

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG



CASE NO: 2021/39004

(1) Reportable No  
(2) Of interest to other Judges No  
(3) Revised: Yes

Date:-16/12/2021

Signature.....

In the matter between:

**SORRYNOS 1 (PTY) LTD**

Applicant

and

**THENGA, MATLAKALA VIRGINIA.**

First Respondent

(Registration Number: 2019/495294/07)

**BOUVERIE, JEANETTE.**

Second Respondent

**THE CITY OF JOHANNESBURG**

Third Respondent

**THE REGISTRAR OF DEEDS, PRETORIA**

Fourth Respondent

**SB GUARANTEE COMPANY (RF) (PTY) LTD**

Fifth Respondent

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J U D G M E N T

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**MAIER-FRAWLEY J:***Introductory background*

1. The applicant brought an application to enforce the terms of a written sale agreement concluded between the applicant (purchaser) and the second respondent (seller) for the purchase of the second respondent's immovable property described as the Remaining Extent of Erf 111 Bramley Township, Registration Division I.R., Gauteng (the sale property). The applicant seeks an order for the transfer of the property into its name against payment of the purchase price to the second respondent on registration of transfer, together with certain ancillary relief directed at advancing the transfer.
2. The second respondent adopted the view that the sale had lapsed for want of fulfilment of the suspensive condition included in the agreement and thus refused, despite demand, to perform her obligations under the agreement. It is common cause that the suspensive condition, which was inserted in the agreement for the sole benefit of the applicant, was expressly waived by the applicant in writing addressed to the second respondent prior to the expiry of the period provided in the agreement for the suspensive condition to be met. The applicant considered the second respondent's conduct as evincing an unequivocal intention not to be bound by the terms of the agreement, amounting to a repudiation of the agreement, which repudiation it refused to accept.
3. The matter was initially enrolled for hearing in the urgent court where it was struck from the roll for lack of urgency. The matter thereafter served before me by way of special motion.
4. At the hearing of the matter, counsel appearing for the applicant placed on record that a settlement had been reached between the applicant and the first respondent, thus requiring no further consideration by this court of the

applicant's claim against the first respondent, however, the matter remained opposed by the second respondent. The third, fourth and fifth respondents did not oppose the relief sought in the application. The first respondent did not appear at or participate in the hearing.

5. The second respondent initially raised a host of defences in her papers to the relief sought by the applicant. However, at the conclusion of oral arguments tendered on behalf of the parties at the hearing of the matter, the second respondent's counsel placed on record that she was abandoning all her pleaded defences,<sup>1</sup> save for her defence relating to: (i) the proper construction of clause 2.2 of the deed of sale and the alleged breach by the applicant thereof; and (ii) the 'uncertainty' defence, as advanced in her answering affidavit and pursued in her heads of argument. The abandoned defences are therefore no longer live issues requiring deliberation, and mention will be made thereof only in a limited respect in the judgment.

#### *Background matrix*

6. The applicant, a developer of immovable properties for both residential and commercial accommodation, is presently involved in the development of residential units in Bramley, which are to be housed in two separate buildings and which are being constructed in two phases. The first phase, involving 222 residential units housed in one building, has been completed. The second phase, which involves the construction of 356 residential units (in another building) on 6 erven, entails the development and consolidation of six immovable properties which the applicant has purchased from each of the respective 6 homeowners, one of which includes the sale property purchased from the second respondent. The applicant alleges that the

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<sup>1</sup> The abandonment of various pleaded defences (including a 'dispute of fact defence', a 'duress defence' and a 'transferability' defence' and was again confirmed in writing by the attorneys representing the second respondent (Maryke Prinsloo Attorneys) pursuant to the hearing of the matter. The 'lack of urgency defence' was presumably dealt with in the urgent court, where the application was first enrolled..

development of phase two is not capable of excision from the broader development, which includes the provision of a private open common space for the enjoyment of all residential occupants within the broader development.

7. The second respondent was a legal practitioner in Gauteng at the time of the conclusion of the relevant sale agreement, having conducted practice under the name and style of Bouverie Attorneys at 50 Eden Road, Bramely, Johannesburg, Gauteng. She has since vacated the sale property,<sup>2</sup> having relocated to Kwa-Zulu Natal, where she has taken up residence. It is uncertain whether she is still practicing as an attorney.
8. The sale property is subject to a mortgage bond in favour of the fifth respondent.
9. On 17 June 2020 the second respondent accepted a written offer from the applicant to purchase the sale property pursuant to which a sale agreement came into force. The sale agreement was subject to a suspensive condition, which condition was expressly stipulated to be for the sole benefit of the applicant, namely, that the applicant obtained written approval from the local authority for the rezoning of the property within a period of 360 days from date of signature, that is, by 12 June 2021. The sale agreement provided that the parties may agree in writing to extend the period for the fulfilment of the suspensive condition and further that the purchaser would be entitled to waive the suspensive condition by written notice to the other party prior to the date on which the suspensive condition was to be fulfilled.
10. In terms of clause 4.1 of the sale agreement, transfer of the sale property was to be effected by the purchaser's conveyancers, namely, Schindlers

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<sup>2</sup> The property described in the sale agreement is situated at 86 Forest Road, Bramley.

