

## REPUBLIC OF SOUTH AFRICA



## IN THE HIGH COURT OF SOUTH AFRICA

## GAUTENG DIVISION, PRETORIA

CASE NUMBER: 84874/15

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO
(3)	REVISED.
13.04.2018	
DATE	SIGNATURE

13/4/18

In the matter between:

**MAHLANGU, MOSES SIBUSISO****Applicant**

and

**FOURIE, JOHAN ANDRE****First Respondent****VAN DER SPUY & DE JONGH ATTORNEYS****Second Respondent****DEO SWANEPOEL PROPERTIES****Third Respondent****REGISTRAR OF DEEDS, PRETORIA****Fourth Respondent**


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**JUDGMENT**


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HATTINGH AJ

FACTUAL BACKGROUND


- [1]. Both the applicant and the third respondent failed to file their replying affidavits in time. Both sought the court's indulgence in this regard and there was no resistance from the first and second respondent. Condonation was therefore granted.
- [2]. It is common cause that on the 21<sup>st</sup> April 2015 the applicant and the first respondent concluded two written sale agreements for the purchase and sale of two immovable properties.
- [3]. The dispute between the parties are in terms of the interpretation of the two sale agreements and if any tacit term should be incorporated into these two sale agreements.
- [4]. The first transaction pertains to the sale of Stand 1091 situated at the corner of Stonechat Loop Street, Zambesi Country Estate, Montana Gardens, and for ease of reference hereinafter referred to as "**Stand 1091**".

- [5]. the second transaction relates to the sale of Stand 1060, Montana Tuine, Zambesi Country Estate, Montana Gardens, and for ease of reference referred to as "**Stand 1060**".
- [6]. These abovementioned sale transactions were executed with the aim to partially fund the purchase of Stand 1178 Cisticoln Avenue, Zambesi Country Estate and for ease of reference referred to as "**Stand 1178**".
- [7]. It is further common cause that the transfer of Stand 1060 has been effected and transferred into the name of the first respondent. The first respondent paid the total purchase price of R800,000.00 (Eight Hundred Thousand Rand) over to the second respondent, the transferring attorney, that represented both the applicant and the first respondent in executing and effecting the abovementioned transfers.
- [8]. I should pause to state that it was the contention of the applicant that both the purchase prices of Stand 1060 and Stand 1178 respectively was decreased by R400,000.00 (Four Hundred Thousand Rand). Reasons advanced were to save on transfer duties, conveyancing, etc.
- [9]. These two agreements are pivotal in determining the outcome of this matter. These offer to purchase agreements are short and the material terms are contained in 6(six) pages each. These agreements therefore need to be attached to this

judgement only to the extent of the material terms and for ease of reference referred to as "MSM3" and "MSM4" respectively.


[10]. See below "MSM3":

29 "MSM3"



**MLS**  
MULTI LISTING SERVICES

**OFFER TO PURCHASE**  
which, after acceptance by the Seller, constitutes a  
**PURCHASE AGREEMENT**



**Deo Swanepoel**

**THE PARTIES, as identified in Addendum "A" (General Information)**

**THE SELLER**

TO: John André Fourie

ID No: 74 11 095124 094

And

ID No: \_\_\_\_\_ ("the Seller")

**PURCHASER**

(We, the undersigned: MUSEE SEBASTIEN MAHLAHLA)

ID No: 6604095316088

And

ID No: \_\_\_\_\_ ("the Purchaser")

hereby offer to purchase through Deo Swanepoel Prop ("PW Estate Agency") the following property. We confirm that no unfair influence or tactics were used by the Selling Agent.

**THE PROPERTY (FULL TITLE)**

Freehold Stand on 1091 Townships: Wentworth

Situated at: Cnr T1 Thubbeleer and Stonecutlapp Zamboni City

**INT. PROPERTY (SECTIONAL TITLE, PLOT, TOWNHOUSE etc.)**

Apartment/flat/warehouse door no: \_\_\_\_\_ Section no: \_\_\_\_\_ Sectional Scheme no: \_\_\_\_\_

\_\_\_\_\_ in the building known as \_\_\_\_\_ situated at: \_\_\_\_\_

\_\_\_\_\_ with reference to the attached house rules where appropriate, including exclusive use areas (if any): 1A

Subject to all terms and servitudes mentioned or referred to in the current and/or prior Title Deeds of the said property, and to all such other conditions and servitudes which may exist in regard thereto, in the condition and to the extent as stipulated in clause 15.2, as is (voetskoots), on the following terms and conditions

