THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 172/07

In the matter between:

KOUMANTARAKIS GROUP CC **APPELLANT**

and

MYSTIC RIVER INVESTMENT 45 (PTY) LTD **1ST RESPONDENT**

REGISTRAR OF DEEDS **2ND RESPONDENT**

CORAM: **HOWIE P, FARLAM JA, NAVSA JA, KGOMO AJA and MHLANTLA AJA**

HEARD: **14 March 2008**

DELIVERED: **14 May 2008**

SUMMARY: **Sale of Land - Meaning and effect of clause in an agreement of sale in terms of which a bank guarantee must be provided- whether the seller acted reasonably in rejecting the guarantee. Seller not entitled to reject the guarantee and cancel the agreement.**

NEUTRAL CITATION: **This judgment may be referred to as Koumantarakis v Mystic River (172/07) [2008] 53 ZASCA (14 MAY 2008)**

MHLANTLA AJA

[1] The appellant appeals against a decision of the Durban and Coast Local Division (Madondo AJ) in terms of which an application to enforce an agreement of sale of immovable property between the parties was dismissed with costs consequent upon the employment of two counsel. The court below found that the first respondent had acted reasonably and in good faith in rejecting the bank guarantee the appellant had furnished, purportedly in terms of the agreement. The court held that the first respondent had validly cancelled the agreement. This appeal is with leave of the court below.

[2] The appeal turns on the meaning and effect of a clause in an agreement of sale of immovable property in terms of which a bank 'guarantee' must be provided by the purchaser to the seller. It is necessary at this stage to commence by setting out the factual background.

[3] On 30 May 2006 at Durban, the appellant (the purchaser) and the first respondent (the seller) concluded a written agreement in terms of

which the immovable property described as Erf 301, Portion 16, Springfield Park was purchased for R12 million plus value added tax.

[4] The purchase price, in terms of clauses 3.2 and 3.3[1] of the agreement of sale, was payable by way of:

(a) A deposit of R1 million secured by a bank guarantee *acceptable to the seller* and payable to the seller on transfer to be lodged within three days of fulfilment of the suspensive condition. The agreement was made conditional upon the purchaser conducting a due diligence exercise on the property within a period of 30 days of acceptance of the offer of the agreement and after receipt of the resolutions of the seller.

(b) A similar guarantee for the balance of R11 million payable on transfer had to be lodged within 45 working days of the deposit being lodged.

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[1] Clauses 3.2 and 3.3 read:
A deposit by the PURCHASER *secured* by way of a Bank Guarantee acceptable to the SELLER, in favour of the SELLER, and payable to the SELLER on registration of transfer of R1, 000,000.00 (one million rand). Such Guarantee to be lodged with the CONVEYANCER within 3 (THREE) days of fulfilment of the suspensive condition. (Emphasis added).

The balance of the purchase price of R11, 000,000.00 (ELEVEN MILLION RAND) and the VAT/TRANSFER DUTY payable, shall be secured by a bank guarantee acceptable to the SELLER, in favour of the SELLER and payable to the SELLER on registration of transfer, such guarantee to be lodged with the CONVEYANCERS within 45 (FORTY FIVE) working days of the date on which the deposit; in the form of a guarantee; referred to in clause 3.2 above is lodged with the CONVEYANCERS.

[5] The purchaser was furthermore obliged to notify the seller within the time allowed for the due diligence exercise of its intention to proceed with the sale, failing which the agreement would be cancelled. Correspondence was exchanged in this regard between the parties. It is apposite at this stage to refer to this in some detail.

[6] It became apparent to the purchaser as early as 15 June 2006 that the due diligence exercise would take longer than the period allowed. It accordingly applied to the seller for an extension of time. That request was refused by the seller which thereafter notified the purchaser that it regarded the agreement as null and void.

[7] On 7 July 2006 the purchaser's agent directed a letter to the seller's attorney challenging the seller's stance in that regard. The purchaser accordingly gave instructions to the Standard Bank of South Africa Ltd (the bank) to prepare a guarantee for payment of the deposit in terms of the agreement.

