



DISPUTES

The Transaction Did Not Flow

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On the 10th of October 2024 the majority judges of the Supreme Court of Appeal upheld an appeal against an order granted by the full bench of the Western Cape Division of the High Court (“the high court”). The issue on appeal was whether an agreement for the purchase and sale of an immovable property could be revived, subsequent to the lapse of a suspensive condition contained therein. While the minority judges appeared to agree with the high court’s ultimate finding that the offer to purchase could be revived and the transaction would flow, notwithstanding the lapsing of a suspensive condition contained therein, the majority judges held an opposing view and ultimately found in favour of the Appellant.

The first respondent (the seller), represented by Dingley Marshall Incorporated, who were the second respondents in the matter, concluded an offer to purchase immovable property (“OTP”) on 4 February 2020 with the third and fourth respondents (“the purchasers”) subject to a suspensive condition that they had to secure a mortgage bond by 14 February 2020. This deadline was extended to 19 February 2020 through a first addendum (“the first addendum”). The appellant undertook to provide financial assistance to the purchasers in the transaction. Despite attempts, the purchasers failed to provide the required guarantees or funds by the new deadline, causing the agreement to lapse.

On 20 February 2020, the parties signed a second addendum, amending the financial arrangements and providing a new deadline for the provision of a bank guarantee by 25 February 2020 (“the second addendum”). However, in May 2020, the purchasers faced financial difficulties due to the COVID-19 pandemic and sought to cancel the sale. The appellant, having paid R1,950,000 on behalf of the purchasers, sought the return of this amount, arguing that the agreement had lapsed and was not revived by the second addendum.

Both the high court and the minority judges found in favour of the Respondents and ordered the dismissal of the appeal, albeit for differing reasons. The minority judges found that the parties had intended to revive the agreement, that the second addendum had such effect and the second addendum amounted to a 'fresh agreement' incorporating the terms of the OTP as amended by the first addendum. However, the majority decision of Schippers JA (Kgoele JA and Baartman AJA concurring) held a different view ("the majority judges").

The central issue before the SCA was whether the second addendum, signed after the failure of the suspensive condition, effectively revived the original agreement or whether a new agreement was required. The majority judges held that while it was clear from the evidence that the parties intended to 'revive' the OTP, the respondents had labored under the erroneous impression that they could simply extend the time for the fulfilment of the suspensive condition without appreciating that a new contract had to be concluded. The majority held that the purported revival of the OTP and the extension of the time fixed for the fulfilment of the suspensive condition, after the expiry date for its fulfilment was legally incompetent.

In this regard, the court relied on the principle applied in *Fairoaks Investment Holdings (Pty) Ltd and Another v Oliver and Others*^[1] ("Fairoaks") and *Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd*^[2] ("Pangbourne"), that upon the failure of a suspensive condition, a contract lapses and is of no force or effect. These judgments, along with the judgment in *Abrinah 7804 (Pty) Ltd v Kapa Koni Investments CC*^[3] (Abrinah) were considered by both the majority and the minority judges. In Abrinah, the issue before the court was whether, an *ex post facto* waiver of a suspensive condition could revive an agreement which had already lapsed due to the non-fulfilment of the suspensive condition. Notwithstanding that the issue had been subject to conflicting judgments, the court in Abrinah held that a contract that had lapsed due to the non-fulfilment of a suspensive condition could not be revived by waiving the suspensive condition at that stage.

Despite the unambiguous precedent set in previous cases, the high court and minority judges were of the view that the facts in the current circumstances were distinguishable from the prior authorities in that Abrinah dealt with whether a condition could be waived after a contract had lapsed, Fairoaks dealt with whether a "revived" agreement required compliance with the formalities of the Act and McPherson v Khanyise Capital (Pty) Ltd^[4] ("McPherson") dealt with whether a contract which the parties sought to revive, would self-destruct as the date for fulfilment of the suspensive condition was not amended, and had already passed.

Both the high court and the minority judges seem to have placed a significant amount of reliance on the parties' intention in coming to their respective decisions, while erroneously disregarding the principle applied in *Pangbourne*. The high court held that the Appellant, in signing the second addendum gave expression to the intention of the parties substantially on the same terms and conditions in the OTP, save that clauses 7.1 and 7.2 were varied. This could never have been the case as clause 7.2 could not be varied after the expiry date for the fulfilment of the suspensive condition. Further to this, the majority judges held that *"neither could the parties to the OTP extend its validity in accordance with the terms of the second addendum- the OTP was invalid and unenforceable on 20 February 2020. For this reason, the respondent's argument that the purchaser sought to 'provide additional time for fulfilment of the suspensive condition', is unsustainable."*

While the minority judges were at pains to interpret the second addendum in a manner that makes *"commercial sense and does not lead to absurd results"*, placing reliance on the trite principles set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*^[5] ("Endumeni"), the majority judges held that the unitary exercise of interpretation enunciated in Endumeni applies only to a valid contract, not to an unenforceable contract that is purportedly "revived" or "extended" in terms of a right that does not exist.

Having considered the abovementioned jurisprudence, the majority judges affirmed the position that a suspensive condition cannot be waived or extended after the time for the fulfilment of the condition has passed; that an agreement which has lapsed due to non-fulfilment of the condition cannot be 'revived'; and finally, that in such circumstances, the parties are required to enter into an entirely new agreement. This judgment serves as a cautionary tale to all contracting parties who fail to adhere to the suspensive conditions related to the particular transactions therein, in the hopes that such an agreement may be revived at a later stage simply through an addendum without properly concluding a new agreement. Once an agreement has lapsed, regardless of the parties' intentions, it becomes unenforceable and as such, the transaction cannot flow.

[1] [2008] ZASCA 42; [2008] 3 All SA 365 (SCA); 2008 (4) SA 302 (SCA)

[2] [2011] ZASCA 20

[3] [2017] ZANCHC 63; 2018 (3) SA 108 (NCK)

[4] [2009] ZAGPHC 57

[5] [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA)



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