Deo Swanepoel Proprietary

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Version: 2011/5/2012/2013/2014/2015/2016/2017/2018/2019/2020/2021/2022/2023/2024/2025/2026/2027/2028/2029/2030/2031/2032/2033/2034/2035/2036/2037/2038/2039/2040/2041/2042/2043/2044/2045/2046/2047/2048/2049/2050/2051/2052/2053/2054/2055/2056/2057/2058/2059/2060/2061/2062/2063/2064/2065/2066/2067/2068/2069/2070/2071/2072/2073/2074/2075/2076/2077/2078/2079/2080/2081/2082/2083/2084/2085/2086/2087/2088/2089/2090/2091/2092/2093/2094/2095/2096/2097/2098/2099/2100/2101/2102/2103/2104/2105/2106/2107/2108/2109/2110/2111/2112/2113/2114/2115/2116/2117/2118/2119/2120/2121/2122/2123/2124/2125/2126/2127/2128/2129/2130/2131/2132/2133/2134/2135/2136/2137/2138/2139/2140/2141/2142/2143/2144/2145/2146/2147/2148/2149/2150/2151/2152/2153/2154/2155/2156/2157/2158/2159/2160/2161/2162/2163/2164/2165/2166/2167/2168/2169/2170/2171/2172/2173/2174/2175/2176/2177/2178/2179/2180/2181/2182/2183/2184/2185/2186/2187/2188/2189/2190/2191/2192/2193/2194/2195/2196/2197/2198/2199/2200/2201/2202/2203/2204/2205/2206/2207/2208/2209/2210/2211/2212/2213/2214/2215/2216/2217/2218/2219/2220/2221/2222/2223/2224/2225/2226/2227/2228/2229/2230/2231/2232/2233/2234/2235/2236/2237/2238/2239/2240/2241/2242/2243/2244/2245/2246/2247/2248/2249/2250/2251/2252/2253/2254/2255/2256/2257/2258/2259/2260/2261/2262/2263/2264/2265/2266/2267/2268/2269/2270/2271/2272/2273/2274/2275/2276/2277/2278/2279/2280/2281/2282/2283/2284/2285/2286/2287/2288/2289/2290/2291/2292/2293/2294/2295/2296/2297/2298/2299/2300/2301/2302/2303/2304/2305/2306/2307/2308/2309/2310/2311/2312/2313/2314/2315/2316/2317/2318/2319/2320/2321/2322/2323/2324/2325/2326/2327/2328/2329/2330/2331/2332/2333/2334/2335/2336/2337/2338/2339/2340/2341/2342/2343/2344/2345/2346/2347/2348/2349/2350/2351/2352/2353/2354/2355/2356/2357/2358/2359/2360/2361/2362/2363/2364/2365/2366/2367/2368/2369/2370/2371/2372/2373/2374/2375/2376/2377/2378/2379/2380/2381/2382/2383/2384/2385/2386/2387/2388/2389/2390/2391/2392/2393/2394/2395/2396/2397/2398/2399/2400/2401/2402/2403/2404/2405/2406/2407/2408/2409/2410/2411/2412/2413/2414/2415/2416/2417/2418/2419/2420/2421/2422/2423/2424/2425/2426/2427/2428/2429/2430/2431/2432/2433/2434/2435/2436/2437/2438/2439/2440/2441/2442/2443/2444/2445/2446/2447/2448/2449/2450/2451/2452/2453/2454/2455/2456/2457/2458/2459/2460/2461/2462/2463/2464/2465/2466/2467/2468/2469/2470/2471/2472/2473/2474/2475/2476/2477/2478/2479/2480/2481/2482/2483/2484/2485/2486/2487/2488/2489/2490/2491/2492/2493/2494/2495/2496/2497/2498/2499/2500/2501/2502/2503/2504/2505/2506/2507/2508/2509/2510/2511/2512/2513/2514/2515/2516/2517/2518/2519/2520/2521/2522/2523/2524/2525/2526/2527/2528/2529/2530/2531/2532/2533/2534/2535/2536/2537/2538/2539/2540/2541/2542/2543/2544/2545/2546/2547/2548/2549/2550/2551/2552/2553/2554/2555/2556/2557/2558/2559/2560/2561/2562/2563/2564/2565/2566/2567/2568/2569/2570/2571/2572/2573/2574/2575/2576/2577/2578/2579/2580/2581/2582/2583/2584/2585/2586/2587/2588/2589/2590/2591/2592/2593/2594/2595/2596/2597/2598/2599/2600/2601/2602/2603/2604/2605/2606/2607/2608/2609/2610/2611/2612/2613/2614/2615/2616/2617/2618/2619/2620/2621/2622/2623/2624/2625/2626/2627/2628/2629/2630/2631/2632/2633/2634/2635/2636/2637/2638/2639/2640/2641/2642/2643/2644/2645/2646/2647/2648/2649/2650/2651/2652/2653/2654/2655/2656/2657/2658/2659/2660/2661/2662/2663/2664/2665/2666/2667/2668/2669/2670/2671/2672/2673/2674/2675/2676/2677/2678/2679/2680/2681/2682/2683/2684/2685/2686/2687/2688/2689/2690/2691/2692/2693/2694/2695/2696/2697/2698/2699/2700/2701/2702/2703/2704/2705/2706/2707/2708/2709/2710/2711/2712/2713/2714/2715/2716/2717/2718/2719/2720/2721/2722/2723/2724/2725/2726/2727/2728/2729/2730/2731/2732/2733/2734/2735/2736/2737/2738/2739/2740/2741/2742/2743/2744/2745/2746/2747/2748/2749/2750/2751/2752/2753/2754/2755/2756/2757/2758/2759/2760/2761/2762/2763/2764/2765/2766/2767/2768/2769/2770/2771/2772/2773/2774/2775/2776/2777/2778/2779/2780/2781/2782/2783/2784/2785/2786/2787/2788/2789/2790/2791/2792/2793/2794/2795/2796/2797/2798/2799/2800/2801/2802/2803/2804/2805/2806/2807/2808/2809/2810/2811/2812/2813/2814/2815/2816/2817/2818/2819/2820/2821/2822/2823/2824/2825/2826/2827/2828/2829/2830/2831/2832/2833/2834/2835/2836/2837/2838/2839/2840/2841/2842/2843/2844/2845/2846/2847/2848/2849/2850/2851/2852/2853/2854/2855/2856/2857/2858/2859/2860/2861/2862/2863/2864/2865/2866/2867/2868/2869/2870/2871/2872/2873/2874/2875/2876/2877/2878/2879/2880/2881/2882/2883/2884/2885/2886/2887/2888/2889/2890/2891/2892/2893/2894/2895/2896/2897/2898/2899/2900/2901/2902/2903/2904/2905/2906/2907/2908/2909/2910/2911/2912/2913/2914/2915/2916/2917/2918/2919/2920/2921/2922/2923/2924/2925/2926/2927/2928/2929/2930/2931/2932/2933/2934/2935/2936/2937/2938/2939/2940/2941/2942/2943/2944/2945/2946/2947/2948/2949/2950/2951/2952/2953/2954/2955/2956/2957/2958/2959/2960/2961/2962/2963/2964/2965/2966/2967/2968/2969/2970/2971/2972/2973/2974/2975/2976/2977/2978/2979/2980/2981/2982/2983/2984/2985/2986/2987/2988/2989/2990/2991/2992/2993/2994/2995/2996/2997/2998/2999/3000/3001/3002/3003/3004/3005/3006/3007/3008/3009/301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**1. PURCHASE PRICE**

The purchase price is R 5300 000

R 500 000 (Five hundred thousand Rand) and payable as follows:

1. R 500 000 (Five hundred thousand Rand) to be deposited with the Conveyancer or the Estate Agency within 7 days of acceptance of this offer and will be payable to the Seller upon registration of transfer of the property into the name of the Purchaser (the Transfer). The Conveyancer/Estate Agency is instructed to deposit this sum in an interest bearing trust account for the benefit of the Purchaser.

1.2 The balance of R 4800 000 (Four thousand eight hundred Rand) shall be paid to the Seller upon date of registration of the Transfer and shall be secured by means of a bank or other guarantee within:-

- 1.2.1 30 days after receipt of a Final Quotation of the mortgage bond/s referred to in clause 2.1 being issued and/or
  - 1.2.2 7 days of date of registration of transfer of the Purchaser's existing property referred to in clause 2.2. The Purchaser undertakes to forthwith instruct the Attorneys attending to the transfer of his existing property to pay the moneys to the Conveyancer, alternatively hereby authorises the Conveyancer to do so; and/or
  - 1.2.3 15 days of acceptance of this Offer to Purchase by the Seller if this agreement is not subject to clause 2.
- 1.3. The Seller warrants that the purchase price is sufficient to cover the outstanding bond, Estate Agency's professional fee, rates and taxes, electricity and water and other imposts by the Local Authority or Legal Person.
- 1.4. The Seller declares that he/she is not a registered vendor in terms of the Value Added Tax Act of 1991 as amended.

**2. SUSPENSIVE CONDITIONS****2.1. BOND FINANCE**

This Offer to Purchase is subject to the Purchaser being able to obtain a Final Quotation from a registered financial institution by no later than with 20 confirming that a loan/s of R 5300 000 (Five thousand three hundred Rand) has been approved, on the security of a mortgage bond/s or other guarantees to the benefit of the buyer to be registered over the property or rates and subject to terms and conditions imposed by the financial institution.

2.1.1 The Estate Agency shall on behalf of the Purchaser apply for such loan through a registered financial institution.

2.1.2 The Purchaser undertakes to complete, sign and submit to the Estate Agency, a loan application within 7 (seven) calendar days of acceptance of this offer and subsequently, on request to complete any new loan application and all documents deemed necessary by the Estate Agency to facilitate transfer, failing which the suspensive condition herein contained shall be deemed to be fulfilled.

2.1.3 In the event of the Purchaser being unable to obtain said written approval of a loan within the period referred to above, an automatic extension of 7 (seven) calendar days will be applied.

**2.2. SALE OF EXISTING PROPERTY**

This Offer to Purchase is subject to the Purchaser being able to obtain a written sales agreement without any suspensive conditions, except for the condition that any prior agreement must lapse or be cancelled, on his property, being situated on 1 A situated at in the township in the (herein referred to as the Existing Property) on terms and conditions that will enable the Purchaser to fulfil the terms and conditions of cancellation thereof and also to deliver unconditional guarantee of this agreement within 1 calendar days of acceptance by the Seller. The Purchaser generally undertakes to co-operate with the Estate Agency in his endeavour to market and sell the existing property and to timely fulfil this condition.