Attorneys and Conveyancers, within a reasonable time after the purchaser had complied with the terms of the agreement.

11. In terms of clause 2.4 of the sale agreement, in the event that the suspensive condition was not timeously met, the sale agreement would lapse.
12. After the conclusion of the sale agreement, the applicant applied for the rezoning of the sale property (including the other five properties it had purchased for development of phase 2). The applicant alleges that pursuant to a declaration of a National State of Disaster in response to the Covid-19 pandemic, since March 2020, bureaucratic processes relating to the rezoning of properties 'crawled to a standstill caused by certain functions being entirely halted and others being conducted by skeleton staff. The third respondent only began hearing town planning applications as from March 2021'.
13. On 11 June 2021 (before the expiry of the 360 day period) the parties concluded an addendum to the sale agreement in terms of which the due date for the suspensive condition to be met was extended to 31 July 2021.
14. When it appeared unlikely that rezoning approval would be obtained by 31 July 2021, the applicant requested the second respondent to conclude a second addendum for purposes of further extending the date for the fulfilment of the suspensive condition, which the second respondent refused to accede to.
15. On 28 July 2021, being a date prior to the expiry of the suspension period, the applicant notified the second respondent in writing of its waiver of the suspensive condition contained in clause 2.1 of the agreement.<sup>3</sup>

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<sup>3</sup> The letter containing the applicant's notification of its waiver of the suspensive condition was contained in a letter dated 28 July 2021 and transmitted to the second respondent on 29 July 2021.

16. On 2 August 2021, the appointed conveyancer addressed an email to the second respondent, notifying her that the transfer documents were ready for signature and calling upon her to attend at the offices of Schindlers to sign the relevant documents. In response, the second respondent sent an email stating that *'The deed of sale has lapsed and I will not be proceeding with the transaction. Kindly refer to clause 13 of the deed of sale.'*<sup>4</sup>
17. On 3 August the applicant's attorneys electronically transmitted a letter of demand to the second respondent in which they pointed out, inter alia, that: (i) the suspensive condition in clause 2.1 of the agreement had been timeously waived in writing by the applicant on 28 July 2021 in terms of the provisions of clause 2.5 of the sale agreement, which provided for such waiver, and accordingly they denied that the sale had lapsed, and (ii) they demanded compliance by the second respondent of her obligations under the sale agreement to sign any and all documents and take any and all steps necessary to effect transfer of the property within a period of ten days, failing which the applicant would apply to court for specific performance of the sale agreement and would in such litigation seek a punitive costs order against the second respondent.

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<sup>4</sup> **Clause 13** contains general terms and provides, in relevant part, as follows:

"13.1 This Agreement constitutes the whole agreement between the parties and no other agreements, representations or warranties of whatsoever nature have been made by the parties, save as included herein.

13.2 This Agreement shall not be varied or cancelled unless such variation or cancellation is reduced to writing and signed by all the parties or their duly authorized representatives...

13.3 Should any provision of this Agreement be deemed illegal or unenforceable, such will be deemed severed from this Agreement, the remaining provisions shall continue to be binding on the parties.

13.4 No latitude, extension of time or other indulgence which may be given or allowed by either party shall be construed to be a waiver or a novation of the party's rights.

13.5 The Parties acknowledge that this Agreement and its provisions have been fully explained to them.

13.6 The Parties undertake to, on request, provide the Conveyancing Attorney with documentation necessary to comply with FICA...

13.7 If the Seller is a non-resident of the Republic of South Africa, the seller acknowledges that ... section 35A of the Income Tax Act are applicable. "

18. The aforesaid demand was not complied with. Instead, on 16 August 2021, the second respondent addressed an email to the applicant's attorneys in which she disputed the applicant's entitlement to waive the suspensive condition in terms of clause 2.5 of the sale agreement<sup>5</sup> on the basis that the applicant had, in her view, previously waived its entitlement to a 90 day reprieve provided for in clause 2.1.1 of the sale agreement<sup>6</sup> when it concluded the addendum to the sale agreement to extend the the 360 day period referred to in clause 2.1.1 (expiring on 12 June 2021) to 31 July 2021 (rather than to await a date expiring 90 days after 12 June 2021), and therefore could not again exercise its right to waiver in terms of clause 2.5 on the basis that *'I disagree with your client's assertion that it had a further right of waive[r] after its initial exercise of the said right to waiver contained in [clause] 2.5 by way of an addendum. ...The Agreement would effectively contain unlimited opportunities for your client to exercise waiver which would result in uncertainty with regards to the offer to purchase or the date of fulfilment.'* The second respondent maintained her stance that the sale agreement had lapsed, stating that *'I have no objection to selling the property to your client and I would be open to signing an agreement to revive the agreement on mutually beneficial terms and conditions that clarify and bring certainty to the offer to purchase.'*<sup>7</sup>
19. The applicant alleged in the founding affidavit that it had complied with its obligations in terms of the sale agreement and that the second respondent

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<sup>5</sup> **Clause 2.5** reads as follows:

"The condition set out in clause 2.1.1 above is included for the benefit of the Purchaser and the Purchaser shall be entitled to waive the suspensive condition by written notice to the other party or the Conveyancing Attorneys prior to the date on which the suspensive condition was to be fulfilled."

