IN THE KWAZULU-NATAL HICH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 12442/2009

In the matter between:

SAROJA DEVI GOVENDER APPLICANT

AND

JAHANNA KALISHIA REDDY 1ST RESPONDENT

REGISTRAR OF DEEDS 2ND RESPONDENT

J U D G M E N T

Msimang DJP,

[1] On 1 June 2009 the Appellant and the First Respondent entered into a written Agreement of Sale in terms of which the First Respondent sold landed property to the Applicant for the purchase price of R420 000,00 (four hundred and twenty thousand rand) payable on registration of transfer and payment of which would be secured by way of a guarantee reasonably acceptable to the seller to be issued by the Mortgagee Financial Institution and payable against registration of transfer.

[2] In terms of Clause 2.1 of the Agreement the entire agreement was made to be:-

"subject to my being granted a mortgage loan in the said amount."

[3] Thereafter steps were taken by the Applicant for the purpose of obtaining the said guarantee but it would appear that, by July 2009, the Applicant had not succeeded in obtaining the same. During that month (the Applicant has not given the exact date) the Applicant avers that he telephoned the First Respondent, advised her that she had access to an amount of R100 000,00 (one hundred thousand rand) and requested the First Respondent to furnish her with an attorney's Trust Account into which the amount could be deposited. According to the Applicant, the First Respondent never reverted to her regarding the issue.

[4] In her Answering Affidavit the First Respondent admits that, during July of 2009, she, indeed, received a telephone call from the Applicant but denies that she was ever informed of the amount of R100 000,00 (one hundred thousand rand) during the conversation. Her recollection as to what transpired during the conversation was that the Applicant had requested her to provide her with the particulars of the attorney dealing with the property and

advised her that she had an advocate friend who would sort the matter out for her.

[5] Wherever the truth lies on the said dispute, it is clear from the Applicant's own version that, as at the date of that telephone call, the Applicant had not been able to obtain a guarantee complying with the agreement.

[6] In paragraph 33 of her Founding Affidavit the Applicant makes the following bald statement regarding the issue of the loan application:-

> "I have been advised that my loan has been approved in principle, however, the Application could not be finalised due to the First Respondent's allegation that the property had been sold to a third party."

[7] Again in paragraph 39 she says she had been:-

> "… advised that owing to the fact that my bond has been approved in principle such guarantee can be furnished within a short space of time."

[8] Furthermore, the Applicant deposes to a number of what she says are incidents of intimidation, harassment and threats of action involving third parties. The first one is alleged have occurred on 29 May 2009 and involved unknown persons who came to the property and insisted on viewing the property as they were considering purchasing

the same. The second one is alleged to have occurred on 30 May 2009 and involved one TREVOR who arrived at the property with labourers and insisted on painting and renovating the premises. Then there was allegedly an involvement of a person called VEES who informed the Applicant that he was the First Respondent's partner. Unfortunately, the date of this involvement is not disclosed in the Founding Affidavit. In early August 2009 one NAICKER allegedly called the Applicant and informed her that he was the new owner of the property and demanded that the Applicant should vacate the same by no later than 31 August 2009. Then calls were received from a person who introduced himself as JAY NAICKER who demanded that the Applicant should vacate the property. On 15 August 2009 it was the turn of a group of unknown persons who demanded access to the house. Then followed calls from a person who introduced herself as ANNELINE who demanded that Applicant should vacate the property. The last incident happened on 19 August 2009 and involved a person who identified himself as ATTORNEY SEELAN PILLAY.

[9] Other than admitting that she had requested her partner, one VEES KOOBLAT, to assist her in dealing with the Applicant who had become obstructive in allowing access to the property for the purpose of renovating it and viewing by potential purchasers, the First Respondent denies the rest of

the acts of intimidation, harassment and threats of eviction alleged by the Applicant.

[10] The First Respondent's case, as pleaded in her Opposing Affidavit, can be summarized as follows; when the parties concluded the sale agreement she expected the Applicant to comply with the provisions of clause 2.1 of the Agreement, by presenting the necessary guarantee, within a reasonable time. When, after a number of reminders, the Applicant had failed to do so, the First Respondent decided to resile from the Agreement and advised the Applicant of the said fact by means of a letter dated 10 July 2009 which was hand-delivered at First Respondent's residence.

[11] Thereafter the First Respondent placed the property back on the market for sale as she no longer considered herself to be bound by the Agreement of Sale which had been concluded by the parties, the fact which the First Respondent did not hide from the Applicant.

[12] Copy of the letter advising the Applicant of the cancellation of the Sale Agreement is referred to in paragraphs 37.7 and 40.3 of the First Respondent's Opposing Affidavit and is annexed as "E" to the same. In paragraph 40.3 an allegation is made that it was by means of that letter that the First Respondent gave notice of cancellation of the Agreement. The allegations contained in

these paragraphs are not denied in the Replying Affidavit subsequently filed by the Applicant.