2.2.1 In the event of a follow up offer on the above mentioned property within the above mentioned time period of the first offer and such follow up offer fulfil all suspensive conditions (or cancellation thereof) and guarantees, then only can:

2.2.2 the buyer and conveyancer of the first offer be given notice (by the conveyancer of the second offer) to provide to the conveyancer of the second offer proof of unconditional guarantees, confirmation of the fulfilment of all suspensive conditions (or cancellation thereof) within 1 working days of such notice where as failure to do so will result in the cancellation of the first offer and the proceeds of the second offer.

#### 1. OCCUPATION

Occupation of this property shall be given to and taken by the Purchaser on 15 February. Should the date of transfer not coincide with the date of occupation, the party enjoying such occupation whilst the property is registered in the name of the other party, shall pay the other party monthly in advance on the first day of the month, in consideration for, and for the period of such occupation an occupational interest of R 100 and shall be paid at the Conveyancer's office. Should transfer be registered during a month, the Conveyancer must refund to the Purchaser a share of the payment made. Such share will be for the period between the date of registration of transfer and the end of that month.

#### 1. BENEFITS AND RISK

On registration of transfer of the property the risk of ownership thereof shall pass to the Purchaser, from which date the Purchaser shall receive all benefits from, and be responsible for all rates and taxes and other imposts upon the property.

#### 5. PROFESSIONAL FEE

- 5.1 The professional fee (attached as Addendum D) of this agreement shall be borne by the Seller which professional fee shall be deemed to have been earned upon fulfilment of the suspensive conditions of this agreement and is payable on date of transfer of the property. The Seller shall continue to be liable to the Estate Agency for such professional fee if the agreement is cancelled either by mutual consent or removal by the parties or any breach of this agreement by the Seller.
- 5.2 The Purchaser warrants to the Seller that he/she/they or they was/were not introduced to the property or the Seller by any person other than the Estate Agency, who is the effective cause of the sale.
- 5.3 In the event of the sale being cancelled or not proceeded with due to any default of the Purchaser's part then and in such event and notwithstanding anything to the contrary herein contained the Purchaser shall become personally liable to the Estate Agency for payment of the professional fee and the Estate Agency shall be entitled at its option to claim for damages from the Purchaser, which is 8.5% (eight point five percent) of the purchase price.
- 5.4 The parties agree that the professional fee stipulated in clauses 5.1 hereof shall be paid to the following MLS participant Estate Agencies as follows:

NAME OF LISTING AGENCY: W/A W/A

NAME OF SELLING AGENCY: DEO Sunquest Prop 100%

The parties irrevocably instruct and authorise the Conveyancer to pay directly in each participant Estate Agency its share of the commission.

#### 6. BREACH

Should either party breach any provision of this agreement and fail to remedy such breach within 7 calendar days after despatch of written notice requiring such breach to be remedied, the aggrieved party shall be entitled, without prejudice to any other rights in law, to cancel this agreement forthwith or claim immediate specific performance of all of the defaulting party's obligations whether or not due to performance and in either event without prejudice to the aggrieved party's rights to claim damages. The aggrieved party shall be entitled to receive as a multiple of turnover or as a genuine pre-estimate of damages or on account of any pending determination by court or actual damages sustained, the balance of the deposit and any other monies paid by the Purchaser after deduction of the professional fee payable to the Estate Agency in terms of clause 5 hereof.

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7. **LEGAL PERSON**

Should the Purchaser act on behalf of a legal person to be established, such legal person must be established within 10 calendar days after signature hereof, failing this, the Purchaser will be considered to have signed the agreement in his personal capacity. Should the legal person have been established, the Purchaser binds himself as surety and principal co-debtor for the performance by the legal person in terms of this agreement. (In case of a trust, the trust must already have been established.)

8. **ARBITRATION**

- 8.1. If any dispute arises between the Seller, Purchaser or the Estate Agency at any time regarding:
- 8.1.1. any incident arising from this agreement; and/or
  - 8.1.2. the interpretation of this agreement; and/or
  - 8.1.3. the termination of this agreement; or any incident arising from the termination of this agreement; and/or
  - 8.1.4. a claim for the reinstatement of the agreement, the parties shall attempt to resolve the dispute by means of negotiation. If the parties fail to reach an agreement, the dispute shall be resolved by means of arbitration.
- 8.2. The arbitration shall be held in Pretoria by "The Arbitration Foundation of Southern Africa" (A/PSA), Tel. 012 303-7403.
- 8.3. The arbitration shall be held in accordance with the rules for an expedited arbitration as used by the Arbitration Foundation of South-Africa.
- 8.4. The cost of the arbitration shall be for the account of the party as ruled by the presiding officer of the arbitration process.
- 8.5. This clause will apply even after termination of this agreement.

9. **TRANSFER**

Transfer shall be affected by the Seller's Conveyancer, being  
 L. R. L. A. Tel. nr. 012 918 3077  
 fax nr.

Bond Attorney: W. M. Tel. nr. W. M.  
 Fax nr. W. M.

All costs incidental to transfer, including transfer duty and stamp duty shall be paid by the Purchaser as directed.

10. **FIXTURES & FITTINGS**

The property is sold with all fixtures and fittings of a permanent nature, which the Seller warrants are fairly paid for and is in the exclusive and sole ownership of the Seller. The following fixtures and fittings are excluded from this agreement:

The following movables are not included: W. M.

11. **SOLD BOARDS**

The Seller and Purchaser agree that the Estate Agency are permitted to place "sold signs" in front of the property for a period of 90 (NINETY) days after suspensive conditions have been fulfilled. This period will however not exceed 14 days after date of Registration.

12. **CHOSEN ADDRESS**

The parties choose, as their chosen address (domestic or business as applicable) for all purposes hereunder as their addresses stipulated in General Information (attached as Addendum C) under their respective names. All notices required to be given by one party to the other shall be in writing and shall be deemed to be received at the addresses on the seventh calendar day following the posting thereof by prepaid registered post or on the date of delivery thereof if delivered by hand or sent by facsimile.



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### 13. CERTIFICATES

The Seller shall obtain, at his expense, a certificate of compliance for the electrical installation in accordance with the regulations of Act no 85 of 1993 as amended. The Seller shall within 14 (fourteen) days of fulfilment of the above conditions as in clause 2 of this agreement, and after the Purchaser paid the transfer fees, and signed the transfer documents, obtain and deliver the said Certificate to the Conveyancer. Should the Seller fail to furnish the certificate of compliance for the electrical installation, the Purchaser will be entitled to obtain the certificate and in that event the Seller hereby authorises the Conveyancer to deduct the cost of obtaining such certificate from the net proceeds and to reimburse the Purchaser.

### 14. DELAY

Should the registration of transfer be delayed due to any cause for which the Purchaser/Seller is responsible, then the latter shall pay the other party the amount as provided for in Clause 2 above, or interest for the period of such delay at the current repo rate as charged by the SA Reserve Bank plus 10% p.a. on the amount of the purchase price, whichever is the greater. In this regard both Purchaser and Seller declare that their affairs with the South African Revenue Services (SARS) are in order. If it is found not to be in order, both parties undertake to make an arrangement with SARS in order not to delay this transfer.

### 15. PROPERTY INFORMATION

15.1 The Purchaser confirms that he is aware of the nature, condition, borders, size and location of the property and that there shall be no claims against the Seller or the Estate Agency or be entitled to terminate the agreement in the event that the property is found to be smaller during surveying.

15.2 The Purchaser confirms that the Property Information List (attached as Addendum B) and documents as provided and completed by the Seller, were given to him when viewing the property, and also confirms that he is purchasing the property as is (voetskoot), in the declared condition.