[8] On the same day, the bank addressed a letter to the seller's conveyancers, attaching a specimen guarantee, enquiring whether it was acceptable. No response was received whereupon, on 11 July 2006, the purchaser gave written notice to the seller of its intention to continue with

the agreement. The purchaser's agent also requested the seller to submit a format of a bank guarantee acceptable to it. The seller did not respond.

[9] On 12 July 2006 at 14h00 the purchaser obtained a guarantee from the bank in its standard form. Clause 4 thereof provides as follows:

'Should any new or previously undisclosed fact emerge which may prejudice the Bank's security or any circumstances arise to prevent or unduly delay registration of the abovementioned transaction/s we reserve the right to withdraw herefrom by giving you written notice to that effect, whereupon the said sum will no longer be held at your disposal.'

[10] After the delivery of the said guarantee, the seller's attorneys, at 16h25 on the same day sent to the bank a draft guarantee, which would be acceptable to it. This draft was different from the bank's specimen guarantee and it included the following clause:

> 'This letter of guarantee expires one year from date of issue and is irrevocable'.

[11] On 17 July 2006 the seller rejected the purchaser's guarantee contending that paragraph 4 thereof contained a 'right to withdraw' and that it required an irrevocable guarantee. It demanded that the purchaser provide an amended guarantee. The purchaser did not comply. Later that day a notice was sent by the seller's attorneys to the purchaser to the

effect that the seller deemed the agreement to be cancelled and null and void because the purchaser had failed to present a guarantee acceptable to the seller. Notably however, a notice in terms of clause 14 of the agreement of sale had not been given to the purchaser to enable it to cure the alleged breach.[2]

[12] On 24 July 2006 the attorneys for the purchaser explained to the seller's attorneys that the right of the bank to withdraw contained in the guarantee was a long-standing and general practice of financial institutions and that the agreement could not be interpreted so as to subject the purchaser to the unreasonable whim of the seller. Thus they called upon the seller, in terms of clause 15 of the agreement, to indicate whether the purchaser's guarantee was acceptable, failing which, the purchaser would institute legal proceedings to enforce the agreement.

[13] Whilst this exchange was taking place an advertisement in a weekly property magazine styled 'Home Guide', for the period 27 July – 2 August 2006, came to the attention of the purchaser. The advertisement related to the property in question, which was put up for sale, despite the

[2] Clause 14 reads: SELLER'S RIGHT ON BREACH OF SALE:
'If the PURCHASER commits any breach of the sale, the SELLER may serve on the PURCHASER notice in writing to remedy such breach and if the PURCHASER fails to comply with such notice within 7 (seven) working days from date of receipt by it of written notice calling upon it to remedy such breach or failure, the SELLER shall have the following rights, either of which he may exercise in his discretion, namely: 14.1…
14.2 to cancel the sale forthwith, by notice in writing to the PURCHASER. . .'

agreement between the parties. The asking price therein was R2 million higher than that in the agreement between the parties.

[14] On 4 August 2006 the seller's attorneys addressed a letter to the purchaser's attorney rejecting the purchaser's contention that the guarantee provided accorded with a long-standing and general practice of financial institutions, alleging that this only applied where a purchase is conditional on the purchaser obtaining a mortgage bond and, that the present was not such a case. The attorneys contended that the agreement was, in any event, not conditional upon the purchaser obtaining finance from any banking institution.

[15] On the same date, the seller's attorneys sent a letter to the purchaser itself, stating that the purchaser was in breach of clause 3.2 of the agreement in that it had failed to furnish a guarantee acceptable to the seller. The attorneys attached a draft of the guarantee the seller required and indicated that the seller, as it was legally entitled, would not accept a guarantee in any other format. The purchaser was directed, in terms of clause 16 of the agreement, to furnish the seller with the said guarantee within seven working days, failing which the purchaser would be deemed to be in breach of the agreement and that the seller would exercise its rights to cancel the agreement.

[16] On 17 August 2006 the seller's attorneys addressed a letter to the purchaser advising it that the agreement was being cancelled due to the non-compliance by the purchaser as stated above.

[17] On 21 August 2006 the purchaser launched an application for an interim order restraining and interdicting the seller from encumbering the property or alienating it to any person other than the purchaser and interdicting the second respondent from registering the transfer of the property to any person other than the purchaser.

