs of the application. As far as the costs of the appeal are concerned, there is, in my view, no reason to depart from the general rules that costs should follow the event and that the successful party is awarded costs as between party and party. This is not one of those 'rare occasions' where an award of punitive costs is warranted. (See *LAWSA* Vol 3 Part 2 Second Edition paras 292 and 320.)

[22] In the result the following order is made:

(a) The appeal is upheld with costs, including the costs of the application for leave to appeal in the court *a quo* and in the Supreme Court of Appeal.

(b) The order of the court *a quo* is set aside and replaced with the following order:

'(i) The relief claimed in paragraphs 1, 2, 3, 4 and 6 of the notice of motion is dismissed.

(ii) No order is made in respect of the applicants' claim for payment of the sum of R450 000, in paragraph 5 of the notice of motion.

(iii) The first respondent is to repay the amount of R115 000 to the applicants.

(iv) Each party is to pay their own costs of the application.'

P.A. MEYER
JUDGE OF THE HIGH COURT

Judgment:	29 June 2021
Heard:	14 April 2021
Appellant's Counsel:	Adv JD Matthee
Instructed by:	Nance-Kivell Attorneys, Germiston
1st and 2nd Respondents' Counsel:	Mr GO Ezenwa
Instructed by:	Ezenwa Attorneys, Bryanston, Johannesburg