### 16. COOLING OFF PERIOD

If the purchase price in clause 1 is R 250,000.00 or less, the Purchaser's attention is drawn to the rights conferred upon him by virtue of section 29 (A)(1) of the Alienation of Land Act, no 68 of 1981 as amended, which is subject to section 29(A)(5), in terms of which he may ~~terminate~~ rescind this offer to purchase by written notice to the Seller within a 5 (five) day period (excluding date of signature of this agreement and excluding any Saturday, Sunday or Public holiday) after signature hereof and to have any amount already paid by him in terms hereof refunded in the event of such termination. Notice of termination must be delivered in writing to the Seller before 12:00 on W/F/A 120.

### 17. DIRECT MARKETING

Should this Offer to Purchase be as a result of Direct Marketing, the Buyer may then terminate this Offer to Purchase by giving WRITTEN notice to the Seller within 3 (five) business days of signing this offer. Notice of termination must be delivered in writing to the Seller before 12:00 on W/F/A 120. Any payments received from the Buyer must then be returned to the Buyer within 15 (fifteen) business days after receipt of such cancellation. The Buyer confirms that this transaction is as a direct result of a Direct Marketing action. In the event of a Direct Marketing action (approached in person, or by mail, or by electronic communication) having been used, the Buyer confirms that the following Direct Marketing technique was used to approach him: W/F/A

### 18. IRREVOCABLE OFFER

This offer is irrevocable until 24.02 as 21.4/2015 and is binding upon signed acceptance at any time prior thereto, irrespective of notification of acceptance to the Purchaser.

### 19. GENERAL

19.1 This document contains the entire agreement between the parties and:

19.2 no additions in or amendments of this agreement shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties;

19.3 The Purchaser may not do any alteration or renovations to the property without the written consent of the Seller before the transfer has taken place. The Purchaser shall have no claim against the Seller for any alterations or renovations to the property by termination of the agreement.

19.4 No conclusion or extension of time granted, by one party to the other party, in respect of any payments or any other obligations of such party, in terms of this agreement, will under any circumstances whatsoever be regarded as abandonment, alteration or novation of that party's right. The aggrieved party will be entitled to demand precise fulfilment of every condition of this agreement.



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19.5. In the event that the agreement is signed by more than one person as Purchaser or Seller, each person shall be jointly and severally accountable to the other party for fulfillment of the conditions as set out in this agreement.

## 20. OTHER CONDITIONS

\* Subject to Registration of Property Situated  
at 1178 Connelley Ave. Zanesville, Ohio

\* Subject to Registration of said Shovel  
at 1060 Oak Hill St. Zanesville, Ohio

\* \$500.00 deposit will be paid in an  
installments within 7 days

Purchase price will be paid out at the end  
of above mentioned period and balance will  
be paid in cash at the end.

[11]. See further below agreement 1060:



**OFFER TO PURCHASE**  
Which, after acceptance by the Seller, constitutes a  
**PURCHASE AGREEMENT**

**Deo Swanepoel**

MSM 4  
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THE PARTIES as identified in Addendum "A" (General Information)  
THE SELLER

TO: MOSES SIBUSISO MAHLANGU

ID No: 604095246088

And

ID No: \_\_\_\_\_ ("the Seller")

PURCHASER

I/we, the undersigned Johan André FOUATÉ

ID No: 7411045124081

And

ID No: \_\_\_\_\_ ("the Purchaser")

herely offer to purchase through Deo Swanepoel Prop ("the Estate Agency") the following property. We confirm that no unfair influence or tactics were used by the Selling Agent.

THE PROPERTY (FULL TITLE)

Freehold Stand no: 1060 Township:

Situated at:

Waxbill Str Zumbani Country Estate

THE PROPERTY (SECTIONAL TITLE, DUET, TOWNHOUSE etc.)

Apartment/Townhouse door no: \_\_\_\_\_ Section no: \_\_\_\_\_ Sectional Scheme no: \_\_\_\_\_

\_\_\_\_\_ in the building known as \_\_\_\_\_ situated at:

\_\_\_\_\_ with reference to the attached House rules where applicable, including exclusive use areas (if any).

Subject to all terms and servitudes mentioned or referred to in the current and/or prior Title Deeds of the said property, and to all such other conditions and servitudes which may exist in regard thereto, in the condition and to the extent as stipulated in clause 1.5.2, as is (voortiens), on the following terms and conditions:

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1. PURCHASE PRICE

The purchase price is R 800 000

(Eight hundred thousand Rand) and payable as follows:

1.1. R 20 000

Cash Two / 20 / thousand

Rand) to be deposited with

the Conveyancer or the Estate Agency within 71 days of acceptance of this offer and will be payable to the Seller upon registration of transfer of the property into the name of the Purchaser (the Transfer). The Conveyancer/Estate Agency is instructed to deposit this sum in an interest bearing trust account for the benefit of the Purchaser.

1.2. The balance of R 800 000

Trough

(Eight hundred

Rand) shall be paid to the Seller upon date of registration of the Transfer and shall be secured by means of a bond or other guarantee within:-

1.2.1. 30 days after receipt of a Final Quotation of the mortgage bonds referred to in clause 2.1 being issued and/or

1.2.2. 7 days of date of registration of transfer of the Purchaser's existing property referred to in clause 2.2. The Purchaser undertakes to forthwith instruct the Attorneys attending to the transfer of his existing property to pay the moneys to the Conveyancer, alternatively hereby authorizes the Conveyancer to do so; and/or

1.2.3. 15 days of acceptance of this Offer to Purchase by the Seller if this agreement is not subject to clause 2. See pg. 6 clause 20

1.3. The Seller warrants that the purchase price is sufficient to cover the outstanding bond, Estate Agency's professional fee, rates and taxes, electricity and water and other imposts by the Local Authority or Legal Portion.

1.4. The Seller declares that he/she is not a registered vendor in terms of the Value Added Tax Act of 1991 as amended.

2. SUPPLEMENTARY CONDITIONS2.1. BOND FINANCE

This Offer to Purchase is subject to the Purchaser being able to obtain a Final Quotation from a registered financial institution by no later than 12/11/2012, confirming that a bond of R 100 000 (one hundred thousand Rand) has been approved, on the security of a mortgage bond/s or other guarantees to the benefit of the buyer to be registered over the property at rates and subject to terms and conditions imposed by the financial institution.

2.1.1 The Estate Agency shall on behalf of the Purchaser apply for such loan through a registered financial institution.

2.1.2 The Purchaser undertakes to complete, sign and submit to the Estate Agency, a loan application within 7 (seven) calendar days of acceptance of this offer and subsequently on request to complete any new loan application and all documents deemed necessary by the Estate Agency to facilitate transfer, failing which the supplementary conditions herein contained shall be deemed to be fulfilled.

2.1.3 In the event of the Purchaser being unable to obtain said written approval of a loan within the period referred to above, an automatic extension of 7 (seven) calendar days will be applied.

2.2. SALE OF EXISTING PROPERTY

This Offer to Purchase is subject to the Purchaser being able to obtain a written sales agreement without any suspensive conditions, except for the condition that any prior agreement must lapse or be cancelled, on his property, being stand no.

at 1A in the township of 1A (herein referred to as the Existing Property) on terms and conditions that will enable the Purchaser to fulfil the terms and conditions or cancellation thereof and also to deliver unconditional guarantee of this agreement within 10 calendar days of acceptance by the Seller. The Purchaser generally undertakes in co-operation with the Estate Agency in his endeavour to market and sell the existing property and timeously fulfil this condition.



