***ROYAL ENERGY MANAGEMENT SERVICES V D F CARSE N.O**NEW CASE LAW ON BOND CLAUSES AND GUARANTEES TO MAKE US THINK AGAIN!***
****

We were recently privileged to receive a judgment from the Cape Town High Court "hot off the press". The judgment was handed down on 23 November 2021 in the matter of Royal Energy Management Services (Pty) Ltd v D F Carse N.O. under case number 6426/2021.

It dealt with two issues which are common to most sale agreements for immoveable property, and it is therefore directly relevant to our day to day lives as property practitioners. The issues were:

1. whether a suspensive condition relating to bond approval can be deemed to be fulfilled as soon as the bond has been approved and a quotation has been issued, if the purchaser has not yet accepted the quotation; and
2. whether the clause in the deed of sale obliging the purchaser to furnish a bank guarantee for the payment of any part of purchase price is a term of a contract or a condition?

This case dealt with a claim by the purchaser of a farm for the return of a R9 million deposit after they were unable to come up with the additional R8 million balances of the purchase price.

The deed of sale contained the usual clauses regulating payment and provided for the deposit to be paid to the transferring attorneys and invested in the name of the purchaser pending transfer. It also provided for the deposit to be refunded if any suspensive conditions were not met.

As regards the R8 million balance of the purchase price, this was payable on transfer, and an acceptable bank guarantee for payment was to be provided within 21 days. The deed of sale did not make the transaction conditional on the grant of a bond. The sale was therefore ostensibly a cash sale.

The R9 000 000 deposit was paid, and the purchaser applied to his bankers for the finance to pay the balance of R8 000 000. This application was however unsuccessful, and the purchaser could therefore not furnish the required guarantee in time.

After the purchaser's bankers had declined the finance, the purchaser argued that the deed of sale was conditional upon the bank guarantee and that, despite their best efforts, it had become impossible to obtain such a guarantee. On the purchaser's version therefore, this condition was not fulfilled, the deed of sale had therefore lapsed and they were entitled to a refund of the deposit. This argument was raised despite the fact that on the face of it, the offer was not conditional upon the approval of finance.

In their attempt to hold on to the deposit the seller alleged that the obligation to provide the bank guarantee was a term of the deed of sale and not a condition, and that the failure to furnish the guarantee was nothing more than an omission that placed the purchaser in breach of the contract. It was therefore not an event that rendered the contract null and void.

After the time period for the furnishing of the guarantee had passed, the seller placed the purchaser on terms to remedy their breach and to furnish a guarantee within 7 days, failing which the seller intended to apply to court for an order of specific performance to compel payment of the balance of the purchase price so that the transfer could proceed. It is noteworthy that the seller stated that it was their intention to enforce the contract, rather than to cancel the contract and claim damages, which was the alternative remedy available. At the time that the matter was heard however, the seller had taken no steps whatsoever to sue for specific performance and enforce the deed of sale.

In deciding the matter, the learned judge set out the law relating to deposits. He stated that in terms of the law applicable to all types of deposits, the holder of a deposit's primary obligation is to restore the deposit, along with all interest, and noted that the seller had not brought a counterclaim to enforce specific performance of the contract, as they had threatened in their correspondence. For technical legal reasons, this failure on the seller's behalf counted against them.

Of greater interest to ourselves as property professionals is the second part of the judgment, where the learned judge relied on sections of the National Credit Act (the NCA). According to the judgment, since the promulgation of the NCA in 2006, deeds of sale that were conditional on the granting of bond finance do not become unconditional upon the mere approval of the loan. This was because, in terms of the NCA, the bank is now obliged to furnish a quotation (and a pre-agreement statement) which the purchaser is entitled to either accept or reject, and if the deed of sale became unconditional on the mere approval of the loan, this would undermine the purchaser's statutory right to decline the offer of finance. Clauses in contracts that undermine statutory rights will not be enforced.

This statement of law calls into question the validity of those clauses in contracts that make sales unconditional as soon as a bank has approved the bond and issued a quotation, regardless of whether the purchaser accepts the quotation. This may well be the case even if the deed of sale specifically provides otherwise, and we should all be particularly careful about this in future.

Whether this part of the judgment is correct is also debatable. The judge's finding on this point was however not necessary to decide the case at hand and this means that the finding will only have persuasive value in subsequent cases where a binding decision on the point has to be made.

If, however the judge's pronouncement on the point is correct, this will force us all to ensure that our deeds of sale are amended to provide for the suspensive condition

relating to the bond to be fulfilled only once the purchaser has accepted the bank's offer of finance.

The judgment then goes on decide the question of whether the clause in the deed of sale requiring the purchaser to furnish a guarantee for payment of the balance of the purchase price is a term of the contract or a condition.

In this regard the judge reasoned that because the furnishing of the guarantee was an uncertain event over which the purchaser did not have complete control, and in the absence of any indications to the contrary in the contract, the clause should be construed as a condition. To bolster his reasoning the judge again referred to the purchaser's right, in terms of the NCA, to either accept or reject the offer of finance.

On these grounds, the judge found that the purchaser was entitled to a full refund of the deposit, plus accrued interest. The seller was also ordered to pay the purchaser's costs.

We respectfully find the judge's partial reliance on the NCA to be flawed, as, in our opinion, the NCA does not apply to credit agreements where the consumer is a juristic person with an asset value or annual turnover of more than R1 million, or where the credit agreement is for an amount greater than R250 000. From the facts of the matter, it appears that the loan agreement between the purchaser and the bank would be exempt on both grounds. That said, if the purchaser was a natural person to whom the NCA applied, the reasoning could certainly be relevant.

What do we take from this case? Well firstly we need to accept that matters are never as simple as they seem, and that litigation is certainly a risky business. The judgment is however a decision by a single judge and will therefore only be binding on our magistrates and regional courts. Other high courts would be free to come to a different conclusion on the same facts. There is also the possibility that this decision will be overturned on appeal, and if this happens, we will let you know.

Secondly, deeds of sale that provide for the suspensive condition relating to the bond to be fulfilled upon the mere approval of the bond are now of questionable validity. Because of this uncertainty we would recommend that your deeds of sale be amended to provide for the bond clause to be fulfilled only when the purchaser accepts the finance that the bank offers.

Thirdly, and in closing, there is now support for the contention that a deed of sale that is not subject to a bond, but which obliges a purchaser to provide a bank guarantee to secure the balance of the purchase price, can be interpreted to be conditional upon the guarantee being furnished, and if the guarantee cannot be obtained, the purchaser might well be able to walk away scot-free.

Whether this decision will stand the test of time is yet to be seen. Anybody wising to read the judgment themselves to obtain a greater insight into the matter can click below. https://www.miltons.law.za/.../Royal-Energy-v-Carse-Bond...