IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: 28/04/2022 ***Signature***:

CASE No 2021/6789

In the matter between

FUTURE INDEFINITE INVESTMENTS 180 (PTY) LTD
(Registration Number: 2002/021851/07) Applicant

and

DEVROG FAMILY TRUST
(Registration No: IT 2383/87PMB) Respondent

In the matter between:

DEVROG FAMILY TRUST
(Registration Number 2383/87PMB) First Applicant

GOVINDSAMY CHETTY N.O. Second Applicant

ROGINY CHETTY N.O. Third Applicant

and

FUTURE INVESTMENTS 180 (PTY) LTD First Respondent

(Registration No. 2002/021851/07

HENKEL GREGORY INCORPORATED Second Respondent

JUDGMENT

MAHOMED, AJ

INTRODUCTION

There are two applications before me. In the first application, Future Investments 180 Proprietary Limited, ("F180") is the applicant who seeks an order for specific performance against the Devrog Family Trust ("the DFT") which opposes this application.

In the second application, the counterapplication, the Devrog Family Trust as first applicant, Govindsamy Chetty N.O. as second applicant, and Rogini Chetty N.O. as third applicant,(DFT) apply for an order declaring the agreement of sale and addendum, concluded by the parties, to be *void ab initio* and of no force and effect, alternatively cancelled. The counter application is opposed. The applicants pray for a dismissal of the application against them and persist in their claim for specific performance.

I propose to deal with the applications together as the facts are interrelated and the parties, and causa are the same. I will refer to the parties as F180, the DFT (Trust, Govindsamy and Rogini) and Henkel Gregory Incorporated “HGI” (the second respondent in the counterapplication.)

The “F180” seeks an order, declaring the agreement of sale including an addendum concluded between the parties to be of full force and effect. It is common cause that its conveyancing attorneys, HGI hold R5 million as a deposit. On 28 October 2020 the parties concluded an addendum to the agreement which regulated the method of payment of the balance of the purchase price.

The DFT, argued that the agreement and addendum was validly cancelled on 20 January 2021, alternatively hereby cancelled. It claims a refund of the deposit of R5 million it paid over. The applicants in the counterapplication raise four points in limine, non-compliance with section 2(1) of the Alienation of Land Act of 68 of 1981, the HGI’s authority to act, a non-joinder and the fourth point was resolved before the date of this hearing and is no longer before this court.

BACKGROUND

1. On 12 February 2020, the parties concluded a written agreement of purchase and sale of a tract of land in Rhodesfield, in the greater Johannesburg area, for the purchase price of R12 million. DFT paid over R1 million as a deposit.

2. Thereafter, on 27 October 2020, the parties concluded an addendum to the agreement pertaining to the terms of payment of a further deposit and the balance of the purchase price.

3. It is common cause that the applicant attended to the rezoning of the property in order that the respondent could develop a hotel on the property.

4. It is common cause that a deposit of R5 million was paid over and held in the trust account of the attorney who was to attend to the transfer of the property and that the balance of the purchase price of R7 075 000 was to be secured by suitable guarantees.

5. On 18 January 2021 HGI attorneys called for the guarantees and in reply thereto, on 20 January 2021, the DFT informed them that it was no longer proceeding with the purchase and purported to cancel the

agreements. Accordingly, the DFT called for a return of its deposit of R5 million.

6. HGI advised the DFT that its actions amounted to a repudiation which was rejected. Furthermore, it advised that it was proceeding in terms of the agreement to apply for specific performance.

7. The DFT argued that the agreement and addendum thereto are *void ab initio* and of no force and effect, alternatively the agreements were validly cancelled on the grounds of a *vis major* or *casus fortuitus* giving rise to a supervening impossibility of performance, being the devastating effects of the global pandemic on the country's economy and their business within the tourism and hotel industry.