2.2.1 In the event of a Follow up offer on the above-referenced property within the above-referenced time period of five (5) days after such Follow up offer fails in all suspensive conditions (for cancellation thereof) and guarantee, then only can

2.2.2 the buyer and conveyancer of the first offer be given notice (by the conveyancer of the second offer) to provide to the conveyancer of the second offer proof of unconditional guarantee, confirmation of the fulfilment of all suspensive conditions (for cancellation thereof) within 3 working days of such notice where as failure to do so will result in the cancellation of the first offer and the proceeds of the second offer.

### 3. OCCUPATION

Occupation of this property shall be given to and taken by the Purchaser on Release of the property. Should the date of transfer coincide with the date of occupation, the party enjoying such occupation whilst the property is registered in the name of the other party, shall pay the other party monthly in advance on the first day of the month, in consideration for, and for the period of each occupation an occupational interest of R 1000 and shall be paid at the Conveyancer's office. Should transfer be registered during a month, the Conveyancer must refund to the Purchaser a share of the payment made. Such share will be for the period between the date of registration of transfer and the end of that month.

### 4. BENEFITS AND RISK

The registration of transfer of the property the risk of ownership thereof shall pass to the Purchaser, from which date the Purchaser shall receive all benefits from, and be responsible for all rates and taxes and other imposts upon the property.

### 5. PROFESSIONAL FEE

5.1. The professional fee (mentioned as Addition D) of this agreement shall be borne by the Seller which professionals fee shall be deemed to have been earned upon fulfilment of the suspensive conditions of this agreement and is payable on date of transfer of the property. The Seller shall continue to be liable to the Estate Agency for such professional fee if the agreement is cancelled either by mutual consent or reason by the parties or any breach of this agreement by the Seller.

5.2. The Purchaser warrants to the Seller that he/she/they or they may/are not introduced to the property or the Seller by any person other than the Estate Agency, who is the effective cause of the sale.

5.3. In the event of the sale being cancelled or not proceeded with due to any default of the Purchaser's part, then and in such event and notwithstanding anything to the contrary herein contained the Purchaser shall become personally liable to the Estate Agency for payment of the professional fee and the Estate Agency shall be entitled at his option to claim for damages from the Purchaser, which is 8.5% (eight point five five percent) of the purchase price.

5.4. The parties agree that the professional fee stipulated in clause 5.1 hereof shall be paid to the following NALS participant Estate Agencies as follows:

NAME OF LISTING AGENCY: UFA

NAME OF SELLING AGENCY: Deo Superd Prop 100 M

The parties irrevocably instruct and authorize the Conveyancer to pay directly to each participant Estate Agency its share of the commission.

### 6. RELEASE

Should either party breach any provision of this agreement and fail to remedy such breach within 7 calendar days after dispatch of written notice requiring such breach to be remedied, the aggrieved party shall be entitled, without prejudice to any other rights in law, to cancel this agreement forthwith or obtain immediate specific performance of all of the defaulting party's obligations whether or not due to performance and in either event without prejudice to the aggrieved party's rights to claim damages. The aggrieved party shall be entitled to receive or retain as monies or as a grossed pre-estimate of damages or an account of any pending determination by court or actual damages sustained, the balance of the deposit and any other monies paid by the Purchaser after deduction of the professional fee payable to the Estate Agency in terms of clause 5 hereof.

# LEGAL PERSON

Should the Purchaser act on behalf of a legal person to be established, such legal person must be established within 30 calendar days after signature hereof, failing that, the Purchaser will be considered to have signed this agreement in his personal capacity. Should the legal person have been established, the Purchaser binds himself so strictly and personally co-debtor for the performance by the legal person in terms of this agreement. (In case of a trust, the trust must already have been established.)

## K. ARBITRATION

K.1. If any dispute arises between the Seller, Purchaser or the Estate Agency at any time regarding

8.1.1. any incident arising from this agreement, and/or

8.1.2. the interpretation of this agreement, and/or

8.1.3. the termination of this agreement, or any incident arising from the execution of this agreement,

and/or

8.1.4. a claim for the reimbursement of the agreement, the parties shall attempt to resolve the dispute by means of negotiation. If the parties fail to reach an agreement, the dispute shall be resolved by means of arbitration.

8.2. The arbitration shall be held in Pretoria by "The Arbitration Foundation of Southern Africa" (AFSA) Tel. 012 303-7408.

8.3. The arbitration shall be held in accordance with the rules for an expedited arbitration as used by the Arbitration Foundation of South Africa.

8.4. The cost of the arbitration shall be for the account of the party as ruled by the presiding officer of the arbitration process.

8.5. This clause will apply even after termination of this agreement.

## 9. TRANSFER

Transfer shall be effected by the Seller's Conveyancer dated 15/12/2016

Used Attorney's Tel nr 012 918 4026

Used Attorney's Tel nr

As to:

All costs incidental to transfer, including transfer duty and stamp duty shall be paid by the Purchaser on demand.

## 10. FIXTURES & FITTINGS

The property is sold with all fixtures and fittings of a permanent nature, which the Seller warrants, are fully paid for and is in the exclusive and sole ownership of the Seller. The following fixtures and fittings are excluded from this agreement:

W / A

The following alterations are not included W / A

## 11. SELLER'S WARRANTIES

The Seller and Purchaser agree that the Estate Agency are permitted to place "sold sign" in front of the property for a period of 90 (NINETY) days after signature conditions have been fulfilled. This period will however not exceed 14 days after date of Registration.

## 12. CHOSEN AGENCIES

The parties choose, as their chosen address (delete this clause as unnecessary) for all purposes hereunder at their addresses situated in General Information (attached to Acknowledgment C) under their respective names. All notices required to be given by one party to the other shall be in writing and shall be deemed to be received at the address on the seventh calendar day following the posting thereof by prepaid registered post or on the date of delivery thereof if delivered by hand or sent by facsimile.

Version 16 JULY 2016/17 DEC 2016/18 DEC 2019/20 DEC 2020



# 13. **CERTIFICATES**

The Seller shall obtain, at his expense, a certificate of compliance for the electrical installation in accordance with the regulations of Act no 43 of 1993 as amended. The Seller shall within 14 (fourteen) days of fulfillment of the respective conditions as in clause 2 of this agreement, and after the Purchaser paid the transfer fees, and signed the transfer documents, obtain and deliver the said Certificate to the Conveyancer. Should the Seller fail to furnish the certificate of compliance for the electrical installation, the Purchaser will be entitled to obtain the certificate and in that event the Seller hereby authorizes the Conveyancer to deduct the cost of obtaining such certificate from the net proceeds and to reimburse the Purchaser.

# 14. **DELAY**

Should the registration of transfer be delayed due to any cause for which the Purchaser/Seller is responsible, then neither shall pay the other party the amount so provided for in Clause 3 above, or interest for the period of such delay at the current repo rate as charged by the SA Reserve Bank plus 10%, p.a. on the amount of the purchase price, whichever is the greater. In this regard both Purchaser and Seller declare that their affairs with the South African Revenue Services (SARS) are in order. If it is found not to be in order, both parties undertake to make an arrangement with SARS in order not to delay this transfer.

# 15. **PROPERTY INFORMATION**

15.1 The Purchaser confirms that he is aware of the nature, condition, borders, size and location of the property and that there shall be no claims against the Seller or the Estate Agency or be entitled to terminate the agreement, on the event that the property is found to be smaller during surveying.