[18] In finding for the seller, the court below held that Clause 3.2 presented two requirements, namely, that the purchaser had to provide the seller with a bank guarantee in the amount of R1 million, and that such a guarantee had to be acceptable to the seller. The court also found that the fulfilment of the requirement was largely dependent upon the seller's discretion regarding the nature and acceptability of the bank guarantee. The court accordingly held that in this case the function of the guarantee was to provide security and that the purchaser had been fully aware of this from the outset.

[19] The court concluded that the seller had given due consideration to and had exercised an honest judgment on the acceptability of the guarantee and found in favour of the seller.

[20] The issues which arise for determination in this appeal can be outlined as follows:-

(a) The meaning and ambit of Clause 3.2 of the agreement of sale;

(b) Whether the seller acted reasonably in rejecting the guarantee provided by the purchaser.

[21] As regards the first issue, counsel for the respondent submitted that the starting point of the enquiry lies in the interpretation of the language of both the agreement of sale and the guarantee from the bank. He contended that the guarantee was replete with loopholes, dangers, doubts and uncertainties and that it could not be said that the seller, in rejecting it, did not act *arbitrio bono viri* as legal principle required it to do.

[22] The meaning and purpose of the word "guarantee" has to be ascertained in relation to the context in which it is used. In *Mouton v Mynwerkersunie,*[3] Wessels JA said:

> 'Die woord "waarborg" het meerdere betekenisse, en die sin waarin dit in 'n bepaalde dokument gebruik word, sou van die inhoud en strekking van daardie dokument afhang.'

[23] In *Hermes Ship Chandlers (Pty) Ltd v Caltex Oil (SA) Ltd*[4] Kriek J, after considering a number of decisions in which the interpretation of the word 'guarantee' was considered, said:

> 'The passages from the various judgments I have mentioned deal with the popular or ordinary meaning of the word "guarantee", but it seems to me that they demonstrate only that the word is capable of bearing different meanings depending upon the context in which it is used. It seems to me also that when the meaning of the word in a particular document is being considered, it is undesirable to commence the enquiry on the basis that any one of its possible meanings predominates, and that the proper approach to the question is to be alive to the various meanings which it can bear and by a consideration of the context in which it is used (together with such other circumstances as may be permissible) to decide which meaning must be attributed to it in that context.'

[24] The nature of bank guarantees in relation to the sale of immovable property is explained in various authorities as follows: In a sale of

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[3] 1977 (1) SA 119 (A) at 136B.
[4] 1973 (3) SA 263 (D) at 267 E-G.

movables payment and transfer should take place *pari passu.* In a sale of land, where large sums of money are usually involved, it is obviously desirable to achieve the same result, since the seller will be reluctant to part with ownership of his land until he has the money and the purchaser will be reluctant to part with his money until he has ownership of his land. It is thus necessary to resort to a device in order to achieve as nearly as possible, the desired reciprocity of payment and transfer. The standard device is the furnishing by the purchaser, when called upon to do so by the seller's conveyancers who are ready to lodge the necessary documentation, of a bank guarantee payable on registration of transfer, normally a revocable guarantee unless the contract expressly calls for an irrevocable guarantee.[5] Generally guarantees are required to be provided by a date in advance of registration because the date of registration is not precisely predictable.

[25] Of course the particular wording of a clause in an agreement of sale of immovable property which requires a guarantee might be such that one is left in no doubt that what is required is security beyond what is set out in para 24 above and more particularly that an irrevocable guarantee such as that demanded by the seller in the present case is what was intended.

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[5] RH Christie *The Law of Contract in South Africa* 5ed pp. 414-415, *Trichardt v Muller* 1915 TPD 175, *Breytenbach v Van Wijk* 1923 AD 541 at 547.

[26] It was contended on behalf of the seller that because the agreement in the present case required the guarantee to be provided in tiers well before transfer, there could be no doubt that security rather than a revocable guarantee was intended and that in effect meant an irrevocable guarantee.

[27] This argument is without merit. The fact that the agreement required the guarantees to be provided by dates in advance of registration does not, in my view, subject to the further analysis of clause 3.2 set out hereafter, detract from the general nature of guarantees described earlier in this judgment.

