IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 11695/2017

In the matter between:

CHESSLYNE BASSON	First Applicant
GAYLEEN BASSON	Second Applicant
and	
RAMOLA RUNAISHA REDDY	First Respondent
KUBEN NAICKER	Second Respondent
PROVINCIAL COMMISSIONER FOR THE SOUTH AFRICAN POLICE SERVICES	Third Respondent

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JUDGMENT

Chetty J:

[1] The applicants launched an urgent application against the respondents seeking interim relief in the following terms:

'2 (a) that the first and second respondents are to permit the applicants and any estate agent and prospective purchaser accompanying the applicants, access to the property situated at […] P. Road, Westville North, KwaZulu-Natal, described as portion 2 of Erf […] of Chiltern Hills, Province of KwaZulu-Natal, between the hours of 08h00 and 16h00 on any weekday which is not a public holiday, provided at least 24 hours' notice of such intention to access the property is given by either of the applicants to either of the first or second respondents;

(b) that the first and second respondents, jointly and severally, the one paying the other to be absolved, are directed to pay the costs of the application.

3. That the South African Police Services are to assist the applicants in the execution of this order in so far as it may be necessary to afford the applicants, and any estate agent and prospective purchaser accompanying the applicants, access to the property;

4. That the provisions of paragraph 2 (a) hereof are to operate as an interim order with immediate effect, pending the return date of the rule nisi.'

[2] The application was opposed by the first and second respondents (to whom I shall refer, for convenience, as the 'respondents' unless a particular act is attributed to either the first or second respondent.). The third respondent was cited merely to ensure the effectiveness of any order issued. No order was sought against it.

[3] The respondents take issue with the urgency of the application. In addition, they contend that the applicants are not entitled to sell the property to any other person as the applicants have already entered into an agreement of purchase and sale of the property ('the agreement') with them (the respondents) and no breach of the sale agreement has occurred justifying the repudiation thereof. According to the respondents, the attorneys attending to the bond cancellation have been properly instructed to attend to the transfer, which process has been held up not by them but rather by the applicants, who have delayed in the payment of certain fees and who have in the interim secured a higher offer for the property from a third party.

[4] When the matter came before K Pillay J on 9 October 2017, a rule nisi was issued in terms similar to that in paragraph 2(a) of the notice of motion, pending finalisation or discharge of the rule. In light of the opposition to the application, an order was further granted directing the first respondent to institute an application for the transfer of the property in question within 20 days of the date of the order.

[5] Apart from opposing the relief sought by the applicants, the respondents brought a counter application for the following declaratory relief:

'1a. That the agreement between the applicants and the first respondent concluded on 22 June 2016, being annexure B to the second applicant's founding affidavit, is and continues to be valid and of full force and effect; and

b. The applicants are not entitled to claim the said agreement has become null and void and of no force and effect by reason of the first respondent having obtained a loan of 90% of the purchase price, and not 100% of the purchase price, from First National Bank;

2. The applicants are directed to do all things necessary to enable Ashnee Reddy & Associates / Ashnee Rampaul & Associates to proceed to cause the property to be transferred to the first respondent in the records of the Registrar of Deeds;

3. In the event of either of the applicants failing to give effect to prayer (2) hereof, the Sheriff of this Honourable Court is authorised and directed to do all things necessary, including the signing of any documentation, to give effect to prayer (2) above;

4. The applicants are directed to pay the costs of this counter application as well as the costs of the application on a scale as between attorney and own client;

5. Ashnee Reddy & Associates / Ashnee Rampaul & Associates are directed, upon the property being the registered in the first respondent's name, to retain the sum of R 125,000 (one hundred and twenty five thousand rands) and to account to the applicants, in due course, after the first and second respondents taxed or agreed costs of this application are deducted therefrom.'