<sup>6</sup> **Clause 2.1** reads as follows:

"2.1 This Agreement is subject to the fulfillment of the following suspensive condition- 2.1.1 that the Purchaser shall, within 360...days from the date of signature of this Agreement, obtain written approval of the local authority for the rezoning of the Property. In the event of any objections being lodged to the rezoning application, a further 90...days, measured from the expiry of the intitial 360 day period, will be allowed for the approval of the said rezoning application."

<sup>7</sup> See Annexure 'FA23 ' to the founding affidavit.

has impermissibly attempted to repudiate the sale agreement in order to obtain a higher purchase price or strike a better bargain. The second respondent disputes that the applicant has complied with its obligations, contending, amongst others, in her answering affidavit that: (i) in waiving the suspensive condition contained in clause 2.1 of the agreement, the applicant had thereby waived the entirety of clause 2, with the result that the sale agreement no longer contained a payment clause,<sup>8</sup> which clause gives 'certainty as to when and how payment will be effected.' Since the agreement was not subject to a credit agreement, so the submission went, it was presumed to be a cash sale,<sup>9</sup> which cash purchase price was due and payable to the conveyancing attorney on date of waiver. The second respondent alleges that the applicant breached its obligations under the sale agreement in that it failed to pay the cash price on date of waiver or to provide a guarantee to the conveyancing attorney on date of waiver; Alternatively, the second respondent contends that (ii) if the entire clause 2 was not waived, then the applicant has failed to provide the guarantee provided for in clause 2.2. of the sale agreement, which, on a proper construction thereof, requires the furnishing of a cash guarantee within 21 days of date of waiver (being on or before 18 August 2021). In failing to furnish the guarantee by the required date, the applicant committed a material breach of the agreement, entitling the second respondent to 'rescind' the agreement.<sup>10</sup>

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<sup>8</sup> **Clause 2.2** makes provision for the purchase price payable and reads, in relevant part, as follows: "The total purchase price in the amount of R2 500 000.00...shall be paid in cash by the Purchaser to the Seller, which amount shall be secured by a written unconditional and irrevocable guarantee from a registered financial institution, payable free of exchange, within 21...days of the fulfilment of the suspensive condition contemplated in clause 2.1.1 above."

<sup>9</sup> The contention being that as a result of the payment clause, which allows for a guarantee to be provided, being deleted from the sale agreement, the sale is deemed to be a cash sale.

<sup>10</sup> The second respondent's stance is summed up in para 79.8 of the answering affidavit where she alleges that: "...despite having failed to comply with its own contractual obligations, the applicant has approached this Honourable Court to get me to comply with a contract which has now been rescinded as a result thereof."



20. The second respondent relies on another defence, referred to as the ‘uncertainty of contract’ defence in the answering affidavit in seeking to avoid the sale agreement and the performance of her obligations thereunder. This defence is inextricably linked to the primary interpretation relied on by the second respondent, namely that the *entirety* of clause 2 in the sale agreement was waived by the applicant. This defence is pleaded in para 81 of the answering affidavit, as follows: “... *I submit that in the instance that clause 2 is completely waived and no payment clause is applicable, the contract becomes unenforceable as there is a lack of certainty in the contract.*”

### **Discussion**

21. Although I have already quoted certain of the sub-clauses contained within clause 2 of the sale agreement earlier in the judgment, it is convenient to set out the entirety of clause 2 for purposes of interpreting the provisions of clause 2.2, which, on the established case law, requires the said clause to be considered within its contractual context and with proper regard to the language used.<sup>11</sup>

22. Clause 2 reads thus:

“2. **SUSPENSIVE CONDITIONS**

2.1 This Agreement is subject to the fulfillment of the following suspensive condition -

2.1.1 that the Purchaser shall, within 360...days from the date of signature of this Agreement, obtain written approval of the local authority for the rezoning of the Property. In the event of any objections being lodged to the rezoning application, a further 90...days, measured from the expiry of the initial 360 day period, will be allowed for the approval of the said rezoning application.

2.2 The total purchase price in the amount of R2 500 000.00...shall be paid in cash by the Purchaser to the Seller, which amount shall be secured by a written

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<sup>11</sup> See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 at 604, referred to with approval by the Constitutional Court in *Trinity Asset Management (Pty) Ltd v Grindstone Inc 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at paras 52-55.

unconditional and irrevocable guarantee from a registered financial institution, payable free of exchange, within 21...days of the fulfilment of the suspensive condition contemplated in clause 2.1.1 above.

2.3 If the suspensive condition contemplated in clause 2.1.1 of this Agreement is not capable of being fulfilled within the time periods provided for fulfilment thereof, the Parties may meet and agree, in writing, to extend the period of fulfilment thereof.