SPECIFIC PERFORMANCE

8. Advocate B Joseph appeared for the applicant and submitted his client had met all its obligations in terms of both the agreement and the addendum and is entitled to its claim for specific performance. He argued that as a general rule an innocent creditor in the case of a breach of contract is entitled to enforce performance of that which was agreed upon. The creditor has a prima facie right to specific performance. [1]

[1] LAWSA 3rd Ed, Vol 9 p316

8.1. He argued further that a plaintiff is always entitled to claim specific performance and if he makes out a case the claim will be granted, subject only to the court's discretion. [2]

9. Mr Joseph advised the court of the points in limine raised by the respondent.

10. Moodley SC appeared for the DFT and submitted that if this Court were to find in favour of the DFT on the first point in limine, it would dispose of both applications.

IN LIMINE 1

No Written Authority

As I understand the issues, this court is to decide if Govindsamy had the necessary authority at the time to conclude the agreement and addendum which would bind the DFT. If not, then the agreement is void ab initio for want of non-compliance with the Alienation of Land Act of 1981.

11. Mr Joseph argued that this court must look at the conspectus of the evidence in determining the issue of authority to conclude the agreement and addendum.

[2] RH Christie, The Law of Contract in SA 5th ed at p523.

12. Counsel submitted, Govindsamy had authority when he concluded the agreement. He knew that the only way to argue his way out of this deal and to rely on the judgment, in **GOLDEX (PTY) LTD v CAPPER NO AND OTHERS**, endorsed by the Supreme Court of Appeals, [3] was to argue he was not authorised.

13. Counsel submitted that the judgment in the Goldex case can be distinguished in that in the Goldex case, there had to be two trustees authorising. The position in casu is different in that Govindsamy as chairman held the casting vote and there were only two trustees in any event. In the event of an equal vote, Govindsamy could resolve the impasse with his casting vote. He therefore, held two votes.

14. Mr Josesph referred the court to the provisions of the trust deed, which provided as follows:

> *"5.1 there shall at all times be no fewer than two nor more than five trustees, of whom GOVINDSAMY CHETTY shall be chairman until his death, incapacity or resignation."*
>
> *7.3 All decisions of the trustees shall be taken by a majority of votes except as otherwise provided in this Deed."*

[3] (24218/2013) [2017] ZAGPJHC (18 October 2017); 543/2018 [2019] ZASCA 105 (4 September 2019)

7.4 In the event of the trustees becoming dead-locked by an equality of votes on a matter for their decision, such matter shall be decided by the casting vote of GOVINDSAMY CHETTY or his successor."

15. Counsel argued that based on the provisions in their ordinary meaning, the written authority for the one trustee to sign for and on behalf of the DFT, is contained in agreement of Establishment of Deed of Trust.

    15.1. Counsel submitted that that document is signed by each of the trustees referred to in this document.[4]

16. He stood by his earlier submissions that Govindsamy had the authority to sign the agreement. His casting vote provides that authority for compliance with the agreement.

17. Counsel submitted that the DFT called itself "a family business" and his client was in negotiations with Govindsamy's son Yolan Chetty on the sale of the property.[5]

[4] Caselines 004-68

[5] Caselines 005-16

17.1. Mr Joseph argued that in all the documentation leading up to the agreement Govindsamy signed as authorised.

17.2. The issue of authority was never in question until the attorneys for the DFT became involved in the matter,

17.3. Rogini is the wife of Govindsamy, and lives in the same house with him, she must have known of this transaction and been involved. Moreover,

17.3.1. an amount of R5 million was paid over as deposit from this family business and as Moodley SC proffered, she was “not just a housewife”, she was an active trustee.

18. He implored the court to consider the probabilities and argued that the defence is contrived and cannot be reasonably possibly true.

19. Mr Joseph referred this court to Govindsamy’s letter on behalf of the DFT dated 20 January 2021 at paragraph 13 stated:

> *“Finally, I point out that no resolution was obtained from the trustees of the Devrog Family Trust <u>when the addendum to the agreement was concluded,</u> and the agreement is also cancelled on that basis.”*[6]

[6] Caselines 002-53

19.1. He referred to no authority for the “addendum.” His version changed in the founding papers when he included the agreement as being unauthorised as well and simply apologises that he had forgotten to include the agreement in his purported letter of cancellation.