[13] It is perhaps apposite that the contents of the letter should be set out *in extenso* in this judgment. The contents of the letter read as follows:-

"

10 JULY 2009

6 MARIGOLD STREET
STANGER
4450

DELIVERED BY HAND

MS SAROJA DEVI GOVENDER
54 CASHEW AVENUE
CROSSMOOR
CHATSWORTH

Dear Madam

RE: CANCELLATION OF PURCHASE AND SALE AGREEMENT

This letter serves as notification to cancel the sale document signed on the 01/06/2009.

We have made numerous attempts to contact you for an update on your bond application but you seem to deliberately ignore our calls and visits (even when you were inside the house).

This matter has gone on endlessly without yielding any results and I am of the understanding that you are either no longer interested in the sale proceeding or unable to procure a bond successfully.

With the lapse of time and incurring of further costs I am unable to now sell the property to you at the same price.

Yours faithfully

J K REDDY (Ms)
0833895751”

[14] The Applicant did not agree that, in the circumstances, the First Respondent could lawfully resile from the agreement and was desirous to hold her to the terms thereof. She also held a view that those persons who were requesting her to vacate the property were acting on First Respondent’s instructions and that they were acting unlawfully. It was therefore for that reason that, on 2 September 2009, she launched the present Application, citing the Registrar as the Second Respondent, seeking the following relief:-

> “a) That pending the outcome of this Application the Respondents be and are hereby interdicted from alienating, selling, pledging, encumbering or transferring the aforesaid property to any third party other than the Applicant herein.
>
> b) That the Second Respondent be and is hereby interdicted from registering the transfer of the property described as:-
>
> **Portion 886 of Erf 300 Chatsworth, Registration Division F.T., Province of Kwazulu-Natal, in extent 601 (Six Hundred and One) Square Metres.**
>
> to any third party pending the outcome of this Application.
>
> c) That pending the outcome of this Application, the First Respondent and those acting under her instructions be and are hereby interdicted from evicting the Applicant and those occupying the premises situated at 54 CASHEW AVENUE, CROSSMOOR, CHATSWORTH;

d) That pending the final determination of this Application, the First Respondent and those acting under her instructions, be and are hereby interdicted and restrained from harassing, intimidating and interfering *or communicating* with the Applicant other than through her Attorneys of Record, RAMESH LUCKYCHUND of RAMESH LUCKYCHUND AND ASSOCIATES.

e) That the First Respondent signs all the necessary documents to give effect to the transfer of the Property as described in paragraph (b) supra, when called upon to do so by the Conveyancing Attorneys, failing which the Sheriff of the above Honourable Court is hereby authorized to sign such documents on behalf of the First Respondent.

f) Costs of suit;

g) Further and/or alternative relief."

[15] Indeed, on 2 September 2009, the matter was brought before my brother SISHI J on an urgent basis who granted an order in terms of paragraphs 1, 2.1, 2.2, 2.3, 2.4 and 3 of 4 of the Notice of Motion, the return date being 30 September 2009.

[16] Thereafter the matter became opposed by the First Respondent who filed her Opposing Affidavit which was followed by Applicant's Replying Affidavit.

[17] On the 4th day of February 2010 when the matter was argued before me it was therefore the extended return date and, on that occasion, MR. REDDY, who appeared for the Applicant, set out to persuade me to confirm the Rule while MR. DAYAL, who argued the case for the First Respondent, submitted that the Rule should be discharged.

[18] Clearly at this stage of the proceedings the Applicant seeks a final relief and it is trite law that, for a Court to grant such a relief, the Applicant must prove that he or she has a clear right, that he has been caused an injury or that one is reasonably apprehended and that no other satisfactory remedy is available to him or her.

[19] The Applicant's right to the property can only be based on the Agreement of Sale concluded between the parties. It accordingly follows that the terms of the said Agreement should be examined in order to establish whether the Applicant has proved, on a balance of probabilities, that she has a clear right over the said property.

[20] It is common cause between the Applicant and the First Respondent that the operation of the Agreement was made subject to a suspensive condition that the Applicant be granted a mortgage loan in the amount of R420 000,00 (four hundred and twenty thousand rand) and that, though the relevant clause does not prescribe a period within which the Applicant should be granted the said loan, the Applicant and the First Respondent accepted that it was an implied term that such a grant should occur within a reasonable time.

[21] It therefore follows that the Applicant could acquire rights flowing from the Agreement only upon the occurrence

of that particular event and only if that particular event had occurred within a reasonable time. Pending the occurrence of that event, the operation of the obligations flowing from that Agreement would be suspended and the Applicant's right based on the Agreement is limited to the occurrence of the event within a reasonable time. Should the reasonable time expire without the occurrence of the event the Applicant would cease to have any rights based on the Agreement. (See; **Design and Planning Service v Kruger 1974(1) SA 689(T)** especially at **695 B-E**)

[22] As already stated in this judgment, on 10 July 2009, the First Respondent gave notice that she was resiling from the Agreement, submitting that a reasonable time within which the event ought to have happened had elapsed.

