

THE CORONDIMAS PRINCIPLE IS STILL ALIVE AND WELL
Diggers Development (Pty) Ltd v City of Matlosana
Case No 824/2010 [2011] ZASCA 247

1 Suspensive conditions and the *Corondimas* principle

It is a trite principle of the law of contract that a condition is an uncertain future event upon which either the *commencement* of the duty to perform or the contract's *continued existence* is made dependent. The effect of a suspensive condition can be summarised as follows (see Otto and Prozesky-Kuschke "General principles of the law of contract" in Nagel (ed) *Commercial law* (2011) 114–115): A condition is suspensive when the right or duty to performance in terms of a contract is suspended or postponed pending (and thus made dependent upon) the occurrence or non-occurrence of an uncertain future event specified in the contract. Pending the fulfilment of the condition, a contractual relationship indeed exists between the parties. One of the consequences of the existence of a contractual relationship is that neither party can withdraw from the contract and that any additional duty must be performed. Upon fulfilment of the condition, the parties are entitled to performance and obliged to perform. Before fulfilment, performance may not be claimed. If the condition is not fulfilled, the contract is terminated and neither party has to perform. In addition, either party is entitled to the return of anything already performed (see also Hutchison and Pretorius (eds) *The law of contract in South Africa* (2009) 247–248; Van der Merwe *et al Contract general principles* (2007) 289–293; Van Rensburg *et al* "Contract" 5(1) *LAWSA* (2004) paras 436–437; Kerr *The Principles of the law of contract* (2002) 446–449 and Christie *The law of contract in South Africa* (2011) 145 and authorities cited).

However, as far as a contract of sale is concerned, a deviation from the above legal position, which became known as the *Corondimas* principle was formulated thus by Watermeyer CJ in *Corondimas v Badat* 1946 AD 548 551:

"[W]hen a contract of sale is subject to a true suspensive condition, there exists no contract of sale unless and until the condition is fulfilled . . . Until that moment, in the case of a sale subject to a true suspensive condition . . . it is entirely uncertain whether or not a contract of sale will come into existence at some future time."

The *Corondimas* principle derived from a misunderstanding of Voet 18 1 26 and D 18 1 80 3 in *Fazi Booy v Short* (1882) 2 EDC 301 and, in particular, *Quirk's Trustees v Assignees of Liddle and Co* (1885) 3 SC 322. *Quirk's Trustees* was unceremoniously echoed in *Johnson v Samuels* 1914 CPD 169; *Mitchell's Piano Saloons v Theunissen* 1919 TPD 392; *Flax v Van der Linde* 1928 CPD 495; *Frasers v Nel* 1929 OPD 182; *Massey-Harris v Van der Walt* 1932 EDL 115; *SA Land Exploration Co Ltd v Union Government* 1936 TPD 174; *Kinsella v Hermanus-Mossel River Township* 1945 TPD 104; *Corondimas v Badat* 1946 AD 548; *Palm Fifteen v Cotton Tail Homes (Pty) Ltd* 1978 2 SA 872 (A); *Sentraalwes Personeel Ondernemings v Wallis* 1978 3 SA 80 (T); *Tuckers Land and Development Corporation v Somerville* 1981 2 SA 17 (C) and *Soja v Tuckers Land and Development Corporation* 1981 3 SA 314 (A).

Voet 18 1 26 deals with the instance where the parties have contracted on the basis that ownership would never pass to the purchaser, in which case no

contract of sale comes into being. This position is correct, since the parties never had the intention to buy and to sell, which intention nullifies one of the *essentia* of a deed of sale. In the case of a suspensive condition, the parties still intend ownership to pass, but only upon the happening of some uncertain future event. If the uncertain future event does not happen, the contract lapses with no further liability for either party.