2.4 If the suspensive condition contemplated in clause 2.1.1 is not fulfilled through no fault of the Purchaser, then this agreement shall lapse and be of no force and effect and any amounts paid by the Purchaser (save in respect of the rezoning contemplated in clause 2.1.1 above) shall be refunded with any interest accrued thereon;

2.5 The condition set out in clause 2.1.1 above is included for the benefit of the Purchaser and the Purchaser shall be entitled to waive the suspensive condition by written notice to the other party or the Conveyancing Attorneys prior to the date on which the suspensive condition was to be fulfilled." (emphasis provided)

#### *Uncertainty of contract defence*

23. Dealing first with the second respondent's interpretation regarding the effect of the applicant's waiver of the suspensive condition, it appears to me to be clear from the wording of clause 2.1 itself, read with the reference in clauses 2.2, 2.3, 2.4 and 2.5 to '*the suspensive condition contemplated in clause 2.1.1*' that the suspensive condition to which the sale agreement was initially subject, and which could be waived, was that set out in clause 2.1, which incorporated sub-clause 2.1.1. When regard is had to the provisions of the applicant's letter in which it expressly waived 'the suspensive condition contained in clause 2.1', as it was entitled to do in terms of clause 2.5 thereof,<sup>12</sup> it is abundantly clear that any interpretation as contended for by the second respondent, namely, that the entirety of clause 2 was waived, is entirely misplaced, if not misguided. Such interpretation is in any event belied by the express wording of the applicant's letter in which it notified the

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<sup>12</sup> It is trite that a condition inserted for the benefit of one contracting party may be waived by such party, provided that the waiver is exercised before the expiry period stipulated for the condition to be met. See: *Westmore v Crestanello and Others* 1995 (2) SA 733 at 738-739.

second respondent of its waiver of clause 2.1 only, as well as the applicant's own version in para 76 of the answering affidavit.<sup>13</sup> The absurdity of the second respondent's postulated interpretation, namely, a *waiver* by the applicant of the entirety of clause 2, and therewith, the undoing of the payment clause itself (clause 2.2)), needs only to be stated to be rejected. If such an interpretation were to be upheld, (assuming for the moment that a waiver was even doable) it would lead to the absurdity that the purchase price payable in respect of the thing sold would no longer be stipulated in the contract. Agreement between a party intending to buy and a party intending to sell must be reached in regard to both the thing sold and the price payable therefore. These are known as the *essentialia* of a contract of sale. They are essential terms without which a binding sale agreement cannot eventuate. Here both parties had the intention to buy and sell, as evidenced by the provisions of the sale agreement. It is not open to one or another of the contracting parties to waive compliance with contractual obligations. Nor would it be open to either of the parties, in the light of the provisions of clause 13.2<sup>14</sup> to alter such clause, save in the absence of a further written agreement concluded between the parties and signed by both parties.

24. Clause 2.2 imposes an obligation on the purchaser to pay a stipulated price for the property bought and confers a right upon the seller to receive payment of the purchase price. How the applicant could have 'waived' its payment obligations is simply not understood. After all, waiver is in essence a unilateral decision not to avail oneself of a right.<sup>15</sup>

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<sup>13</sup> There the applicant admitted that it is common cause that the applicant waived the suspensive condition on 28 July 2021 in terms of clause 2.5 of the agreement, which said clause itself refers unequivocally to the condition as set out in clause 2.1.1 of the agreement.

<sup>14</sup> Clause 13.2 contains what is commonly known as 'a non-variation clause' and is quoted in full in fn 4 above.

<sup>15</sup> See *Mutual Life Insurance Co of New York v Ingle* 1910 TPD 540 at 550, reaffirmed in *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3)SA 773 (A) at 792 B-D where InnesCJ stated as follows:

25. The effect of the waiver by the applicant of the suspensive condition relating to rezoning approval meant that the sale was no longer conditional upon such approval being granted, whether by a certain date or at all, with the result that the sale agreement remained valid and became immediately enforceable upon its remaining terms, sans any suspensive condition.
26. The suspensive condition recorded in clause 2.1.1 was for approval for the rezoning of the sale property to be obtained within 360 days (one year) of the signing of the sale agreement by the parties. If any objections were lodged to the rezoning application, a further 90 day grace period was afforded to the applicant within which to obtain such approval. No mention is made in the papers of any objections having been lodged to the rezoning application brought by the applicant, in the absence of which, the 90 day period would not apply. The 90 day grace period was, on the facts of the matter, clearly not waived by the applicant, as had mistakenly been presumed by the second respondent. Having regard to clause 2.3, if the condition was not capable of being fulfilled within the period provided for fulfilment thereof, such period could be extended by written agreement between the parties. In terms of clause 2.5, the suspensive condition, being one for the exclusive benefit of the applicant, could be waived by the applicant prior to the date on which it was to be fulfilled, which on the applicant's unrefuted and undisputed version, is precisely what eventuated because it was not able to procure rezoning approval prior to the expiry of the period of 360 days, being on 12 June 2021, or prior to the expiry of the extended period provided for in terms of the addendum to the sale agreement, being on 31 July 2021.