[6] When the matter came before me, it was accepted by Mr *Veerasamy* and Mr *Reddy*, who appeared for the applicants and the respondents respectively, that the latter had paid the purchase price of R1,3 million. The crux of the dispute is that the first respondent only obtained a 90% bond as opposed to a 100% bond, and that, according to the applicants, the period allowed in the agreement for compliance with the suspensive condition (which is referred to further below) had lapsed. The respondent concedes that she secured a 90% bond, resulting in a shortfall of

R130 000. This shortfall was duly paid to the conveyancing attorney, within the period stipulated in the agreement. She considered this to be part of the purchase price, as this amount was to be held in trust by the attorney. The first respondent's contention is that while she did not secure a 100% mortgage bond in respect of the property, the total purchase price was nonetheless secured prior to the cut-off date. As such, it was argued, no breach of the agreement occurred justifying the application by the applicants.

[7] It is common cause that the applicants are the registered owners of the property. They were divorced in September 2017, but this has no bearing on the issues before the court. The applicants placed their property on the market for sale, upon which the first respondent submitted an offer to purchase. A purchase and sale agreement was concluded on 20 June 2016. In terms of clause 4 of the agreement, the purchase price agreed upon by the parties was R1,3 million. In terms of clause 1.5, the first respondent was to obtain a loan secured by way of a mortgage bond over property for 100% of the purchase price within 21 days of the date of signature of the agreement. Clause 5.4 stipulated that in the event of the purchaser being unable to obtain the loan against security of a mortgage bond with the stipulated 21 days, the agreement would be null and void and of no force and effect. Clause 10 provided that the purchaser would take occupation of the property upon registration of transfer, or earlier, by agreement between the parties.

[8] It is not in dispute that the first respondent took occupation of the property in June 2012 by agreement with the applicants. There was no agreement on payment of occupational rental as the parties believed that the loan would be obtained without any problems. What also emerges from the papers is that the respondents had been in occupation of the property for approximately 4 years prior to concluding the agreement, and during this time they paid the municipal services bills, including rates, water and electricity.

[9] Upon the applicants coming to the conclusion that the first respondent had breached the agreement which thereafter was of no force and effect, they instructed an estate agent to market the property. They subsequently received a written offer on 17 August 2017 from a buyer known only as Solomon in the amount of R1,4

million. It is noteworthy that on the interpretation sought for by the applicants, the agreement with the first respondent lapsed 21 days from 20 June 2016. However, the papers are silent as to when the applicants had formulated this view, inasmuch as an offer on the property was only received more than a year later after the alleged breach.

[10] The applicant accepted the offer of Solomon, subject to him obtaining access to the property within seven days of the acceptance. Following the securing of a loan by Solomon, the applicant's attorneys gave the respondents a month to vacate the property, and stipulated that during this period access to the property should be granted unhindered to representatives of the bank and or any other necessary service providers. The estate agents who concluded the agreement between the applicants and Solomon attempted to access the property, as did representatives from the bank. The respondents refused to grant them access on the basis that they had a valid agreement with the applicants, which agreement was still in place, and as such, they would not allow any third parties to enter the property. They further contended that their occupation of the property is with the consent of the applicants, pending the registration of the transfer of the property.

[11] On 28 September 2017, Solomon, the estate agent, and the first applicant attempted to view the property but this visit had to be cancelled as they were refused access to the property. The applicant attempted to secure the assistance of the police in gaining access. The latter, correctly in my view, indicated that they were unable to intervene in what was essentially a civil dispute between the parties.

[12] The applicants brought an urgent application asserting their right as the owner of the property, and contending that they would suffer substantial prejudice if permission was not secured for the 'new purchaser' to view the property, as the sale with him could collapse. They further contended that they would suffer irreparable harm should an order not be granted, on the assumption that they were not likely to again receive an offer as favourable as that made by Solomon.

[13] The first respondent brought a counter application seeking declaratory relief that the agreement concluded between her and the applicants on 20 June 2016 is

and continues to be valid and of full force and effect. The first respondent and her partner, the second respondent, and their three children have been living on the property since 2012. She occupied the property as a tenant. After concluding the sale agreement in June 2016, there was no agreement regarding occupational rental.