[28] The express terms of clause 3.2 of the agreement merely refer to a guarantee acceptable to the seller. Neither a provision for irrevocability nor a provision that the guarantee provide security was expressly stipulated for in the agreement. It is evident that the guarantee provided only for the payment of the deposit and balance of the purchase price. Furthermore, if what was indeed required was security of a kind as contended by counsel and that the guarantee should be irrevocable, clause 3.2 should have said so in express terms. The contract was not in a standard form but specially drafted. Irrevocability was provided for elsewhere but not in clause 3.

[29] In *Wehr v Botha, N.O.*,[6] an agreement for the sale of immovable property for R9000 provided for payment of the purchase price by way of a deposit of R1000 with the balance to be *secured* by means of a banker's guarantee or a reputable and acceptable letter of guarantee to be paid on demand on registration of transfer. The court held that a contract which seeks to impose on a purchaser an obligation to furnish security that the seller will in any event be paid the price 'must place this extra duty and burden on a purchaser in the clearest of terms.'[7]

[30] Returning to the words used in clause 3.2, there is no special magic to the words 'secure' or 'security'. In *Rosen v Ekon*[8] the court stated that subject to any express term in an agreement for the sale of immovable property, the function of the bank guarantee for payment against transfer is not one of security but is one of payment. Wunsh J held:[9]

'Most agreements for the sale of properties, and indeed that in the present case, require a guarantee to be delivered by a specified date which would be more than a few days before transfer. The legitimacy of a revocable letter of credit would be open to challenge in such a case if, because a date is fixed for the delivery of a guarantee, the function of the guarantee becomes one of security rather than payment.'

Wunsh J further stated:

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[6] 1965 (3) SA 46 (A).
[7] At 60G.
[8] 2001 (1) SA 199 (W)
[9] At 208E-G and 209H.

'Since the function of a property guarantee is to provide for payment and not to serve as security, the delivery of a revocable guarantee is compliance with the purchaser's obligation. The statement in clause 4.2 of the agreement that the balance of the purchase price "shall be secured by means of a … guarantee" does not detract from this view.'

[31] The court below dealt with the decision in *Rosen* and apart from distinguishing it rejected its conclusion. The distinction is fallacious. The guarantee in this case was to be payable on registration of transfer as was the guarantee for payment of the balance of the purchase price. The only 'security' afforded by the provision of the guarantees was the knowledge that the purchaser had access to the necessary funds to pay the purchase price when due. This was the same position in *Rosen*. In my view, the finding in the *Rosen* case is correct and that matter is not distinguishable.

[32] In this case, it appears to me that the guarantee in the context of this contract is not irrevocable and was not intended to serve as security in the true sense of the word. It is evident that the letter issued by Standard Bank is a contractual undertaking and that payment will be made upon registration of transfer.

[33] The parties agreed to structure payment in staggered phases. This was a two-tier stage, where the guarantee for the deposit had to be furnished within three days after the due diligence exercise and the guarantee for the balance to be provided 45 days later. It was a term of the agreement that such guarantees would only be payable upon a later date, that is, on registration of transfer. In my view, absent the word 'irrevocable' in the present contract, one is left with the usual undertaking provided by a financial institution. If the seller required security pending transfer, it should have stipulated in the agreement that it required an irrevocable guarantee. It is not for the seller to achieve by later objection what it could have, but did not, achieve by appropriate agreement.

[34] Aside from the general discussion in relation to guarantees usually provided in relation to the sale of immovable properties, it is in my view necessary to have regard to the evidence of Mr Roger Green and Mr Gareth Scott, who in the present case deposed to affidavits on behalf of the purchaser.

[35] Mr Green has practised as a conveyancer for over 30 years. He has extensive experience in the practice of property law and conveyancing and served on committees of Property Law Matters of the Law Societies of KwaZulu-Natal and of South Africa for about 14 years and eight years

respectively. He has had extensive dealings with letters of undertakings issued by financial institutions and stated that the guarantees issued by these institutions in property transactions invariably contain a clause providing for the withdrawal of the guarantee in certain circumstances, unless the parties have agreed on an irrevocable guarantee. According to him clause 4 is unexceptional and similar clauses are found in all guarantees issued by financial institutions in property transactions.