15.2 The Purchaser confirms that the Property Information List (attached as Addendum B) and documents as provided and accepted by the Seller, were given to him when viewing the property, and also confirms that he is purchasing the property as is (presentation), in the declared condition.

# 16. **COOLING OFF PERIOD**

If the purchase price in clause 1 is R 250,000.00 or less, the Purchaser's attention is drawn to the rights conferred upon him by virtue of section 29 (A)(V) of the Alienation of Land Act, no 98 of 1981 as amended, which is subject to section 29A(5). In terms of which he may terminate the offer to purchase, by written notice to the Seller within a 5 (five) day period, (excluding day of signature of this agreement and excluding any Saturday, Sunday or Public holiday) after signature hereof, and to have any amount already paid by him in terms thereof refunded in the event of such termination. Notice of termination must be delivered in writing to the Seller before 12.00 on 11/11/20

# 17. **DIRECT MARKETING**

Should this Offer to Purchase be as a result of Direct Marketing, the Buyer may then terminate this Offer to Purchase by giving WRITTEN notice to the Seller within 5 (five) business days of signing this offer. Notice of termination must be delivered in writing to the Seller before 12.00 on 11/11/20. Any payments received from the Buyer must then be returned to the Buyer within 15 (fifteen) business days after receipt of such cancellation. The Buyer confirms that this transaction is to a direct result of a 2-Storey Marketing action. In the event of a Direct Marketing action (approved in person, or by mail, or by electronic communication) having been used, the Buyer confirms that the following Direct Marketing technique was used to approach him: WIA

# 18. **IRREVOCABLE OFFER**

This offer is irrevocable until 21/02/2021 on 31/11/2020 and is binding upon signed acceptance at any time prior thereto, irrespective of notification of acceptance to the Purchaser.

# 19. **GENERAL**

19.1 This document contains the entire agreement between the parties, and:

19.2 no additions to or amendments of this agreement shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties;

19.3 The Purchaser may not do any alteration or excoriation to the property without the written consent of the Seller before the transfer has taken place. The Purchaser shall have no claim against the Seller for any alterations or improvements to the property by termination of the agreement;

19.4 No contract is or shall be made in relation to the property by one party to the other party, in respect of any payments or any other obligations of such party, in terms of this agreement, with under any circumstances whatsoever is regarded as abandonment, alteration or revocation of that party's right. The aggrieved party will be entitled to claim the precise fulfillment of every condition of this agreement.



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19.3. In the event that the agreement is signed by more than one person as Purchaser or Seller, each person shall be jointly and severally accountable to the other party for fulfillment of the conditions as set out in this agreement.

20. OTHER CONDITIONS

a Purchase price of R800 000 to be paid in with attorneys within 7 days and will be non-refundable. Transfer cost paid by agent.

- [12]. It is further common cause that both these agreements were signed by both the seller and purchaser on the same day.
- [13]. It is further common cause that the applicant had failed to adhere to the contractual stipulations of "**MSM3**", in that the applicant failed to pay the full deposit of R500,000.00 (Five Hundred Thousand Rand) relating to the purchase of Stand 1091. The applicant was only able to pay R250,000.00 (Two Hundred and Fifty Thousand Rand).
- [14]. The explanation advanced by the applicant for his default in terms of the full deposit was financial difficulty brought about by unexpected tax issues and more specifically that he owed the South African Revenue Services an amount of R3,2 Million (Three Million Two Hundred Thousand Rand). These taxes were owed to the Receiver of Revenue by a company known as MCC Security and Projects CC. It is further clear from the founding affidavit that the applicant is the sole member of the abovementioned Close Corporation.
- [15]. It is further common cause that on the 31<sup>st</sup> July 2015 the applicant instructed the second respondent in writing to deduct the amount of R18,711.39 (Eighteen Thousand Seven Hundred and Eleven Rand and Thirty Nine Cents) from the partial deposit paid as to their wasted costs, and to pay the estate agent the amount of R50,000.00 (Fifty Thousand Rand) from such partial deposit as commission. I

pause to mention that these two amounts are the amounts that the applicant currently tries to reclaim from the second and third respondents.

[16]. It is clear from the agreement, "**MSM3**", that the written contractual stipulations are:

16.1. The first respondent is described as the seller and the applicant as the purchaser.

16.2. It is declared that the purchaser offers to purchase through DEO Swanepoel Properties (third respondent) the property described as Stand 1091.

16.3. The purchase price is the amount of R5,300,000.00 (Five Million Three Hundred Thousand Rand) payable as follows:

16.3.1. R500,000.00 (Five Hundred Thousand Rand) to be deposited within 7(seven) days after acceptance of the offer; and

16.3.2. R4,800,000.00 (Four Million Eight Hundred Thousand rand) shall be paid to the seller upon date of registration of the transfer;

16.3.3. The parties agreed under clause 20 as to how the purchase price would be paid.



16.4. The two suspensive conditions in clause 2 of the agreement were deleted as not applicable. The first suspensive condition relates to the obtaining of bond finance, and the second suspensive condition relates to the sale of existing property.

16.5. In terms of Clause 19 the parties agreed that the written document contained the entire agreement between the parties, and that no additions to or amendments of the agreement would be of any force or effect unless reduced to writing and signed by or on behalf of the parties.

16.6. Under "Clause 20: Other Conditions" the parties inserted the following:

16.6.1. Subject to registration of stand situated at 1060 Waxbill Street, Zambesi Country Estate (emphasis added)

16.6.2. Subject to registration of property situated at 1178 Cisticoln Avenue, Zambesi Country Estate.

16.6.3. R500,000.00 (Five Hundred Thousand Rand) deposit will be paid in at attorneys within 7 (seven) days.

16.6.4. Purchase price will be paid out of the funds of abovementioned property and balance will be paid in cash. No bond.

**THE NOTICE OF MOTION**

[17]. In the notice of motion the applicant seeks for an order in the following terms:

- 17.1. Declaring the exchange of properties transaction contained in two offers to purchase, both dated 21 April 2015, entered into by the applicant and the first respondent in respect of erf 1178 Cisticola Avenue, Zambesi Country Estate, Montana Gardens, erf 1060 Montana Tuine Ext 46, held under title deed number T65868/2015 ("Stand 1060") and erf 1091, situated at Corner Stonechat and Loop Streets, Zambesi Country Estate, Montana Gardens, to have lapsed. (emphasis added)
- 17.2. Declaring the transfer of Stand 1060 from the name of the applicant into the name of the first respondent to be void *ab initio*.
- 17.3. Directing the second respondent to refund the applicant an amount of R18,711.39 (Eighteen Thousand Seven Hundred and Eleven rand and Thirty Nine Cents).
- 17.4. Directing the third respondent to refund the applicant an amount of R50,000.00 (Fifty Thousand Rand).

**THIRD RESPONDENT'S COUNTERCLAIM**

- [18]. The applicant on the 21<sup>st</sup> April 2015 at Pretoria and acting personally gave a written mandate to the third respondent to find a purchaser for the applicant's property being stand 1178, Zambesi Country Estate, Pretoria, Gauteng.
- [19]. During July 2015, the third respondent introduced a willing and able purchaser, Mr & Mrs Hlokwe to the applicant and to the said property. A copy of the written offer to purchase was signed.
- [20]. In terms of the written mandate the applicant is liable for estate agent's commission if he refuses to sign an offer to purchase for the gross price indicated in the said mandate or any higher amount.
- [21]. The amount of the offer to purchase was in accordance with the mandate of the applicant and the applicant failed, refused or neglected to sign the said written offer to purchase his property and despite demand failed to do so.
- [22]. The applicant in his founding affidavit clearly states that he is not selling the property at all.