[14] As to the contention that the first respondent had breached the provisions of clause 5.1 of the agreement in that they had failed to secure a mortgage bond for the total amount of the purchase price, the first respondent contends that it was her election whether to pay the full purchase price by means of a mortgage bond secured through a bank or whether to pay a portion thereof in cash. As long as she provided security for the total amount of the purchase price stipulated in the agreement, the first respondent contends that there had been substantial compliance with the provisions of clause 5.1. It is not in dispute that the first respondent applied for a loan in the sum of R1,3 million, and after consulting with the bank, she elected to pay 10% of the purchase price in cash, with the remaining 90% secured through a loan from First National Bank.

[15] On 28 June 2016, an amount of R130 000 was paid into the account of the conveyancing attorneys, Ashnee Reddy & associates, in cash. On 30 June 2016, First National Bank furnished a written confirmation of the loan for R1 170 000 to the first respondent towards the purchase price of the property, against security of a mortgage bond registered over it. At 16h23 on 30 June 2016, the conveyancing attorney despatched an email addressed to the respondents and the second applicant confirming that she had received a ‘final grant’, which I presume to be the security for the 90% of the purchase price from the bank. The second applicant was presumably quite pleased, as a replying email from her confirms that she conveyed the news to her father. Accordingly in the mind of the respondents, the purchase price had been secured within 21 days of the date of the purchase and sale agreement having been signed, and accordingly they had been compliance with the provisions of clause 5 of the agreement. In light thereof, the respondents adopt the view that the agreement is valid and binding, which precludes the applicants from securing a prospective purchaser of the property of which they are in the process of taking transfer. It bears noting that the nature of such a guarantee was considered in

Koumantarakis Group CC v Mystic River Investments 45 (Pty) Ltd & another 2008 (5) SA 159 (SCA) para 24 where the court said:

'The nature of bank guarantees in relation to the sale of immovable property is explained in various authorities as follows: In a sale of movables payment and transfer should take place *pari passu*. In a sale of land, where large sums of money are usually involved, it is obviously desirable to achieve the same result, since the seller will be reluctant to part with ownership of his land until he has the money and the purchaser will be reluctant to part with his money until he has ownership of his land. It is thus necessary to resort to a device in order to achieve as nearly as possible, the desired reciprocity of payment and transfer. The standard device is the furnishing by the purchaser, when called upon to do so by the seller's conveyancers who are ready to lodge the necessary documentation, of a bank guarantee payable on registration of transfer, normally a revocable guarantee unless the contract expressly calls for an irrevocable guarantee. Generally guarantees are required to be provided by a date in advance of registration because the date of registration is not precisely predictable.'

[16] Far from accepting that they were in breach, the respondents lay the blame for the delay in the transfer with the applicants, pointing out that the conveyancing attorney (Reddy) proceeded with due promptitude to take steps to transfer the property into the name of the first respondent. The respondents point out that on 5 July 2016 Reddy wrote to the second applicant requesting proof of her address in Cape Town, a municipal rates and services account, documentation from the South African Revenue Service in respect of the first applicant, his contact numbers, email address, as well as a copy of the bond statement on the property. In addition Reddy requested the second applicant make payment of her fees in respect of services rendered in connection with the cancellation of the bond. On 18 July 2016, Reddy again wrote to the second applicant indicating that she is unable to proceed with the transfer if the existing bond on the property is not cancelled, and that the delay was attributable to the second applicant not furnishing her with a copy of the bond statement. Various emails followed from Reddy to the second applicant pertaining to her request for documentation to ensure that the transfer could take place.

[17] During the period that Reddy was awaiting the transfer documents from the second applicant, Reddy attempted to secure the services of an electrician to provide the necessary certificate as a requirement for transfer. The second applicant

was unhappy with this arrangement and instructed her own electrical contractor. Although the work was carried out in September 2016, payment by the second applicant of these monies only took place in March 2017. During this period, Reddy also paid to SARS an amount of R19 350, being in respect of the transfer duty on the property.

[18] On 27 July 2017, Reddy wrote to the applicants and the respondents confirming that the only issue holding up the transfer was a document from the applicants' attorneys. Once that came to hand, Reddy indicated that she would be in a position to lodge her documents at the Deeds Office. After receipt of this email, the second applicant's father instructed Reddy to cancel the sale. In an email shortly thereafter the second applicant was more restrained and asked Reddy not to cancel the sale as 'we are so close to the end', but asked that the purchasers (being the first respondent) be 'placed on terms to avoid further delays'. The response from the second applicant is telling as it conveys, at least on a balance of probabilities, that as at July 2017 she still considered there to be an agreement between the applicants and the first respondent. If she was of the opinion that this agreement had lapsed and of no force and effect, her response to Reddy would have been entirely different. Around the same time, Reddy received confirmation from FNB that she could proceed to lodge the transfer documents at the Deeds Office.