The *Corondimas* principle is clearly not in step with the general principles of the law of contract explained above, and it was (and still is) criticised, with good reason, in the case law and in academic circles. (See eg *Provident Land Trust Ltd v Union Government* 1911 AD 615; *Tuckers Land and Development Corporation v Strydom* 1984 1 SA 1 (A); De Villiers “Die betekenis van opskortende voorwaarde by ooreenkoms” 1943 *THRHR* 13; Nienaber “Opskortende en ontbindende voorwaarde” 1967 *THRHR* 353; Cronje en Lotz “Die koopkontrak en die opskortende voorwaarde” 1977 *THRHR* 276; Devenish “The nature of contracts of sale subject to suspensive conditions” 1977 *SALJ* 385; Van Rhijn “Die verbod op die verkoop van ongeproklameerde erwe” 1980 *MB* 30; Olivier “Opskortende voorwaarde en koopkontrak” 1980 *De Jure* 288 and Project 39 of the SA Law Commission “Ondersoek na die regsgevolge van opskortende voorwaardes by koopkontrakte” 1986.)

In *Diggers Development (Pty) Ltd v City of Matlosana* the *Corondimas* principle came under fire again. (Although a number of other aspects also featured in the case, the focus in this note is mainly on the *Corondimas* principle.)

2 Background

The appellant, Diggers Development (Pty) Ltd, is the registered owner of a shopping centre known as Flamewood Walk. Subsequent to a public invitation by the City of Matlosana, the first respondent, to develop approximately 1 172 hectares of land along the N12 corridor between Klerksdorp and Stilfontein, a deed of sale was concluded with Isago @ N12 (Pty) Ltd, the second respondent, on 2 October 2007 in accordance with a resolution in terms of section 115 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA) dated 23 March 2007. This sale was, *inter alia*, subject to suspensive conditions that it should comply with section 79(18) of the Local Government Ordinance 17 of 1939 (the Ordinance), section 84 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) and sections 14, 20, 33, 90, 110(3), 116 and 168 of the MFMA. It was also stipulated in the deed of sale that the first respondent would at all times support the second respondent in causing a township to be proclaimed and to do all things necessary to implement the terms and conditions of the agreement.

On 8 September 2009 the second respondent, who had applied for shopping mall rights on certain erven, sold some 22 hectares of land to West Ridge Shopping Centre, later to become known as Matlosana Mall. It was evident that the intended shopping malls would compete for business with the mall operated by the appellant. This triggered the appellant’s concern and prompted him to take legal steps.

3 Sequence of events

Although the deed of sale between the first and second respondent was concluded on 2 October 2007, the first respondent, in order to comply with the

legislative requirements, published a notice in terms of section 33(1)(a)(i)(bb) of the MFMA (read with s 21A of the Systems Act) and section 79(18)(b)(ii) of the Ordinance on 21 May 2008, 5 June 2008 and 21 November 2008. The purpose of this notice was, firstly, to inform the public of its intention to conclude a contract which would impose financial obligations on the municipality beyond the three-year period covered in the annual budget and, secondly, to invite the local community and other interested persons to submit comments or representations in respect of the proposed contract by no later than 4 August 2008.

Given that the deed of sale had been concluded prior to the compliance with the provisions of the MFMA or the Systems Act, the appellant's attorney on 29 July 2008 objected to the sale. The core of this objection was that the entire process followed by the first respondent was *ultra vires*.

Notwithstanding this objection, a certificate was issued on 30 January 2009 by the first respondent's municipal manager verifying that the sale complied with the relevant statutory provisions, followed by a council's resolution on 5 February 2009 which endorsed the deed of sale of 2 October 2007. The effect of this was that all suspensive conditions of the deed of sale in question were duly fulfilled and implementation of the sale was initiated by the first and second respondent from 19 May 2009.

On 4 August 2009 the appellant launched an application in the court below in which it sought an order reviewing and setting aside the council's resolution and declaring the deed of sale void. The matter came before Murphy J (*Diggers Development (Pty) Ltd v City of Matlosana* (47201/09) [2010] ZAGPPHC 15) who held that since the sale was subject to suspensive conditions, the *Corondimas* principle was applicable. It followed that the first respondent had complied with the relevant legislative provisions before the deed of sale became unconditional. Consequently, Murphy J held that the deed of sale was enforceable and no foundation subsisted to declare either the council's resolution or the deed of sale void.

4 Appellant's submissions

According to counsel for the appellant, the core question to be answered was whether the first respondent had to comply with statutory prerequisites applicable to the sale of immovable property by local authorities before it entered into the sale agreement of 2 October 2007, or whether compliance subsequent to the conclusion of the sale agreement constituted proper compliance, in view of the fact that certain clauses of the sale agreement were subject to the fulfilment of suspensive conditions.