- [23]. The third respondent and/or Donovan Brits has complied with all the obligations in terms of the mandate and has introduced a willing and able buyer to the applicant for the amount stated in the mandate.
- [24]. The third respondent and/or Donovan Brits did a "*LUCID CLEAR CREDIT*" credit check to establish if the purchasers would be successful to obtain finance in accordance with their offer to purchase. In accordance with this report the purchaser qualified 100% for the finance to be obtained by themselves.
- [25]. It is submitted by the third respondent and/or Donovan Brits that they complied with all their obligations in terms of the mandate and the applicant is to blame for not signing the offer to purchase resulting in the applicant being responsible for the commissions as set out in the said mandate.
- [26]. It is finally stated that the applicant is indebted to the third respondent in the amount of R108,000.00 (One Hundred and Eight Thousand Rand) being 3% of the purchase price of R3,6 Million (Three Million Six Hundred Thousand Rand).
- [27]. The applicant furthermore now blames the second respondent for his failure to exercise due care, skill and diligence when dealing with the transaction. He states further that the second respondent should have protected his rights by making sure that, in light of the lapsing of the transaction, a new agreement should have been drafted.

[28]. On the 29 July 2015 @ 2:06PM Nicola van der Spuy send an email to the applicant:

***"Dear Mr Mahlangu***

***As telephonically discussed a few minutes ago:***

***Our firm confirms that you are unable to proceed with the purchase of the abovementioned property and therefore the deal is being cancelled.***

***You are in agreement that we can deduct our wasted costs of R18,711.69 and Deo Swanepoel agents commission to the amount of R50,000.00***

***Please reply to this email and state if you agree and if I can proceed.***

***Also please provide me with your banking details so that I can release the balance to you."***

[29]. On the 31<sup>st</sup> July 2015 @ 9:12 the applicant send an email to the second respondent, Mrs Nicola van der Spuy and the subject was: **"ERF NO: 1091 Montana Tuine"**. The contents of the email are:

*“Hi Nicola. as per our telephonic discussion on Wednesday you can proceed to pay Deo Swanepoel R50,000.00 (Fifty Thousand Rand). This is a result of an agreement reached between Donovan Brits and myself. Further deduct the R18,000.00 odd for your cost to date as per our discussion.*

*The differences or rather the balance including the R1,2 Million of my stand I will advice as into which account should it be paid not later than next week Friday.”*

[30]. It seems that the emails clearly demonstrate that the applicant accepted that because of his default the transaction was to come to nothing and part of this acknowledgement is clear from the fact that he agreed that the estate agent and conveyancer attorney could be defrayed from the said deposit. This stands in stark contrast to the Notice of Motion where he changed his stance and concluded that the deposit was a suspensive condition and his inability to pay the same in full had the result that the contract fell through because of non-compliance with the suspensive condition. These two positions are *juxtaposed* and therefore irreconcilable.

[31]. The applicant argued that a dispute had arisen. Firstly that the nature of the transaction as a result of the fact that neither of the offers to purchase expressly describes themselves as an exchange of properties and/or single transaction.



There was also during argument referred to a so-called ***“linked transaction”***. Secondly that the consequences of the applicant’s failure to raise the full deposit of R500,000.00 (Five Hundred Thousand rand) led to the transaction not coming into being.

[32]. The applicant argued further that it is common cause that the first offer to purchase makes the ***“registration of Stand 1060 Waxbill Street, Zambesi Country Estate”*** a precondition to its own enforcement and deliberately entangles its own success in the success of the second offer to purchase.

[33]. The applicant further argued that the applicant’s sole reason for selling Stand 1060 was in order to assist his acquisition of Stand 1091. It is further stated that it is necessary to treat the two offers to purchase as part of a single transaction because in the end ***“[9] Sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document”<sup>1</sup>***.

[34]. It was also contended by the applicant that it is entirely absurd to hold the applicant to such a starkly one sided bargain as the one contended for by all the respondents. According to the applicant the most convincing piece of evidence in support of this absurdity is the fact that the applicant still holds on to the R800,000.00 (Eight Hundred Thousand Rand) purchase price of Stand 1060.

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<sup>1</sup> Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18] and Bothma-Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) at [12].

[35]. There was also an email from moses.mahlangu@yahoo.com addressed to the first respondent and dated 3 August 2015. The court is not going to quote the whole correspondence but only the last and salient portion:

***“When encountering this situation I proposed a few solutions to Donovan which I will restate for your records:***

- 1. If you still want to retain the stand, you are free to do so and the offset amount of 400k should be reinstated because your property will now be sold to a different buyer with its original price. I believe your property will sell as it is a very good property.***
- 2. You be refunded all your expenses to date (money paid for the stand, your transfer costs and if there are any costs incurred on the stand we can discuss that between ourselves, I will try and see how can I assist). All of this will be at my costs.***

***Once again I will like to apologise for all the inconvenience caused to you and hope one day we will be able to engage in a successful deal.”***

[36]. This can hardly be described as the demeanour of somebody that fell foul to a bad deal or a deal where he was cheated. His apologetic tone is that of a man that

made a mistake and that mistake was probably the fact that he could not financially conclude the transaction.

[37]. The court after perusal of the founding papers could not find a single correspondence in which the applicant claimed the R800,000.00 (Eight Hundred Thousand rand) back from the second respondent. It was also the 1<sup>st</sup> respondent's contention that the applicant was most welcome to carry on with the transaction notwithstanding the fact that there was not full compliance with the R500,000.00 (Five Hundred Thousand Rand) deposit requirement. The onus was on the applicant to request repayment of his R800,000.00 (Eight Hundred Thousand Rand). If the second respondent then refused to repay the same he could institute legal proceedings against such attorneys and/or claim such amount back subject of course to a damages counterclaim etc.

[38]. It is the version of the applicant that the first offer to purchase makes express reference to the, second offer to purchase, and taking that into account room is created for importing a tacit term that the two offers to purchase are to be treated as a single transaction<sup>2</sup>.

**WHAT IS THE NATURE OF THE TRANSACTIONS BETWEEN THE APPLICANT AND THE FIRST RESPONDENT AS IT RELATES TO THE SALE OF PROPERTY**

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<sup>2</sup> Pan American Worlds Airways Inc v SA Fire and Accident Insurance Co Ltd 1965 (3) SA 150 (A) at 175 C.



- [39]. The transaction was recorded in two offers to purchase which were concluded on 21 April 2015. In terms of the first offer to purchase the first respondent's property would be purchased by the applicant (**MSM3**) and in terms of the second transaction the applicant would be the seller and the first respondent the purchaser of Stand 1060 (**MSM4**).
- [40]. It is the argument of the applicant that the nature of the agreement, although not expressly described as such, must be seen as an exchange of properties and/or a single transaction. Secondly that the consequence of the applicant's failure to pay the full deposit of R500,000.00 (Five Hundred Thousand rand) had the result that there was non-compliance with a suspensive condition.
- [41]. It is further stated in argument by the applicant that the first offer to purchase makes express reference to the second offer to purchase and therefore room is created for importing a tacit term that the two offers to purchase are to be treated as a single transaction. It is furthermore stated by the applicant that it is not disputed that the applicant's sole reason for selling Stand 1060 was in order to assist acquisition of Stand 1091.
- [42]. The applicant further submitted that the agreement would lead to an absurdity because the applicant has not received the R800,000.00 (Eight Hundred Thousand Rand) from the attorneys in terms of the first offer to purchase and the net effect thereof would be:

- (a) the applicant had received nothing of value for having sold Stand 1060;
- (b) the applicant sold Stand 1060 for a loss as it was sold for R400,000.00 (Four Hundred Thousand Rand) less than its value.