[19] It is not clear whether the second respondent or her father addressed an email to Reddy contending that the respondents had breached the agreement, resulting in it being null and void. The upshot of this was that Reddy caused an email to be sent to all parties concerned on 17 August 2017 indicating that she was unable to proceed to register the transfer. She confirmed that at the time when she had been contacted to cancel the sale, she had by then received the confirmation from the bond cancellation attorney and the bond registration attorney that transfer duty had been paid and that she was placed in possession of an electrical compliance certificate, an entomologist's report and that payment had been made to both the bond registration attorney and the bond cancellation attorney.

[20] None of these exchanges via email is disputed by the applicants, and on the basis of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) the version of the respondents must prevail.

[21] The applicants in their reply contend that the respondents have deliberately dragged their heels in the matter in order to avoid paying occupation rental. This is in direct contrast to the position adopted by the second applicant in her founding papers. It is a new matter in reply, of which the respondents have not been afforded an opportunity to respond. I am of the view that this is not an issue before me and according take no account of it. The only issue requiring a determination in this court is whether the respondents have breached the purchase and sale agreement, entitling the applicants to market the property to prospective purchasers.

[22] On careful consideration of the issues to be determined on the papers, and the contention in the applicants' heads of argument that there are no material disputes of fact, prior to the hearing I indicated to counsel that I would require the attendance at court of the conveyancing attorney, Ashnee Reddy, and her input particularly with regard to the payment which she received from the second respondent and what she construed this payment to be. Despite attempts by both counsel to secure her attendance at court, Reddy indicated that she was unavailable due to urgent family matters. She did however depose to an affidavit, the contents of which were not disputed by the applicants, save for paragraph 14 in which Reddy states that upon the deposit being paid to her, she informed the applicants of this, and which they accepted. She avers that the funds paid to her are held in her trust account. This averment has been placed in dispute, although the basis therefor is unknown to me.

[23] The affidavit from Reddy confirms that she was appointed as the transferring attorney in terms of clause 2 of the agreement and that she received payment into her trust account of R130 000 on 28 June 2016 from an entity known as Inyameko, on behalf of the first respondent. She categorically states that the amount was paid as a 10% deposit towards the purchase price of the property in question 'and for no other purpose or reason'. The amount of R130 000 remains in her trust account to date. In response to the enquiry from the Court as to whether she had a mandate to

receive the amount of R130 000 as part payment of the purchase price, Reddy stated that as the conveyancing attorney, she considered that she required no mandate from the parties and that she was entitled to receive payment even by way of a cash deposit. At no stage, according to Reddy, did the applicants object to the deposit being paid into her trust account as part payment of the purchase price. On the contrary, she was of the view that all parties were happy that the total purchase price had been secured within the 21 day period stipulated in the agreement. The applicants take issue with Reddy's averment that she informed them of the payment of the deposit a few days after it was made.

[24] The contention of the applicants is that the payment of the purchase price was not in accordance with the terms of the contract which stipulated the purchase price being secured 100% by way of a mortgage loan. Upon FNB informing the first respondent that she would not obtain a loan for the full amount of R1,3 million, the applicants contend that the first respondent could not satisfy the requirement of the suspensive condition in clause 5.1, and importantly, the agreement contained a non-variation clause (clause 17). It was argued in the alternative that as the agreement relates to the alienation of land, the contention that the agreement permitted an oral or tacit variation, offends against the provisions of section 2(1) of the Alienation of Land Act 68 of 1981, which requires that such agreements *must* be in writing.