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*“ Waiver is the renunciation of a right Where the intention to renounce is expressly communicated to the person affected he is entitled to act upon it, and the right is gone...”*

27. Should the suspensive condition not be timeously fulfilled, i.e within the period stipulated in clause 2.1.1 or any further extended period agreed to between the parties, as contemplated in clause 2.3 or in the absence of any waiver by the applicant of the condition, as contemplated in clause 2.5, then the sale agreement would lapse and be of no force or effect, as contemplated in clause 2.4. Since the suspensive condition was timeously waived by the applicant, the agreement did not lapse and the payment clause regulating the price payable and the method of payment remained extant. This then puts paid to the second respondent's uncertainty defence which falls to be dismissed.

*Proper construction of clause 2.2 and applicant's alleged breach thereof*

28. It might be apposite to point out at this juncture that it is trite that, in a contract which is made subject to a suspensive condition, the rights of the parties remain in abeyance pending the fulfilment of the condition,<sup>16</sup> although the contract is binding immediately upon its conclusion.<sup>17</sup> Once the condition is fulfilled, the contract is deemed, as regards the mutual rights of the parties, to have been in force from the date of the agreement, not from the date of the fulfilment of the condition.<sup>18</sup>
29. By waiving the suspensive condition, the applicant elected to take transfer of the sale property without having obtained prior rezoning approval.
30. In my view, on a plain reading of Clause 2.2, it provides for the purchase price payable in respect of the sale property in the amount of R2.5 million. It further provides for the method of payment of the purchase price, namely, in cash. The amount of R2.5 million was to be secured by the provision of an

<sup>16</sup> *Absa Bank Ltd v Sweet and Others* 1993 (1) SA 318 (C) at 322C-F.

<sup>17</sup> *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O) at 666-667

<sup>18</sup> *Peri-Urban Areas Health Board v Tomaselli and another* 1962 (3) SA 346 (A) at 351H. In *Malaba v Takangovada* 1990 (3) SA 413 (ZHC) at 415 F-H it was held that in respect of matters such as fixing the date for transfer duty, the running of prescription, or the occurrence of a prohibited sale, the date of the fulfillment of the suspensive condition is taken into account.

unconditional and irrevocable guarantee, which was to be: (i) obtained from a registered financial institution; (ii) payable free of exchange; and (iii) provided within 21 days of the fulfilment of the suspensive condition contemplated in clause 2.1.1, i.e, 21 days after the sale agreement became enforceable and the rights of the parties created by contract were no longer held in abeyance pending fulfilment of the condition, or by implication, its waiver.

31. A guarantee would ordinarily provide security to the seller that a stated sum of money (a guaranteed amount) would be paid by one party to another party at a future date (guaranteed payment), being either on demand or at a predetermined date.
32. Clause 2.2 must be interpreted in the context of an enforceable sale eventuating, which was either when the suspensive condition was timeously fulfilled, or, by implication, when the suspensive condition fell away by the applicant's waiver thereof on 28 July 2021. As will be shown hereunder, both parties are in fact *ad idem* about the time when the guarantee was intended to be issued or provided by the applicant in terms of clause 2.2 of the sale agreement.
33. The applicant contends that, on a proper construction, the guarantee had to be provided or issued within 21 days of the fulfilment of the suspensive condition or its waiver. The second respondent contended in oral argument presented at the hearing of the application that the guarantee had to be *issued immediately* and that it was to be *paid* within 21 days after fulfilment of the suspensive condition or its waiver.<sup>19</sup> As neither of the events had

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<sup>19</sup> In the second respondent's heads, dated 24 August 21, the contention was phrased somewhat differently. In para 37 of the heads, it was contended that ' *even if this Honourable Court accepts the applicant's interpretation of the contract, then naturally clause 2.2 is still applicable. Which means that **the guarantee must be produced and/or the cash price paid within 21 days of fulfilment of the suspensive condition. Because such condition has been waived then by default that would mean within 21 days of **the waiver.*****' Reliance was placed on *WD Russell* (cited in fn 32 below) in support of this submission, where the following was said at p219-220 of the judgment:

occurred, whether timeously or at all, the second respondent was entitled, so it was submitted, to cancel the agreement on account of the applicant's material breach of its payment obligations. The difficulty with the interpretation contended for by the second respondent's counsel is that it is belied by the allegations in the answering affidavit, where a different construction was pleaded and relied upon by the second respondent to justify her assumed entitlement to cancel the sale agreement. This is dealt with more fully below. But even if the construction contended for were to be considered on its merits, it is still unsustainable, for reasons that follow.

34. It was submitted by the applicant's counsel in oral argument that if the guarantee had to be issued immediately and was payable within 21 days of the suspensive condition being fulfilled or waived, then the purpose for issuing a guarantee would be rendered nugatory.<sup>20</sup> As I understand the argument, it was submitted that it is only possible to determine the extent of the outstanding liability on the second respondent's bond for purposes of obtaining the cancellation of the bond in order to proceed with transfer of the property into the applicant's name, and any amount owing to the City of Johannesburg (COJ) for purposes of obtaining a rates clearance certificate, at the time when the condition was either fulfilled or waived. The amount of the second respondent's outstanding liability to her bank (mortgagee) and her ability to procure a clearance certificate would be affected by whether or

