

CASE STUDY:

Can a seller cancel an agreement of sale when the contract does not fix a date by which the purchaser must obtain confirmation from the bank for the required loan to pay the purchase price, and the purchaser fails to provide such guarantees on demand by the seller?

This was the issue in the case of *Butler v Du Preez (2006) JOL 16522 (SE)*, heard in the Eastern Cape High Court. In this case, a purchaser (Plaintiff) entered into an agreement of sale with a seller (Defendant) on 04 June 2003 whereof the seller sold certain immovable property to the purchaser for a purchase price of R 950 000.00. The purchaser was represented by his father who signed the agreement on his behalf. In terms of this agreement, transfer of the property was to be effected "on or as close as possible to 1 February 2004". The purchase price was payable by means of a deposit of R 30 000.00 with the balance payable in cash on registration of transfer.

In respect of payment of the balance, the purchaser was, in terms of the agreement, obliged to deliver to the seller's conveyancer "such bank guarantee as shall be approved by the seller or his conveyancers and which shall be payable in cash on registration of transfer". No time was fixed within which the guarantee had to be provided for by the purchaser or his bank.

The written agreement provided that, in the event of the purchaser failing to carry out any of its "terms and conditions" duly and promptly, the seller shall at his option be entitled to sue for specific performance or to cancel the agreement and claim other related relief.

Upon receiving the instructions from the seller to attend to the transfer of the property, the seller's conveyancer, who was also instructed by the bank to attend to cancellation of the existing bond over the property, contacted the purchaser and his father and discussed and agreed with them the following:

- a) Delivery of guarantees for the purchase price and payment of the amount in respect of costs were to be made during the first week of January 2004.
- b) The purchaser was required to pay the amount in order to pay transfer duty and the costs to obtain a rates clearance certificate before he could lodge the transfer documents.
- c) The guarantees for the purchase price were required to enable him (the conveyancer) to prepare the necessary documentation to effect cancellation of the existing bond over the property.

What is pertinent is that the conveyancer informed the purchaser and his father that the listed matters had to be attended to before he could finally prepare all the documentation and lodge it with the Registrar of Deeds for registration of the transfer. The purchaser and his father agreed to the above.

On 5 January 2004, the seller's attorneys wrote a letter to the purchaser demanding signed documents, guarantees and payment of the transfer costs to be made within 7 days. When no response was received, the attorneys sent further letters and had a telephonic discussion with the purchaser warning him that failure to comply with the written demand would entitle the seller to cancel the agreement and sue for damages or institute legal action for specific performance. At the time of writing the letter, the seller's attorneys had drafted his personal affidavit, power of attorney to pass transfer and were in possession of a transfer duty declaration and FICA affidavit by the seller.

Whilst the purchaser did transfer monies relating to transfer costs into the seller's attorneys account, the deadline set by the letters of demand for guarantees came and went without any guarantees being provided by the purchaser. It was at this point that the seller decided to cancel the agreement. A day after the seller cancelled the agreement, First National Bank furnished guarantees for an amount of R 760 000.00, consequently with the amount of R160 000.00 remaining unsecured.

The purchaser approached the Court to compel the seller to take steps to transfer the property into his name against payment of the purchase price. He argued that the cancellation of the agreement had been invalid because it had been premature: *the seller had not provided his conveyancer with certain documents necessary to lodge the transfer of the property with the Registrar of Deeds at the time when he had demanded the guarantees to secure payment of the purchase price.*

The purchaser argued that he had been justified in resisting the seller's demand because the demand for guarantees and notice of cancellation were both made before a transfer duty receipt had been obtained from SARS or a rates clearance certificate had been issued by the Municipality or signature by the seller of documents listed above.

The question before the Court was whether the seller had been entitled to demand payment or the guarantee when he had not finalized the documents necessary to transfer. In answering this question, the Court held that the validity to make demand will depend on the intention of the parties or circumstances of each case. In this present case, the facts showed that at the time the demand for the guarantee was made, the seller had every intention of effecting transfer. Preparation towards lodging the transfer documents were at an advanced stage and the Court indicated that the outstanding matters would not have required much time or effort to complete.

Ultimately the Court held that the demand had been valid and therefore cancellation was also valid. The Plaintiff's claim was dismissed with costs.