20. Mr Joseph submitted that his client persists in its application.

21. The court was alerted to the DFT business being a family business. Mr Joseph argued that Govindsamy cannot advance an argument that he did not know the law about authority of a trustee and referred the court to the established presumption in our law, “ignorance of the law is no excuse.”

22. “*The law imputes knowledge of all laws to all persons within the jurisdiction no matter how transiently. It is to ensure that “wilful blindness cannot become the basis of exculpation*.”

23. Counsel, furthermore, emphasised that Govindsamy is an astute businessman, and from his papers it is apparent that he has been involved in business deals for a long time.

24. He must know the law and know the provisions of the Trust Deed. He is Chairman of that trust.

25. It was further argued that Govindsamy knew he was going to perpetrate a fraud on his client when he "left the door open" at the time of conclusion of the addendum. He knew it would provide him an opportunity to resile from the contract.

26. Mr Joseph submitted it was irrelevant if Rogini did not authorise or provide any written resolution, Govindsamy had the authority anyway, through his casting vote to conclude the agreement and addendum thereto. Counsel submitted his client is an innocent creditor, who performed in terms of the agreement and disbursed monies for the rezoning of the area, it has a prima facie right and is entitled to succeed in its claim for specific performance.

27. In response, Moodley SC set out the common cause facts, as follows:

11.1 There is no written resolution authorising Govindsamy to have signed the agreement of sale and addendum.

11.2 Rogini Chetty did not act jointly with Govindsamy when he entered into the agreement

28. Moodley SC submitted that the agreement and addendum were signed by Mr Govindsamy only, without the written authority of the other remaining trustee, Rogini. He was under the bona fide but

mistaken belief that he could sign the documents on behalf of the DFT without her consent. There was no resolution taken on behalf of the DFT authorising Govindsamy to enter into the Agreement of Sale and the Addendum.

29. It was further submitted that Rogini, the other remaining trustee did not act jointly with Govindsamy, when he concluded the agreement and addendum with F180 on behalf the DFT.

30. Moodley SC referred to clause thirty-one of the Trust Deed which provides *that all deeds or instruments required to be executed by the Trustees shall be deemed to have been validly executed in the name of the Trust by any two (2) Trustees, if duly authorised thereto.*

31. The DFT therefore, submitted the agreement of sale and addendum thereto was *void ab initio,* as Govindsamy was not duly authorised at the time of concluding the agreement.

32. Moodley SC relied on the decision in **GOLDEX (PTY) LTD v CAPPER NO AND OTHERS**[7] which was endorsed by the Supreme Court of Appeals, wherein the court declared the agreement void for want of

[7] (24218/2013) [2017] ZAGPJHC 305 (18 October 2017); (543/2018) [2019] ZASCA 105 (4 September 2019)

the written authority of two trustees acting together as per the provisions of the Deed of trust.

33. Counsel referred to s2(1) of the Alienation of Land Act 68 of 1981 which provides:

> *"no alienation of land after the commencement of this section shall subject to the provisions of Section 28, be of any force and effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents on their written authority."*

34. Mr Moodley submitted that Govindsamy did not have the authority required in writing even as agent and the wording of the Act is peremptory.

35. Moodley SC submitted therefor the agreements are *void ab initio* and of no force and effect for lack of compliance with the Act.

36. He referred to **THORPE AND OTHERS v TRITTENWEIN AND ANOTHER** [8] that the whole "*object of compliance is to put the proof of alienation of land beyond doubt and in the public interest to avoid litigation. The need for putting the authority in writing is no less than the need for the deed to be in writing."*

[8] 2007 (2) SA 172 SCA [8]

37. Moodley SC submitted that the facts in the **THORPE** matter was on all fours with the matter before this court.

38. He argued that Mr Joseph, is incorrect in his submissions that it was irrelevant if Rogini signed, because Govindsamy as Chairman had the casting vote.