[23] The Applicant's position, as I understood it, is that, much as she did admit that, at that time, the event had not occurred, she denied that a reasonable time had elapsed.

[24] The crisp issue therefore to be determined in this Application is whether, in the circumstances of the case and at the time when the First Respondent purported to resile from the Agreement, a reasonable time for the fulfillment of the suspensive condition had expired.

[25] In **Cardoso v Tuckers Land and Development Corporation (Pty) Ltd 1981 (3) SA(W)** McEWAN J enunciated the following principles which he thought should be applied in order to determine whether a reasonable time for the fulfillment of a suspensive condition in a contract that has elapsed, namely, that:-

> "(1) Each case must depend upon its own peculiar circumstances.
> (2) Important factors to be borne in mind are
> *(a)* the contemplation of each of the parties at the time of entering Into the contract; and
> *(b)* the commercial interests of each of the parties.
> (3) As regards *(a)* above, however, the test is not solely subjective. An objective test must also be applied. In other words, although one of the parties may in fact not have contemplated any particular difficulty or cause of delay that might or did arise, if it was reasonably foreseeable it must be taken into account." **(page 67 A-C)**

[26] Dealing with peculiar circumstances of the event in that case, McEWAN J took note of the fact that:-

> "In the case of the establishment of townships in the Transvaal it is notorious that unexpected difficulties do occur that give rise to delays. For that reason the witnesses showed varying degrees of reluctance to form an estimate of the likely time to be taken for the establishment of a township (that is from the date of application up to the date of proclamation), even in the case of a so-called "trouble-free run". I have already indicated, however, that Messrs Nichol and Strydom said that, even allowing for the dolomite problem that cropped up in the present case, they would regard 42 to 48 months as being the normal time. Mr Strydom handed in a list of townships as exh D which showed variations from two years to just under eight years as having been required before proclamation, although two exceptional cases had taken approximately 20 years. Excluding those two cases, the average time taken for the townships on his list was 51/2 years, but that obviously cannot be regarded as an accurate statistical average. It is the range that is important.
>
> It has been mentioned earlier that, in answer to a request for further particulars, the plaintiff alleged that four years from the date of the contract was a reasonable time for the fulfilment of the condition. That brought the time to May 1975. That would have been about four years and four months from the date of the application for the approval of the establishment of the township. It seems to me, however, that, if the Court should find that a reasonable time had not elapsed by then, the H plaintiff should not be held to

> be bound by that answer, if it is found that a reasonable time had elapsed by the date of issue of the summons, namely 12 May 1977." **(page 67 C-G)**

[27] In the present case, the First Respondent gave notice that she was resiling from the Agreement on 10 July 2009, some six (6) weeks after the date of the conclusion of the same. What I found remarkable in the facts of the present case was the paucity of information relating to the circumstances of the case. Though the First Respondent was at pains to emphasize that, at the time when she resiled from the Agreement, she had given the Applicant more than a reasonable time to effect the fulfillment with the suspensive condition, she gave no basis for arriving at that conclusion. The sort of evidence which was adduced in **Cardoso *(supra)*** and from which McEWAN J concluded that the relevant period in that case was sufficiently long to constitute a reasonable time was missing in the present case.

[28] The Court finds itself in a situation similar to the one in which COETZEE J must have found himself in **Tuckers Land & Development Corporation (Pty) Ltd v Soja (Pty) Ltd 1979 (3) SA 477 (W)** and it was because of that situation that he pronounced himself as follows:-

> "The defences based on the alleged implied terms must be established by the defendant. It led no evidence whatsoever which could persuade me that a reasonable time had expired or even that such terms should be implied. Quite apart from the fact whether it ought to be implied, the only evidence before me which related to this point was that of one Potgieter and nothing in his evidence could be said to support the defendant's contention that the time which has elapsed in this matter is in excess of a reasonable time. Potgieter

> said that it is well-known that this kind of operation is a lengthy one which takes many years to complete. He was not prepared to say that the time which has elapsed is longer than that which is normally required for the proclamation of townships in that part of the Witwatersrand. The evidence falls far short of proving this defence."
> **(page 479 D-F)**

[29] In the circumstances of the present case, I have also not been persuaded that, at the time when the First Respondent purported to resile from the Agreement, a reasonable period had elapsed. I must accordingly find against the First Respondent on the issue.

[30] The First Respondent has accordingly failed to satisfy this Court that she was entitled to place the property back on the market for sale at the time when she did so.

It now remains of me to issue an appropriate order in this matter which is in the form of a declarator that the First Respondent's purported cancellation of the Sale Agreement herein is hereby declared invalid and, the First Respondent is ordered to pay the costs of this Application.

Date of Hearing	:	4 February 2010
Date of Judgment	:	17 February 2010
Counsel for Applicant	:	Adv. Dayal
Instructed by	:	Ramesh Luchchund & Associates c/o Kushen Sahadaw Attorney at Law
Counsel for 1st Respondent	:	Adv. Reddy
Instructed by	:	Attorneys Anand-Nepaul