[25] Mr *Veerasamy* submitted that the respondents' argument of substantial compliance, based on the 90% bond together with the 10% paid in cash, could not be sustained as is was contrary to the *Shifren* rule[1] to the effect that where a contract provided for no variation of its terms other than in writing, any oral alteration of those terms would be of no force and effect. The applicants based their case on the ratio in *Kovacs Investments 724 (Pty) Ltd v Marais* 2009 (6) SA 560 (SCA) and emphasised what was set out by Mpati P at para 22 where he stated the following:

'As was said in *Van As v Du Preez* "(a)n oral variation masquerading as or in the guise of a waiver remains what it truly is". It remains a variation. To hold otherwise, the court concluded, "would be to render nugatory the principle of the effectiveness of contractual entrenchment as laid down in *Shifren's* case". …The amended agreement, therefore, would

[1] See SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere 1964 (4) SA 760 (A), approved in Brisley v Drotsky 2002 (4) SA 1 (SCA).

not comply with the provisions of the legislation which required an agreement for the sale of land to be in writing. ….The alleged tacit agreement would be contrary to the provisions of s 2(1) of the Alienation of Land Act.'

[26] In light thereof, counsel submitted that irrespective that the full amount of the purchase price may have been secured before the 21 day cut-off period, the parties could not have agreed to such a variation (of a part cash payment) unless it had been reduced to writing. Even if such a variation were found to be sustained, it was contended that this would fall foul of the requirement in s2 of the Alienation of Land Act. For all of those reasons, the applicants contend that the application must succeed and the counter claim must by necessary implication, fail.

[27] Mr *Reddy* argued, however, that that the facts in *Kovacs* were distinguishable from the facts in the present case. As to the argument that the 10% cash payment constituted an impermissible variation of the written sale agreement, the court in *Kovacs* said the following at para 21:

'Here, the appellant seeks to claim that it has substantially performed when it could raise a loan only in an amount less than that stipulated in the written agreement. Jonker [the managing director of the appellant] makes no averment whatsoever, in any one of his affidavits, of an agreement as to how and when the deficit of almost R500 000 would be payable. He suggested that he would have obtained the full amount through his giving the bank additional security, but nowhere was it alleged that the respondent was aware of this possibility, or that the bank would in fact have approved a loan for the full amount. Thus, in my view, the change to the quantum of the loan approved by the bank is not a waiver but an amendment to the condition which does result in the contract being altered.'

[28] I agree that the facts in this case differ from those in *Kovacs*. The question which arises in this case is, irrespective that the purchaser has secured the full amount of the purchase price of the property, albeit in a manner contrary to the stipulations set out in the contract and in circumstances where the variance attracts no prejudice whatsoever to the seller, has the purchaser discharged her contractual obligation? Did the resort by the purchaser to securing the remaining 10% of the purchase price, by means of a cash deposit into the conveyancing attorney's trust account, amount to an impermissible variation? I agree with counsel for the respondent that to adopt such an approach, in the facts of the present matter, would

amount to an absurdity. In *Kovacs* the court at para 20, referred to the decision in *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A) where a sale of land agreement required the purchaser to obtain a loan from the Land Bank. Instead, the purchaser obtained a bank guarantee for the stipulated amount. In rejecting the argument that the agreement had lapsed because the purchaser had failed to secure a loan in the manner stipulated in the agreement, the court noted that such an interpretation would lead to an absurdity, and specifically referred to the proposition of whether a seller had a right to refuse a cash payment by the purchaser instead of a loan from a bank, and then to contend that the agreement was null and void.

[29] Counsel for the respondents submitted that the suspensive condition in the agreement was present for the benefit of the purchaser and as such, she could unilaterally waive the protection of the condition on or before the cut-off date of 21 days from date of signature, by paying the purchase price in full either in cash or a portion thereof in cash with the remainder secured through a bank mortgage. See *Eloff & another v Dekker* (2197/2006) [2007] ZAWCHC 71 (28 November 2007) where Meer J stated at para 57 that a bond clause '…is for the exclusive benefit of the purchaser and is capable of unilateral waiver provided that such waiver takes places before the date for fulfilment of the condition'.