    38.1. Referring to **VAN DER MERWE NO AND OTHERS v HYDRABERG HYDRAULICS CC AND OTHERS**[9] he submitted that a trustee cannot be left out of participating in a decision and this is the very point *in casu*. They must act jointly.

    38.2. He submitted that the applicant cannot show that Rogini was given an opportunity to participate in the decision to conclude the agreement and bind the trust.

    38.3. Clause 8 of the trust deeds stipulates a quorum is two trustees.

39. Counsel submitted that there would be no point in having other trustees if a chairman can simply exercise his casting vote.

[9] 2010 (5) SA 555 WCC [14]

40. Furthermore, it was submitted, that the written authority must be available at the time that the agreement is signed, subsequent authority will not "rectify" an agreement that is *void ab initio.* See **JANSEN NO AND OTHERS v RINGWOOD INVESTMENTS 87 CC AND OTHERS**[10]

41. Moodley SC proffered that the blame must lie with the attorneys who fail to obtain the resolution and confirm authority of the trustees.

42. Counsel submitted that based on the facts presented to this court the Agreement and addendum must be declared *void ab initio* and of no force and effect and the F180's application for specific performance must be dismissed with costs.

43. The court was referred to the **MERIFON (PTY) LTD v GREATER LETABA MUNICIPALITY AND ANOTHER**[11], where the court held that no court is competent to compel a party to commit an illegality. The "*agreement is unlawful it cannot be sanctioned through the remedy of specific performance*."

[10] (59771/2009) [2013] ZAGPPHC 129 (20 May 2013)

[11] (1112/2019) [2021] SASCA 50 (22 April 2021)

44. I agree with Mr Joseph that a court must look at the conspectus of the evidence in applying its discretion and any refusal of an order for specific performance.

45. I considered the various events which Mr Joseph highlighted as set out earlier.

46. I noted further that the addendum was concluded approximately eight months after the agreement.

47. Having regard to the fact that there were only two trustees, which the applicants knew of, and having considered the language employed in clauses, as set out in paragraph 14 above, I am of the view that Govindsamy had the necessary authority to conclude the agreement and addendum on behalf of the DFT.

48. Mr Joseph is correct in his submission that the casting vote was the other vote required and that it mattered not if Rogini did not authorise the conclusion of the agreement on behalf of DFT.

49. The addendum signed eight months later appears to have been an exit strategy to assist the DFT to resile from the contract. It was able to argue that the applicant's cannot produce any written resolution to confirm authorisation and this court has to accept it say so.

50. In my view, the F180 did not need to confirm any written resolution from another trustee, Govindsamy has the two votes required by the trust deed.

51. The HGI whom Moodley SC blamed for failing to ensure a written resolution was in place, also did not need to do so, when one has regard to the provisions as set out in paragraph 14 above.

52. The F180 and HGI both had the trust deed, in particular the provisions set out in paragraph 14 above, the letters of authority, and the chairman with the casting vote, which was the authority to bind the DFT.

53. I am persuaded and of the view this point must fail and accordingly the first point is dismissed.

IN LIMINE 2

NON-JOINDER

54. It was argued that the F180 failed to cite the Trustees as parties to the proceedings and that renders the application fatally defective.

55. Mr Joseph argued that in the papers the F180 set out all the relevant allegations to locus standi of the DFT.

    55.1. It also referred to the trustees as appears in the letters of authority and pointed out that "the notice of motion will be served on those trustees at the same address."

    55.2. The service on the trustees at the same address was not disputed.

56. Moodley SC rejected F180's argument that they cited both trustees and that in its papers it only "referred" to the trustees individually.

57. Counsel submitted that the F180 could have brought a simple joinder application and remedied the problem, but it did nothing.