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*"This follows from the rule that, where a plaintiff sues on a contract between him and the defendant and claims performance of the defendant's obligations to him under the contract, and where his right to such performance is conditional on the performance by him of a reciprocal obligation due by him to the defendant, then it is necessary that in his **declaration he should tender performance of his obligation to the defendant**; he is only entitled to judgment against performance of his obligation... This principle is a necessary consequence of the rule that in bilateral contracts the party who seeks to enforce performance must first fulfil **or be ready and able to fulfill** his own obligations (Wolpert v Steenkamp 1917 AD 493 at 499)." The court in *WD Russell* merely iterated the legal principles applying to the reciprocity of obligations in a bilateral contract. As long as the required payment guarantee was tendered, as was the case in the present matter, the applicant was entitled to seek specific performance.*

<sup>20</sup> Stated differently, the argument as I understand it was that if the purchase price, as secured by a guarantee, had to be paid within 21 days of fulfilment (or waiver), why would a guarantee have to be issued (within 21 days – as contended by the second respondent herself) if the applicant had to pay the cash price within the 21 day period?

not the second respondent had complied with her obligations to the mortgagee or had paid the clearance figures to COJ. These figures were unknown at the time of the conclusion of the sale and may well have changed by the time the suspensive condition was either fulfilled or waived. It is only once all the information is to hand i.e., the amounts payable to the mortgagee to obtain the bond cancellation and to COJ to obtain a clearance certificate that the guarantee in relation to payment of the purchase price can be issued.

35. Significantly, in the second respondent's heads of argument dated 24 August 2021, it was submitted that *'the applicant does not have bond cancellation figures therefore it would not be possible for the applicant to have appropriate guarantees in place which are a requirement in the conveyancing process.'*<sup>21</sup>
36. In a letter addressed to the second respondent's attorneys, dated 18 August 2021,<sup>22</sup> it was pointed out that the conveyancing attorney had requested the second respondent to sign the relevant transfer documents and that the second respondent had refused to do so. It was specifically pointed out that the transfer documents were required to enable the transferring attorney to: (i) lodge the documents in order to transfer the sale property; (ii) provide a time estimate for registration of transfer to be effected; (iii) obtain bond cancellation figures; (iv) obtain transfer duty receipts or exemption therefrom.
37. On the second respondent's pleaded version,<sup>23</sup> she alleged that clause 2.2 afforded the applicant '21 days in which to provide a cash guarantee within

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<sup>21</sup> The second respondent did not disavow reliance on the submission made in the heads. Albeit that such submissions were made in support of the abandoned transferability defence, to support the second respondent's argument that the application was premature, they do support the applicant's argument regarding the issuing of guarantees only when the relevant information is to hand.

<sup>22</sup> Annexure 'RA4' to the replying affidavit.

<sup>23</sup> See para 80 read with 80.4 of the answering affidavit.



21 days of waiver,' which period expired on 18 August 2021. No mention is made of the contention proffered in oral argument at the hearing of the mater, namely, that such guarantee was *payable* within the 21 day period. She alleges that since the guarantee was not furnished on that date, the applicant was in material breach of the agreement, 'therefore the agreement is subject to being rescinded'. The reference to 'rescinded' is presumably a reference to cancellation. The second respondent further alleges in her answering affidavit that '*If the applicant furnishes such guarantee now, it would be outside the stipulated time period. The contract will have already been rescinded on that basis.*'

38. The first difficulty with the aforesaid pleaded defence, assuming for present purposes, the alleged material breach by the applicant of the sale agreement, is that the second respondent failed to follow the procedure for cancellation laid down in the sale agreement.
39. Clause 8 of the sale agreement provides for cancellation of the sale agreement upon a breach of the agreement.<sup>24</sup> Clause 8 is what is known in our law as a *lex commissoria*, namely a right to cancel the contract upon the happening of a specified event, whether or not in common law the event in question would justify cancellation.<sup>25</sup> In Christies' Law of Contract in South Africa,<sup>26</sup> the trite principle is stated in the following terms:

<sup>24</sup> **Clause 8** reads, in relevant part, as follows:

"8.1 In the event of a breach of this Agreement, the aggrieved party may give the defaulting party 10 (ten) days written notice to remedy the default, failing which the parties will have the right, without prejudice to his rights in law, to act as set out below.

8.2 If the aggrieved party is the Seller, the Seller may, after the Purchaser's failure to remedy the default after receipt of notice, at his option and without prejudice to its rights in law:- (i) cancel this agreement and retain any amounts paid by the Purchaser into the Conveyancer's trust account and set it off against any damages proved by the Seller to have been suffered; or (ii) enforce the terms hereof including payment of the full Purchase Price owing at the date of the Purchaser's breach aforementioned.

8.3 ...

8.4 ..."

<sup>25</sup> See: Unreported judgment of Rogers J in *Macakati v Larry and Others* (6776/2016) [2016] ZAWCHC 73 (15 June 2016)

<sup>26</sup> See: GB Bradfield Christie's Law of Contract in South Africa (7<sup>th</sup> ed) at 637 and the authorities there cited.. For a summary of the legal principles pertaining to a *lex commissoria*,, see: *GPC*

*“If the contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective.”*

40. The second respondent has neither averred nor demonstrated that she complied with the provisions of clause 8 in pursuing her alleged right to cancel the agreement.<sup>27</sup> Her alleged or purported cancellation is thus ineffective. The defence based on cancellation of the sale agreement on account of the applicant’s alleged breach thereof cannot succeed on this basis alone. This means that the sale agreement remains uncancelled.

