

Dear Colleagues

Hassim v Taladia, [2007] JOL 19054 (T). The judgment was handed down on 17 November 2006.

This matter deals with the question whether one can successfully incorporate terms and conditions of a lapsed agreement into a new agreement by referral.

The dispute

Some time ago Hassim (as seller) and Taladia (as purchaser) concluded an agreement of sale for a certain property, and Taladia took occupation. This action is one where Hassim seeks an eviction order against Taladia based on the provisions of the sale agreement. In terms of this agreement, Taladia (who breached the agreement, which was then cancelled) had to vacate the property on a given date and Taladia failed to do so. Taladia alleges that the agreement was invalid since it incorporated terms and conditions of a previous (lapsed) contract.

The facts

Hassim and Taladia entered into an agreement of sale for immovable property ('the first agreement'). The agreement was subject thereto that Hassim obtained loan approval for an amount of not less than R200 000-00 by a certain date, which loan was to be secured by the registration of a mortgage bond. Hassim failed to secure a loan and the agreement lapsed. Thereafter the parties entered into a further agreement of sale ('the second agreement'). The terms and provisions of the second agreement were as follows:

- A new provision was made to arrange for a different method of paying the purchase price;
- A new provision was made to determine a specific date when Hassim will take occupation and possession of the property;
- Save for the above 2 new provisions, all the terms and provisions of the first (lapsed) agreement would be incorporated in the new agreement.

Question before the court

Is the second agreement valid and legally binding between the parties? In other words, can one successfully incorporate terms and provisions of a lapsed agreement into a new agreement despite the fact that the first agreement does (*legally*) not exist?

Finding:

Ledwaba J (Transvaal High Court) held that the question must be answered with reference to the intention of the parties at the time of entering into the second agreement. On the facts, it appeared that the parties were aware that the first agreement had lapsed due to non-fulfillment of a suspensive condition relating to the payment method of the purchase price. They then agreed on a different financing method and made a specific arrangement with regard to the date of occupation and possession. For the rest, they agreed that other aspects can be regulated by the terms and provisions as contained in the previous agreement. In the light of these facts, it was clear that there was no uncertainty between the parties as to what was agreed upon and all the material terms of the contract could be easily ascertained, complying with the provisions of s 2(1) of the Alienation of Land Act. Therefore, Ledwaba J held that there were no grounds to find that the second agreement did not constitute a binding contract between the parties. He accordingly ordered that Taladia evict the property.

Of interest is the submission by Taladia's counsel to the effect that it was impossible to incorporate terms and provisions of the lapsed agreement into the second agreement due to the fact that the first agreement did not (*legally*) exist at the time of entering into the second agreement. He argued that by referring to the lapsed agreement, Hassim was attempting to revive the obsolete provision relating to payment of the purchase price as contained in the first agreement. In light of the court's finding on the facts, this submission was unsuccessful. Ledwaba

J found that the intention of the parties was never to resurrect the lapsed agreement; they merely incorporated certain terms and provisions as part of the process to make up a new (the second) agreement. This did not mean that they intended to blow life into the provisions of the first agreement.

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