[36] Mr Scott stated in his affidavit that he was employed by Standard Bank as an accounts executive and was conversant with the practice and policy of the bank in regard to the issue of the letters of undertaking. According to Mr Scott, the provision for the right of withdrawal was a standard clause that the bank required in every guarantee regarding the transfer of property whether or not mortgage finance was required and that the bank would not permit the deletion of such a clause.

[37] No contrary evidence was tendered on behalf of the respondent. Counsel for the respondent argued that no reliance could be placed on the evidence of these witnesses and furthermore that their evidence did not discharge the stringent requirements for establishing a trade usage or custom. Counsel further argued that the clause was a recent development of a draconian nature imposed unilaterally on clients of financial

institutions without just cause and for the sole benefit of the institutions which have become a ‘law unto their own’.

[38] This submission cannot, in my view, prevail. Mr Green’s experience is of importance and is relevant. It cannot be denied that he is an experienced conveyancer and has wide experience in the field. He can rightly be regarded as an expert. In my view this is good and proper evidence that has to be accepted. Mr Scott’s testimony is equally relevant. There is in my view no basis to reject their testimony in this regard. I accordingly conclude that the seller was not contractually entitled to insist on an irrevocable guarantee.

[39] The final issue to be determined is whether the seller acted reasonably when it rejected the guarantee. Put simply, what is at the heart of this part of the case, is the so-called ‘whimsical revocability’ of the guarantee. In order to determine this issue, the court must consider the grounds expressed by the seller and apply a double requirement. First, a seller must exercise an honest judgment in deciding whether to accept or reject a guarantee. (Honesty was not in issue here.) Second, the seller’s decision to reject must objectively viewed, be based on reasonable grounds.

[40] In *Herbert Porter & Co. Ltd v Johannesburg Stock Exchange,*[10] the court held:

> 'When parties have stipulated in their contract that something must be done to the "satisfaction" of one of them, the Courts have applied an objective test – what would satisfy a reasonable man?'

[41] It is common cause that the bank reserved itself the right to withdraw from the guarantee in two circumstances: First, where any new or previously undisclosed facts emerge which might prejudice the bank's security, and, second, where any circumstances arise to prevent or unduly delay registration of transfer.

[42] Counsel for the respondent submitted that the guarantee could be revoked at any time, that is, prior to and after registration of transfer. He furthermore argued that the previously undisclosed facts would relate to dealings between the bank and the purchaser; that these were entirely outside the knowledge and beyond the control of the respondent and that it was impossible for the respondent to judge objectively whether any such new or previously undisclosed facts might prejudice the bank. It was submitted that this meant that the bank could act capriciously and on a whim.

[10] 1974 (4) SA 781 (W) at 789E.

[43] In regard to 'new or undisclosed facts', it has to be borne in mind that the guarantee conferred rights on the seller and the bank would have to justify its withdrawal on grounds which would have to be related to its security. It seems to me that the bank would have to demonstrate which new facts had arisen or prior material facts had not been disclosed. The construction adopted by the seller is unjustifiably an exaggerated characterisation of risk. I am accordingly satisfied that the bank would not be entitled to a 'whimsical' withdrawal but is limited to a withdrawal that is factually based and related to its security. The reference to the 'bank security' is a reference to the registration of a mortgage bond over the immovable property which registration was to occur simultaneously with the registration of transfer.

[44] I turn to deal with the second prerequisite, that is, 'any circumstances that may arise to prevent or unduly delay' the registration of transfer. In *Friedman v Blumenthal*[11] Margo J stated the following:

'[I]t is of course correct that the occurrence of an event which prevents the condition from being fulfilled would, by implication, discharge the guarantee. However, in my view it is not an implied term of a guarantee in cases such as this that, if "unforeseen circumstances" arise which "unduly delay" the final decision of the creditor's claim, the guarantee is to be discharged. If, for example, a delay of say three or even more years were to occur because of the unexpected congestion of the trial roll, or because

[11] 1981 (2) SA 398 (W) at 401E-H.

of a prolonged illness of the Judge seized of the matter, or because of repeated postponements forced on the applicant through no fault of her legal representatives or herself, would the Court be driven, in order to give business efficacy to the contract, to hold that the guarantee was discharged? I hardly think so.