41. The second difficulty with the aforesaid pleaded defence is that it fails to take account of the fact that the applicant tendered performance of its obligation to provide a guarantee as required in clause 2.2, not only prior to the launch of the application, but in its Notice of Motion and again in its replying affidavit. The applicant relies on the case of *Nkengana*,<sup>28</sup> where the following was said:

*“It is settled law that every party to a binding contract who is ready to carry out its own obligations under it has a right to demand from the other party, so far as it is possible, performance of that other party’s obligations in terms of the contract. Accordingly it was not disputed on behalf of the respondent that, for so long as the original deed of sale remains uncancelled (as in this instance), it remains open to the appellants – even at this late stage – to claim specific performance of the original agreement while tendering performance of their reciprocal obligations.”*

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*Developments CC and Others v Uys* (A71/2017) [2017] ZAWCHC 80; [2017] 4 All SA 14 (WCC) (15 August 2017) and the authorities therein cited.

<sup>27</sup> In *Qartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA), par 13, the Supreme Court of Appeal affirmed the trite principle that *‘in motion proceedings affidavits fulfil the due role of pleadings and evidence. They serve to define not only the issues between the parties but also to place the essential evidence before court. They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out.’* (footnotes omitted)

<sup>28</sup> *Nkengana and Another v Schnetler and Another* (65/09) [2010] ZASCA 64; [2011] 1 All SA 272 (SCA) (7 May 2010), para 11. The court however pointed out in para 12 that *“In order to be a valid tender where performance consists of payment of money, the tender must be for payment of the full amount owing, otherwise the creditor is entitled to refuse the tender and the debtor is not entitled to specific performance.”* (footnotes omitted)

42. The applicant seeks registration of transfer of the sale property against payment of the purchase price. In this regard, what was stated by Broome J in *Ghandi*,<sup>29</sup> is apposite. There it was held that:

“...in the absence of some clear stipulation to the contrary, payment and transfer take place *pari passu* and clear language would be required to impose an obligation to make payment before transfer. Generally speaking, a sale of land for cash means that the whole of the purchase price is payable against transfer and the purchaser may fulfil his obligation by providing a suitable guarantee. See *AA Farm Sales (Pty) Ltd v Kirkaldy* 1980 (1) SA 13 (A) at 16H.”

43. In *Botha*,<sup>30</sup> it was said that:

“It is an accepted principle of our law that where a contract creates reciprocal obligations, own performance or tender of own performance by a claimant is a requirement for the enforceability of her claim for counter-performance. This is an instance of the principle of reciprocity. The other side of the coin is that the party from whom performance is claimed may raise the failure of counter-performance as a defence. This defence is well known as the exception of a non-performed contract (*exceptio non adimpleti contractus*). In bilateral contracts the obligations of parties are *prima facie* reciprocal.” (footnotes omitted)<sup>31</sup>

and further:

“As I have already explained, there is a presumption that obligations in bilateral contracts are reciprocal.”<sup>32</sup>

44. There appears to be no dispute between the parties that the sale agreement in question created reciprocal payment obligations between the parties in relation to the transfer of the property.

45. In my view, the second respondent has failed to indicate or demonstrate that clause 2.2 imposes an obligation to make payment within 21 days of waiver

<sup>29</sup> *Gandhi v SMP Properties (Pty) Ltd* 1983 (1) SA 1154 (D) at

<sup>30</sup> *Botha and another v Rich No and Others* 2014 (4) SA 124 (CC)

<sup>31</sup> *Id* para 43

<sup>32</sup> *Id* para 44. See too: *WD Russell (pty) Ltd v Witwatersrand Gold Mining Co Ltd* 1981 (2) SA 216 (W) at 219 where principles applicable to reciprocal contracts are discussed.

by the applicant of the suspensive condition. As was made plain in *Ghandi*, 'in the absence of some **clear stipulation** to the contrary, payment and transfer take place *pari passu* and **clear language would be required to impose an obligation to make payment before transfer.**' As alluded to earlier in the judgment, the argument proffered in regard to payment being required to be made within 21 days of waiver, was not the basis upon which the second respondent sought to justify an entitlement to cancel the sale agreement. The second respondent's allegation that the payment date is uncertain if the construction contended for by the applicant is to be accepted, is likewise unsustainable. Payment is due on transfer, as the authorities cited above make clear.

46. For all the reasons given, I am persuaded that the applicant has established its entitlement to specific performance. I was informed by counsel for the applicant at the conclusion of the hearing that a revised draft order had been formulated (and uploaded to Caselines) to provide for relief as claimed only against the second respondent, given that the notice of motion had also contained prayers for relief as claimed against the first respondent. The revised draft order provides for compliance by the second respondent with her reciprocal payment obligations in relation to transfer but also caters for an amendment of the tendered guarantee in the event that the second respondent fails to meet her reciprocal obligations in relation to the transfer of the sale property.
47. The applicant seeks an order in terms of the revised draft together with costs payable on the scale as between attorney and client. Whilst it is correct that the second respondent raised and initially pursued a litany of unmeritorious defences, only to abandon several of these only after the matter was finally argued in court, at the end of the day I cannot conclude that she was necessarily mala fide in so doing. She ultimately pursued her opposition on a limited basis, albeit that such opposition was premised on a mistaken or

misguided standpoint and which was ostensibly pursued on advice obtained from her legal representatives. In these circumstances, I am inclined to order costs on the ordinary scale in favour of the applicant.