[30] In *Coetzee v van der Walt* (2589/2004) [2004] ZAFSHC 112 (25 November 2004), the court affirmed the decision in *Mia v D J L Properties (Waltloo) (Pty) Ltd & another* 2000 (4) SA 220 (T) holding in para 11 that a suspensive condition which required the purchaser to obtain a loan from a bank or other financial institution within 30 days of the date of the agreement could be waived by the purchaser before the 30 day period 'by raising the purchase price in whatever way he wanted, pay it in cash or providing guarantees for its full value.' On the facts in *Coetzee*, however, the court found that as neither the deposit nor the guarantees had been furnished within the requisite period, there could be no waiver of the suspensive condition after the cut-off date.

[31] To the extent that the affidavit of attorney Ashnee Reddy is evidence of a waiver of the terms of the agreement and in particular of the suspensive condition, counsel for the applicants submitted that no reliance could be placed on the

decisions in *Coetzee* and *Mia* in that the purported waiver took place outside of the 21 day period referred to in the agreement. In this regard counsel referred to an averment by the applicant in her replying affidavit to the effect that the 'First respondent has not made any averment whatsoever, in any of her affidavits, of an agreement in writing as to how and when the deficit of R130 000 would be payable.'

[32] I am not persuaded by this argument and it is in direct conflict with the affidavit of the conveyancing attorney who confirms that she received the R130 000 before the 21 day cut-off period and that she construed the payment to constitute a deposit or part payment of the total purchase price. It must be borne in mind that the conveyancing attorney was appointed by the applicants in terms of the purchase and sale agreement. She acts without favour to either the buyer or the seller. Moreover, in terms of the second applicant's own email dated 27 July 2017, she urged the conveyancing attorney *not* to cancel the sale agreement. This email is destructive of the applicants' case. This, together with the correspondence from the conveyancing attorney to the applicants, in which persistent reminders were made to comply with requests to furnish various documents necessary to enable the transfer to take place, suggest that if blame is to be attributed, it would fall heavily on the side of the applicants.

[33] In any event, in light of the authority to which I have been referred, I am satisfied that the respondents discharged their obligations timeously in terms of the contract and that no basis existed in law for the grant of the relief sought by the applicants to declare the agreement null and void. The main application falls to be dismissed with costs. Conversely, the respondents brought a counter application for a declarator that the agreement with the applicants remains valid and of full force and effect. It follows that in light of the main application failing, the counter application must succeed. No argument was addressed to me regarding the relief in the counter application for Ashnee Reddy to retain the sum of R125 000 after registration of the property into the name of the first respondent, nor can I find any averment in the papers canvassing this aspect. I therefor decline to make any order in that regard. The respondents (applicants in the counter application) sought that the main application be dismissed with attorney client costs and that the counter

application be granted with costs on the same scale. I am not satisfied that costs on a punitive scale are warranted in this matter.

[34] In the result I make the following order:

(a) In the main application, the rule issued on 9 October 2017 is discharged with the costs, including those incurred on 9 October 2017 and 28 November 2017, to be paid on a party and party scale by the applicants, the one paying the other to be absolved.

(b) In the counter application:

(i) a declarator be and is hereby issued that the agreement between the parties marked “B’ to the second applicant’s founding affidavit, concluded on 20 June 2016, remains valid and of full force and effect.

(ii) the applicants (in the main application) are directed to do all things necessary to enable Ashnee Reddy & Associates to proceed to cause the property to be transferred to the first respondent in the records of the Registrar of Deeds;

(iii) in the event of either of the applicants (in the main application) not giving effect to (ii) above, the Sheriff is authorised and directed to do all things necessary, including the signing of any documentation, to effecting the transfer in (ii) above;

(iv) the counter application succeeds, with costs thereof to be paid by the first and second respondents (the applicants in the main application) on a party and party scale, the one paying the other to be absolved.

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M R CHETTY

Appearances:

For the Applicant	:	*Mr I Veerasamy*
Instructed by	:	Rajespree Naidoo & Associates
		Umhlanga Ridge
Tel	:	031 566 3680
For the Respondent	:	*Mr G Reddy*
Instructed by	:	Rodney Reddy & Associates
	:	Windermere, Durban
Tel	:	031 312 2049
Date of Hearing	:	02 March 2018
Date of Judgment	:	30 April 2018