It was submitted by the appellant at the trial court and on appeal that the procedure employed by the first respondent in complying with the provisions of the MFMA and the Ordinance was flawed in so far as it was obliged to abide by these provisions before concluding the deed of sale on 2 October 2007. The crux of the appellant's concern was not the non-compliance with the statutory provisions, as a fact, but the timing of the process. As a result of the timing, the statutory process had been compromised as a result of the deed of sale being signed prior to compliance with it. To substantiate this submission, the appellant relied on *Ferndale Crossroads Shareblock (Pty) Ltd v City of Johannesburg Metropolitan Municipality* (unreported judgment, case no 3879/08 (W)). Reliance by the appellant on *Ferndale* was, however, rejected on appeal since the facts are distinguishable: contrary to the present appeal, there was no compliance with

section 79(18) of the Ordinance in *Ferndale* before the conclusion of the lease agreement (para 31).

The appellant referred to the following observation regarding the *Corondimas* principle in *Tuckers Land and Development Corporation v Strydom* (*supra*) 18C–G:

“A last aspect for consideration is to what extent maintaining the *Corondimas* approach could lead to permanent injustice. It appears to me that the approach has little, if any, practical meaning other than to the interpretation of legislation wherein terms such as ‘contract of sale’ or ‘sale’ are used. Whether a sale subject to a suspensive condition is characterised as not being a contract of sale, or as a contract of sale which is not *perfecta*, there is still no reason why the common law legal consequences which attach to such a sale should not find full application. And regarding legislation, more clarity will presumably be provided in the future, as was achieved now by s 57A(2) as to the interpretation of the above mentioned concepts. It is also the legislature’s prerogative to enact statutory provisions which, without infringing on existing rights, would amend the interpretation given by judgments, including this judgment, so as to give effect to the true intention of the legislature which had previously not been clearly articulated. It is also instructive that after periods of respectively five and four years following the judgments in [*Sentraalwes Personeel Ondernemings (Edms) Bpk v Wallis* 1978 (3) SA 80 (T)] and [*Sentraalwes Personeel Ondernemings (Edms) Bpk v Nieuwoudt* 1979 (2) 538 (C)], s 3(e) of Act 70 of 1970 has remained unamended” (court’s translation para 26 fn 9).

Counsel for the appellant submitted that, should the court still find the *Corondimas* principle to be applicable, the same should be revisited as was suggested in *Tuckers Land & Development Corporation v Strydom supra*. This was necessitated by the new constitutional dispensation, which requires strict compliance by municipalities with legislation in order to curtail public power when disposing of public assets. The appellant further submitted that the policy considerations which convinced the court in *Tuckers Land & Development Corporation v Strydom* to retain the *Corondimas* principle, were outweighed in a new constitutional dispensation aimed at curtailing abuse of power and corruption at municipal level and emphasised that the Constitution requires strict compliance with legislation providing for the alienation of public assets.

5 Judgment

The appeal was dismissed, primarily for two reasons: compliance with the relevant statutory provisions and the upholding of the *Corondimas* principle.

5.1 Compliance with statutory provisions

Section 79(18)(b) of the Ordinance authorised a council to alienate its property, provided that whenever a council *wishes* to do so, a notice of its intention should be pinned to its public notice board and published in a newspaper, in order that any person who opposed such alienation may object to it in writing with the town clerk.

After analysing section 79(18)(b), the Supreme Court of Appeal held that the word “wishes” in this section clearly indicates that no final decision to alienate council property would be taken before the above notice of intention to do so had been advertised (para 22). Consequently, when the first respondent finally decided to conclude the deed of sale with the second respondent, the requirements of

section 79(18)(b) had been complied with and the suspensive conditions fulfilled (*ibid*).

As to the non-compliance with section 33 of the MFMA, Cloete and Mhlantla JJA resolved that the same response as to section 79(18)(b) of the Ordinance should apply (para 33). It was also the Supreme Court of Appeal's view that a fair and transparent process was indeed followed by the first respondent, effecting compliance with section 14 of the MFMA (para 34).