It may be argued that such circumstances would not constitute undue delay within the meaning of the provision whereby the bank has reserved its right to withdraw from the guarantee. However, undue delay in this context is not the same as unreasonable delay. The undue delay here contemplated is such occasioned by unforeseen circumstances, that is irrespective of breach of contract on the applicant's part, whereas unreasonable delay would presumably be delay which is unreasonable because of the applicant's failure to pursue the claim with reasonable diligence. While there would no doubt be an implied obligation on the applicant's part in respect of unreasonable delay, the breach of which obligation would entitle the bank to withdraw, the same does not necessarily hold good for undue delay in the particular sense in which the words "unduly delay" are used in the guarantee in this case.'

[45] In *Friedman*[12] the applicant sought an irrevocable guarantee the terms of which had to be satisfactory to the applicant. The bank issued a guarantee but reserved to itself the right to withdraw should 'any unforeseen circumstances' arise to prevent or unduly delay the fulfilment of the agreement. Margo J held that the applicant was entitled to reject the guarantee as it was not irrevocable. However, he stated that the term 'irrevocable' could not have been intended as an absolute, and that there

[12] At 402D.

could be circumstances entitling the bank to withdraw from its undertaking. The ambit of the withdrawal clause in *Friedman* was more extensive than in the present case.

[46] In *Davis v Braatvedt*[13] the bank reserved the right to withdraw at any time prior to registration of transfer should any circumstances arise which prevent or unduly delay the registration of the transaction. It was contended on behalf of the purchaser that bank guarantees as a matter of practice were all couched in that sort of way and that the seller must have known of it and could not be heard to complain about it. The court left this question open after the seller's counsel had conceded that something in the nature of the trade usage had grown up and 'particularly where the right is unqualified and exercisable by the grantor at its whim'.

[47] The words, 'any circumstances' would be limited to the circumstances that would arise after the issue of the guarantee and occasion an undue delay in effecting transfer. It has to be borne in mind that the seller is responsible for the timeous transfer of the property. It would thus be within the seller's powers to ensure maximum reduction of delay. In my view the right to withdraw is not as wide as contended for and is not liable to be employed capriciously.

[13] 1989 (3) SA 327 (N) at 331J-332A.

[48] Counsel for the respondent also argued that the guarantee could be revoked after registration, *inter alia*, due to the insolvency of the purchaser. In my view, the post registration points raised are fanciful and are accordingly rejected. The possibilities raised by counsel could perhaps have occurred during the communication delays of past eras. Nowadays there would be almost immediate communication relating to registration of transfer due to current technology. It follows therefore that this is not a realistic argument and furthermore is not a reasonable ground to reject the letter of undertaking.

[49] In my view the seller was not entitled to reject the guarantee. In the result the guarantee delivered on behalf of the purchaser complied with the obligations set out in the agreement of sale. The seller was consequently not entitled to cancel the agreement of sale between the parties. The court *a quo* therefore erred in accepting the first respondent's argument. It follows therefore that the appeal must succeed.

[50] The following order is made:

1. The appeal succeeds with costs.

2. The order of the court *a quo* is set aside and replaced by an order in the following terms:

‘ (a) (i) The written agreement concluded between the applicant and the first respondent on 30 May 2006 (the agreement) in respect of the immovable property described as Erf 301, Portion 16, Springfield Park (the property), is of full force and effect;

(ii) The letter of undertaking TRN No. M466831 dated 12 July 2006 by The Standard Bank of South Africa Ltd is in compliance with the agreement;

(b) the first respondent is ordered to do all such things and execute all such documents, within five days of the service of this order upon it, to cause the property to be transferred from the first respondent to the applicant in the Deeds Registry, Pietermaritzburg, against provision by the applicant of a guarantee in terms of clause 3.3 of the agreement;

(c) in the event of the first respondent failing to do so, the Sheriff: Durban North is hereby authorised and directed to do all such things and execute all such documents to cause the property to be so transferred;

(d) the first respondent is ordered to pay the costs of this application.'

N Z MHLANTLA
ACTING JUDGE OF APPEAL

CONCUR:

HOWIE P

FARLAM JA

NAVSA JA

KGOMO AJA