48. In the result, the application succeeds with costs and the following order is granted:

**ORDER:**

1. The second respondent is ordered and directed to comply with the offer to purchase concluded with the applicant on 17 June 2020, as amended.
2. The conveyancers appointed by the applicant (hereinafter referred to as '*the conveyancers*') are authorised and directed to take all steps necessary in order to procure the registration of transfer of ownership into the name of the Applicant, of the Remaining Extent of Erf 111 Bramley Township, Registration Division I.R., Gauteng held under title deed no: 62731/2015, situate at: 86 Forest Road, Bramley, Johannesburg, Gauteng ('*the second respondent's property*').
3. The second respondent shall within 7 (seven) days after demand made therefore by the conveyancers:
  - 3.1 provide the conveyancers with all the required information and documents for purposes of procuring the registration of transfer of ownership of the second respondent's property into the name of the applicant, which information and documentation includes but is not limited to:
    - 3.1.1 all information necessary to obtain the issue of a clearance certificate/s by the Third Respondent; and

- 3.1.2 the issue of a transfer duty receipt for a transfer duty exemption certificate, as the case may be, by the South African Revenue Services (hereinafter referred to as '*the transfer information*');
  - 3.2 sign or procure the signature of all documents, including but not limited to powers of attorneys, authorities to act, affidavits and declarations for the purposes of the transfer, including such documents as may be necessary in terms of the FICA (hereinafter referred to as '*the transfer documents*');
  - 3.3 generally do all things necessary to be done by the second respondent in order to give effect to the transfer of ownership of the second respondent's property and to provide the transfer information and the transfer documents.
4. In the event that the second respondent refuses and/or fails to give effect to the order in paragraph 3 above or the order contemplated in paragraph 7 below (or any part thereof) within a period of 7 (seven) days of written demand given to the second respondent by the conveyancers, then in such event:
  - 4.1 the Sherriff of this Court or his lawfully appointed Deputy shall be authorised and are directed to sign all transfer documents on behalf of and in the place of the second respondent;
  - 4.2 the third respondent is directed and authorised to provide the conveyancers on written demand made therefor with all information and documents with regard to the second respondent as may be necessary for purposes of the issue by the third respondent of a clearance certificate for purposes of the transfer.

5. The applicant is authorised and directed to substitute the guarantee payable to the second respondent (to secure payment of the purchase price by the applicant against transfer):
  - 5.1 with a guarantee in favour of the fifth respondent, in an amount not exceeding the purchase price, such substitution being required for the purpose of the release of the second respondent's property from the operation of the mortgage bond registered in respect of the property in favour of the Fifth respondent;
  - 5.2 with a guarantee in favour of the third respondent in an amount not exceeding the purchase price less the outstanding balance on the mortgage bond, such substitution being required for the issue of a clearance certificate by the third respondent as required by section 118 of the Local Government Municipal systems Act, 2000 (*'the clearance certificate'*); and
  - 5.3 with the purchase price less the outstanding amount on the bond and municipal clearance figures being secured by a guarantee by the applicant in favour of the second respondent.
6. The fifth respondent is ordered and directed to, within seven days after written request being made therefore by the conveyancers, to:
  - 6.1 provide the conveyancers with all required information and documents to procure the cancellation of the mortgage bond, including but not limited to the cancellation figures to release the second respondent's property from the operation of the mortgage bond and the title deed applicable in respect of the second respondent's property;

- 6.2 provide the conveyancers with their written consent to the release of the property from the operation of the mortgage bond registered in favour of the fifth respondent in respect of the second respondent's property;
  - 6.3 sign or procure the signature of all documents, including but not limited to powers of attorney, authorities to act, affidavits and declarations for purposes of procuring the cancellation of the mortgage bond.
7. The third respondent is ordered and directed, within seven days after written demand being made therefore by the conveyancers, to:
- 7.1 provide the conveyancers with all required information and documents to procure the clearance certificate; and
  - 7.2 upon receipt of the guarantee for the clearance figures, sign or procure the signature of all documents, including but not limited to powers of attorney, authorities to act, affidavits and declarations for purposes of issuing the clearance certificate in relation to the transfer of ownership of the second respondent's property.
8. The second respondent is ordered to pay the costs of this application on the party and party scale.

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**A. MAIER-FRAWLEY  
JUDGE OF THE HIGH COURT,  
GAUTENG DIVISION, JOHANNESBURG**



Date of hearing: 4 October 2021  
Judgment delivered 17 December 2021

*This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 17 December 2021.*

APPEARANCES:

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Counsel for the 2nd Respondent: Mr R De Leeuw  
Attorneys for the 2nd Respondent: Maryke Prinsloo Attorney