5.2 Application of the *Corondimas* principle

It was not in dispute that the deed of sale contained suspensive conditions. With reference to Christie *The law of contract in South Africa* (2011) 145 and Kerr *The principles of the law of contract* (1989) 339 the Supreme Court of Appeal (again) voiced no objection to the trite principle that a suspensive condition suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event (para 23). However, the court referred with approval to the dictum of Watermeyer CJ (quoted para 1) and held that since a deed of sale subject to a suspensive condition cannot, pending fulfilment of the condition, be regarded as a "sale" in terms of the *Corondimas* principle, it will not be affected by legislative embargos pending fulfilment of the condition (para 24). The court also quoted Brand JA in *Geue v Van der Lith* 2004 3 SA 333 (SCA) who, having reviewed the authority in point, stated the following:

"In all these cases it was held that contracts subject to these suspensive conditions were not hit by the legislative enactments concerned. The reasoning that formed the basis of these decisions was essentially that the agreement prohibited by both enactments was a *sale* whereas, in accordance with the decision of this Court in *Corondimas*, an agreement of sale subject to a suspensive condition cannot, pending fulfilment of the condition, be regarded as a 'sale'. It only becomes a sale when the condition is fulfilled, in which event there is no contravention of the statutory provisions involved."

To counter the appellant's arguments to revisit the *Corondimas* principle, Cloete and Mhlantla JJA also referred to *Tuckers Land and Development Corporation v Strydom supra* where it was held that the key impact of the *Corondimas* principle concerns the interpretation of legislation wherein terms such as "contract of sale" or "sale" are used and that it sustains no practical significance (para 26). It follows that although a sale subject to a suspensive condition is characterised as not being a "sale", or as an "imperfecta sale", no rationale exists as to why the common law consequences should not be applied (*ibid*). On the subject of legislation, it was further ruled in *Strydom* that it is the legislature's prerogative to ratify statutory provisions which were previously interpreted inconsistently with the legislature's true intention (*ibid*).

In context of the latter remark in *Strydom*, the Supreme Court of Appeal observed that although section 79(18) of the Ordinance was substituted, after *Strydom*, by section 9(1)(h) of Ordinance 18 of 1985, the legislature still has not found it necessary to provide that "sell" for the purposes of section 79(18) of the Ordinance shall include a deed of sale subject to a suspensive condition (para 27). Contrary to this, the definition of "sale" in the Subdivision of Agricultural Land Act 70 of 1970 and Town Planning and Township Ordinance 25 of 1965 (T), for example, was amended after *Strydom* to include a sale subject to a suspensive condition (*ibid*). It was therefore concluded by Cloete and Mhlantla that

the legislature was aware of the numerous cases since *Corondimas*, but has chosen not to amend the definition in the Ordinance so as to include a sale subject to a suspensive condition (*ibid*).

The court finally pointed out (para 28) that the *Corondimas* principle was recently endorsed in *Paradyskloof Golf Estate v Stellenbosch Municipality* 2011 2 SA 525 (SCA) para 17 where it was reiterated that a deed of sale subject to a suspensive condition does not establish a contract of sale, but still created a contractual relationship, which on fulfilment of the condition, transforms into a deed of sale. Thus, *stare decisis* applies (para 29).

The court therefore decided as follows (para 29):

“It is clear therefore that the council’s intention to exercise the power to alienate was only formulated on 5 February 2009 when it took the resolution sought to be impugned by the appellant. The contract of sale thus came into existence on that day. Counsel for the appellant correctly conceded that the council could have decided at that stage not to proceed with the contract. *And that is the answer to the appellant’s submission that the Corondimas principle should be departed from in view of the new constitutional dispensation aimed at curtailing abuse of power and corruption at municipal level.* The effect of the *Corondimas* principle in a case such as the present, is that interested parties affected by the sale contract would be able to examine not proposals, but the detailed scheme itself. Any competitor of the successful tenderer could be relied upon to draw the council’s attention to any irregularity or corruption, and at the end of the day, the elected council of the respondent could have walked away from the project if it thought this would be in the interests of the first respondent and its ratepayers” (emphasis added).