58. He referred the court to MARIOLA **AND OTHERS v KAYE-EDDIE N.O. AND OTHERS** [12], wherein was stated "unless one of the trustees is authorised by the remaining trustee or trustees, all trustees must be joined in suing, and all must be joined when action is instituted against the trust."

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[12] 1995 (2) SA 728 (W) at 731

59. Mr Joseph submitted that all the parties were properly before court and denied that the application was fatally defective.

60. I noted with interest the argument raised by Moodley SC, however he did not inform the court of any prejudice suffered by the trustees.

61. Moreover, if there was substance to this point, I am not sure how Moodley SC, argues that the counterapplication by his clients must succeed, if “they are not before this court” as he argued.

62. No application for intervention was brought, how can this be an effective point to raise. It seems as if the DFT approbates and reprobates and that in effect it concedes that the parties are properly before court, as it continues with its defence of cancellation, in the alternative.

63. I am satisfied the papers have dealt with the trustees as parties in the proceedings. The DFT’s papers confirm this fact.

Common sense and convenience are the barometers to joining of parties and a court has a discretion in that regard. See HARDING v BASSON[13].

[13] 1995 (4) SA 499 (C) at 501 H-I

64. This point in limine is dismissed as all the parties are before the court.

***IN LIMINE* 3**

AUTHORITY TO ACT

65. It was submitted that Mr Steven David Gottschalk, who deposed to the founding affidavit, did not state that he was authorised to bring the application on behalf of the Applicant. No resolution by F180 was filed to confirm such authority either.

66. The evidence is that in its reply the F180 annexed a document purporting to be a resolution taken to authorise the attorney to bring the application on its behalf.

    66.1. Counsel pointed out that the F180 relied on a document marked SG 1 which is dated only "after" the attorney deposed to the affidavit and the papers were launched. It was submitted the application was not authorised at the time it was brought, and it cannot be regarded as a ratification by the directors to authorise the attorney.

67. Furthermore, the F180, ignored a notice sent in terms of Rule 7 (1). It also failed to file a power of attorney as evidence that the attorney was

authorised to bring the application on its behalf. F180 provided no reasons for failing to reply to the Rule 7(1) notice.

68. Moodley SC submitted that the DFT was entitled to raise this point and should not be criticised for doing so.

69. Mr Joseph's in turn argued that it was implicit in a reading of the founding affidavit that S D Gottschalk was authorised. SG 1 is a resolution signed by F180's directors specifically authorising the application and argued this point must be dismissed.

70. I am of the view that not much turns of this point, in that the DFT did not raise any prejudice suffered and that the replying affidavit includes a resolution signed by the directors of the F180.

71. As follows from the previous point raised, the DFT continues to answer to the founding papers, "unscathed" from the lack of authority as alleged.

72. The resolution attached serves to confirm authority to depose to the papers and this point is dismissed.

CANCELLATION

73. The DFT argued, in the alternative, that on 20 January 2021 the agreement and addendum thereto was validly cancelled.

74. Counsel submitted that the global pandemic caused serious havoc to the world economy and South Africa was no exception.

75. It is common cause that the land which is the subject of the agreement was rezoned specifically for the development of a hotel. Moodley SC proffered that the pandemic and the various levels of lockdowns throughout the world, had a devastating impact on the tourism industry and the hotel industry was one of the main casualties.

76. The parties concluded the agreement in February 2020 and a few weeks later in March 2020 the South African Government imposed a strict lockdown, which has only recently been relaxed, some two years later. The DFT simply could not sustain its businesses.

77. Counsel referred the court to email correspondences between the DFT and its financial advisor, who confirmed that he had approached Nedbank, for funding of its project and it was turned down. The banking institutions did not see the viability in financing of construction projects, particularly hotels.

78. Counsel proffered that his clients also disposed of several of their established hotels which were running at a loss, to mitigate their losses and were unable to realise sufficient capital to purchase and develop the property.