6 Criticism of the *Corondimas* principle

Consistent with general legal principles, a suspensive condition should have no bearing on the existence of a contract of sale. A contract of sale comes into being when the parties reach consensus on: (a) the conclusion of an agreement to buy and to sell; (b) in terms of which ownership of the *merx* is transferred by the seller to the purchaser against payment of a sum of money and (c) provided that all other requirements for validity have been met. In law, a suspensive condition should not alter the above principles.

After revisiting *Tuckers Land and Development Corporation v Strydom supra* we submit that the Supreme Court of Appeal in fact came to the following deductions: (a) *Fazi Booy* and *Quirk’s Trustees* are wide of the mark in so far as it was held that a deed of sale subject to a suspensive condition constitutes an innominate contract and not a deed of sale pending the fulfilment of the condition; (b) the correctness of *Corondimas v Badat* is seriously under suspicion; and (c) *Provident Land Trust Ltd v Union Government (supra)* endorsed the possibility that a deed of sale subject to a suspensive condition represents a sale as soon as it is concluded, even though the suspensive condition is not yet fulfilled. Regrettably the Supreme Court of Appeal in *Strydom* was, as in the present appeal, not bold enough to rectify the misconception created by *Corondimas*.

For reasons of the lack of practical significance and probable interpretation hiccups, the South African Law Commission (Project 39 above) was also not prepared to recommend that legislation be promulgated to adjust the legal

position in general. The commission consequently proposed that should the *Corondimas* principle be problematic in a particular legislative setting, such legislative provision could be adjusted to include a sale subject to a suspensive condition in order to prevent circumvention of it. For this reason the definition of “sale” was, *inter alia*, amplified in the Shareblocks Control Act 59 of 1980, Alienation of Land Act 68 of 1981, Timeshare Control Act 75 of 1983 and Housing Development Schemes for Retired Persons Act 65 of 1988 to include a “sale subject to a suspensive condition”. However, the possibility that legislative circumvention could also be achieved by a resolutive condition was not researched by the Commission.

Unfortunately the travesty caused by the *Corondimas* doctrine in instances where a legislative provision has no relevance, is not resolved by the above proposal or methodology implemented by the courts and the South African Law Commission.

The fundamental objections against the positive-law view of suspensive conditions in contracts of sale are: (a) a contract of sale still exists *ab initio* despite the suspensive condition; (b) the transfer of ownership (not the coming into being of the contract) is suspended; (c) there is confusion between the obligatory act (making of the contract) and the real act (transfer of ownership); (d) a suspensive condition postpones the claimability of the performance, not the legal obligation (contract of sale) itself. Consequently in countless cases the reservation of ownership or payment of the purchase price forms part of the parties’ performance duties.

7 Conclusion

The problem with a situation such as the present is readily apparent from the almost check-list like approach by Murphy J in the court *a quo* who, referring to *Leibrandt v South African Railways* 1941 AD 1 13 had the following to say (para 66):

“The question is: Has the thing ordered by the legislature to be done been done? . . . No case has been made that the objection procedures contemplated in section 79(18) of the Ordinance and section 33 of the MFMA were applied defectively in relation to the representations received on grounds of procedural shortcomings, irrationality or a discounting of relevant considerations by the first respondent. The notices were published in May and November 2008, objections were received, placed before the Council and considered by its members before the resolution exercising the power of alienation was taken in February 2009. What the legislature ordered to be done was in fact done.”

Strictly speaking this is true in the present circumstances. However, as counsel for the appellant emphasised, almost everything was done in reverse order. The respondents got away with it, as far as *Corondimas* is concerned, simply because the “sale” in question was not regarded as a true sale before the resolution was implemented to go ahead with it. In the meantime, the parties had carried on as if the eventual confirmation of everything done over quite a considerable period of time was in order and that it was a given that it would eventually be authorised and accepted. Is this really good governance, and really the expectation of the legislature, especially under present circumstances where no argument is necessary to confirm that a huge number of municipalities and local authorities are guilty of maladministration and are suffering financially?

We are convinced that the time has come for the *Corondimas* principle to be revisited. It would be instructive to see whether it will be able to pass constitutional muster and it is to be hoped that the appellant in the present matter does approach the Constitutional Court along the lines made in argument by its counsel.

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