79. The pandemic was a vis major; it was unforeseeable and unexpected; his client cannot be held to the agreement in the face of such unfavourable conditions. There could be no fault on his client, as the event was devastating and unforeseeable.

80. The prevailing economic conditions had made it impossible for the DFT to perform. It had no option but to cancel as set out in its correspondence of January 2021.

81. Mr Moodley submitted that the court has a discretion that it can exercise in an application for specific performance. Specific performance is not there for the taking.

82. Counsel referred to court to **HAYNES v KINGWILLIAMSTOWN MUNICIPALITY**[14], where the court stated that a court has a discretion, in appropriate cases, to refuse to grant an order for specific performance, and reference was made to Wessels on Contract Law, "*where the order would operate unreasonably hardy on the defendant*

[14] 1951 (2) SA 371 AD at 378

or where it would be unconscientious to enforce the contract specifically", a court may refuse specific performance.

83. The court was again directed to the correspondence from the financial advisor one Robin Breeds who confirmed he tried to raise finance from Nedbank, but they refused.

84. Moodley SC conceded that his clients failed to file any financial documentation that would prove their claims of unaffordability and a decline in its business performance.

85. Counsel, furthermore, referred to clauses 6.2 and 6.3 of the agreement, in which was provided that in the event of a cancellation before transfer, the seller would procure the deposit together with interest accrued and refunded to the purchaser within 5 days of the agreement being cancelled. Any right to defer or withhold such payment was excluded. The seller could furthermore not set off the amount of raise any counterclaim against the monies it held. The evidence is that the deposit has not been refunded to date.

86. In reply, Advocate Joseph argued that as a general rule the innocent party is entitled to rely on specific performance the creditor has prima facie right.

87. Counsel submitted that the Trust claimed impossibility to perform but failed to prove the impossibility.

88. Mr Joseph argued further that it was never contemplated that the trust would look for finance from a bank, it is not in the agreement. He proffered that his clients understood that they would realise assets and raise the capital needed.

89. He submitted the deal is possible, they simply no longer want the deal.

90. Mr Joseph submitted that Govindsamy and family are astute business persons and cannot be allowed to ignore their obligations simply because they no longer want the deal. His client has also relied on the deal being finalised for its own business plans.

91. It was submitted the pandemic was an excuse used to resile from the agreement.

92. He argued that DFT appears to have limited its loan inquiry to only one bank. This must demonstrate the strength of its commitment to the deal. Furthermore, if one has regard to the correspondence from their financial advisor, he confirmed that the bank has no concerns for the DFT's creditworthiness. The Regal Inn Group's financial or credit record was considered sound. Mr Joseph reiterated that the DFT's

failure to support its allegations on affordability must not be overlooked.

93. Supervening impossibility does not equate to non-viability or difficulty to obtain or attain.

94. Mr Joseph submitted that the DFT failed to discharge its onus on a balance of probabilities. It has not laid a factual or legal basis to rely on this defence. His client is severely prejudiced given that no admissible evidence has been placed before the court to determine its true ability.

95. Only correspondence from an alleged financial adviser was before court which is hearsay evidence which the court cannot admit.

96. Mr Joseph submitted the F180 is entitled to the relief it seeks.

JUDGMENT

97. The DFT's first point in limine, argued on grounds of non-compliance with s2 (1) of the Alienation of Land Act 68 of 1981 is dismissed.

98. I do not propose to restate the reasons, but the Court agrees with Mr Joseph that Govindsamy had the necessary authorisations to conclude a valid agreement and addendum thereto on behalf of DFT.

99. Having regard to the clauses in the Trust Deed set out in paragraph 14 above, Govindsamy as Chairman, hold a casting vote, within the wording of that deed, had the two votes and therefor the necessary authorisation.

100. The F180 and GHI were entitled to rely on the information before them which included, the signed trust deed, the relevant clauses set out in paragraph 14 above, the official letter of authority and the conduct of Govindsamy and his family members (Yolan Chetty) throughout the negotiations leading to the conclusion of the agreements, to satisfy themselves on the "authority to conclude the agreement."

101. In casu there can be no majority, there are only two trustees. The deed is clear, Govindsamy holds the final authority in his casting vote whether in a situation of a "deadlock" or otherwise.

101.1. There is no "room" in the composition of this trust for any "majority" in the ordinary meaning of the word. The deed as it

is worded is a brain teaser if not read in context and together with the other documents.

101.2. The distinction from the facts in the Goldex cases emerges when the relevant provisions of the trust deed are read in context together with the letters of authority.

101.3. Mr Joseph was correct in his analysis that, in the Goldex case, two individual persons were required to vote and therefor authorise, to comply with the deed of trust. In casu, in the person of Govindsamy by himself, emerges the two votes for authorisation and compliance with the trust deed.

101.4. I am persuaded that the agreement and the addendum thereto were concluded with the necessary authorisation and together there was no contravention of s2(1) of the Alienation of Land Act of 1981.

102. The decision in the Goldex case cannot assist the DFT in casu.

103. I have determined the other two points in limine and do not propose to repeat my views on the facts but confirm that the non-joinder point was clearly completely inappropriate in the light of the defences raised, including one in the alternative, and the arguments presented

on behalf of the DFT. The DFT were “before the court” when it suited them.

103.1. The DFT cannot have it both ways, either it argues as a party to the proceedings which was the case, having regard to its long and detailed submissions, or it is not properly before the court as incorrectly alleged in the point that it raised.

104. I turn now to the defence in the alternative, that is, cancellation due to a supervening impossibility of performance.

105. The DFT bears the onus to prove on a balance of probabilities the impossibility to perform.

106. Although submissions were made on each of its group of hotels and their performance over the recent past, it is only the DFT’s say so. No evidence to support those submissions were put before this court.

106.1. The submissions though were useful in demonstrating to this court the DFT’s long history in the business world and the hotel industry. They must have known of the authority to contract and bind the DFT.

106.2. The letters of authority reflecting two trustees was issued by the Master in 2008. The trust was established in 1987 when it registered three trustees at the time. It is clear from counsel's submissions that a lot of business was conducted in the name of the DFT over the years.

107. Christie, RH in his book Law of Contract[15], states

"… the fact that vis major or casus fortuitous had made it uneconomical for a party to carry out his obligations does not mean that it has become impossible…"

108. I agree with Mr Joseph that the DFT has not laid out a factual or legal basis for supervening impossibility. Moodley SC's submissions that the DFT suffered huge financial losses was not supported by any evidence. However, counsel conceded that his clients have failed in that regard and "will have to live with it."

109. Mr Joseph is correct that impossibility does not equate to non-viability and on a balance of probabilities the DFT has failed to prove its defence to cancel the agreement.

110. There were no grounds in law and fact for the cancellation.

[15] 5th edition p 472

111. Accordingly, I find that the applicant (F180) is entitled to the relief it seeks and its application is granted.

I make the following order:

1. The agreement of sale dated 12 February 2020, including the addendum to the agreement dated 28 October 2020 concluded between the first applicant and the First respondent relating to the sale of property, the remaining extent of Erf 676 Rhodesfield Township, Registration Division, I.R, Province of Gauteng, is of full force and effect.

2. The respondent is to do all things necessary to ensure the transfer of the property from the applicant to the respondent, including signing all such documents and providing all such information as may be reasonably required by the applicant's conveyancers for the purpose of effecting the transfer in the applicable deeds office.

3. The counterapplication against the first and second respondents is dismissed with costs.

4. The respondents are to pay the costs of this application.

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MAHOMED AJ

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand-down is deemed to be 28 April 2022.

Date of Hearing: 21 January 2022

Date Delivered: 28 April 2022

Appearances:

For the Applicants and the second respondent in the counterapplication

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