[43]. The applicant therefore submitted that the transaction was an exchange of properties and/or a single transaction, with the sale and registration of each property being conditional on the successful sale and registration of the other. Only a single transaction, so it is argued, could lead to the sensible and business-like result in which the applicant received something of value in exchange for the sale of Stand 1060.

[44]. The applicant argued that it is clear that the transaction was subject to the successful registration of two properties belonging to the applicant. The success of these depended on factors outside the applicant's control, such as finding a suitable buyer for property 1178 Cisticola Avenue, because without money to be generated from the sale of the abovementioned properties, the applicant would not be able to purchase Stand 1091 and the first offer to purchase would fail.

[45]. The first, second and third respondents, *inter alia*, deny that:

45.1. The two sale agreements constituted one transaction of exchange;

45.2. The sale agreement of Stand 1091 was subject to any suspensive conditions;

45.3. Any fraud was present in the conclusion or execution of the two sale agreements.

[46]. The applicant's bare denial of the factual allegations made by the respondents. It is further argued by the respondents that under such circumstances the version of the respondent be accepted.

[47]. The first respondent stated that the applicant had attempted to place a simulated construction on the separate transactions after having being advised by his legal representatives that this was a possible construction which would possibly entitle him to the relief sought.

[48]. The first respondent denied that both sale transactions constituted one transaction.

[49]. The first respondent stated that both sale agreements respectively contain a non-variation clause and that no variation agreements were entered into.

### **INTERPRETATION OF THE SALE AGREEMENTS**



[50]. The applicant stated that the sole reason for selling Stand 1060 was in order to purchase or assist his acquisition of Stand 1091.

[51]. The applicant further submitted that it is necessary to treat the two offers to purchase as part of a single transaction because in the end ***“[a] sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document”***. The court was referred to the matter of **Natal Joint Municipal Pension Fund v Endumeni Municipality**<sup>3</sup>.

[52]. It was further stated by the applicant that the law in this regard is:

***“Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional”***<sup>4</sup>.

[53]. The applicant finally raised the issue that in the case of doubt an agreement must be interpreted against the drafters of the offer to purchase by application of the principles of *contra proferentem* and/or *quod minimum*.

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<sup>3</sup> 2012(4) SA 593 (SCA) at [18] and Bothma-Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) t [12].

<sup>4</sup> Wilkins v Voges 1994 (3) SA 130 (A) 137.

[54]. It is clear in law and specifically the law of contract that the primary consideration should be the intention of the parties. It was further stated in **Hoeksma v Hoeksma**<sup>5</sup>:

*“Exchange differs from sale, historically its precursor and now its counterpart, in the nature of the reciprocal consideration which is promised for the res sold or exchanged: with sale the agreed co-ordinate is essentially the payment of money; with exchange it is the delivery or transfer or another asset. But just as in sale, the res sold must be an identified or identifiable asset (cf Clements v Simpson 1971 (3) SA 1 (A) at 7C – G), so too, in exchange, the commodities exchanged must be capable of proper identification. If not, the transaction, whatever else it might or might not be, would not be an exchange.”*

and

*“In my view, therefor, the oral agreement, for all that it may have involved a measure of give and take was never intended by the parties to constitute or to incorporate a contract of exchange. The intention of parties is a relevant factor in determining the true nature and classification of a contract. (See, for instance, Zandburg v Van Zyl 1910 AD 302 at 309 and, in relation to the distinction between sale and exchange where the consideration is partly in money and partly in kind, see Voet 18.1.22 and Mountbatten Investments (Pty)*

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<sup>5</sup> 1990 (2) SA 893 (A) at 897 A and 897F.

*Ltd v Mahomed 1989 (1) SA 172 (D) at 174 – 8, where the relevant case law is collected and discussed). The present agreement was conceived, not as an exchange, but as a compromise – and, not being an exchange, did not have to comply with the provisions of the Act in order to be valid.”*

- [55]. It was further argued by the first respondent that a written agreement is capable of ready interpretation, that it is not permissible to attach a different interpretation to such a written agreement, as being contrary to the parol evidence rule. See in this regard **Premier FS v Firechem FS (Pty)Ltd 2000 (4) SA 413 (SCA) [2000] 3 All SA 247; [2000] ZASCA 28 at 29:**

*“But I do not think that the case is to be decided upon the basis of Mr Pillay’s views. To do so would be to ignore the parol evidence rule in a fundamental way. It is not for him to tell us what the Board intended, when the Board has expressed its intentions in words that are capable of ready interpretation. One must ask oneself what was expressed to be intended when the acceptance referred to ‘a contract...signed by the province and Firechem’. This expression must be read together with the statement that: ‘This letter of the acceptance constitutes a binding contract...’ If the contract brought into being by this acceptance was to bind, then the further contract envisaged could not be one which contradicted it. What must have been intended was something additional to the tender contract already concluded, such as one dealing with the inducements offered by Firechem, for instance building a*



*factory in the Free State, or conceivably one dealing with the details of the tender contract but not so as to contradict it or the provisions of the Act.”*

- [56]. The correct approach to the admissibility or parol evidence is that stated in this court by Harms DP in **KPMG Chartered Accountants (SA) v Securefin Ltd and Another**:

*“First, the integration (or parol evidence) rule remains part of our law. However, It is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnston v Leal 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) Phipson on Evidence (16) ed 2005) paras 33 – 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd 1985 BP 126 (A) ([1985] SASCA 132 (at [www.saflii.org.za](http://www.saflii.org.za))). Fourth, to the extent that evidence may be admissible to contextualise the document (since context is everything) to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible’ (Delmas Milling Co Ltd v Du Plessis 1955(3) SA*

**447 (A) at 455B – C). The time has arrived for us to accept that there is no merit in trying to distinguish between background circumstances and surrounding circumstances. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms ‘context’ or ‘factual matrix’ ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* 2008 (6) SA 654 (SCA) para 7).”**

- [57]. The court believes that the point of departure would always be the parol evidence or integration rule. It serves an important purpose of ensuring that where the parties have decided that a contract should be recorded in writing, their decision will be respected and the written document will be accepted as the sole evidence of the terms of the contract<sup>6</sup>. The following was expressed by Corbett JA in *Johnston v Leal*<sup>7</sup>:

***“It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract....”***

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<sup>6</sup> The Law of Contract, 4<sup>th</sup> Edition, RH Christie, page 218.

<sup>7</sup> 1980 (3) SA 927 (A) 943 B.

*To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered."*

- [58]. In **Venter v Birchholtz**<sup>8</sup> Jansen JA accepted Wigmore's description of the rule as the "*integration rule*" and his way of looking at it was confirmed by Botha JA in **National Board (Pretoria) (Pty) Ltd v Estate Swanepoel**<sup>9</sup>:

*"The rule is well summarised by Wigmore, Evidence, 3<sup>rd</sup> ed Vol 9 sec 2425, as follows:*

*'This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, ie its formation from scattered parts into an integral documentary unit. The practical consequence of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; They are replaced by a single embodiment of the act. In other word: When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act'."*

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<sup>8</sup> 1972 (1) SA 276 (A) 282.

<sup>9</sup> 1975 (3) SA 16 (A) 26.



- [59]. The key to unlock the intention of the parties therefore should be found in the written word of the agreement.
- [60]. It is clear from both the agreements as **MSM3** and **MSM4** that clause 2 SUSPENSIVE CONDITIONS were cancelled by drawing lines through both of them and inserting N/A which simply means not applicable. The reason for this was to be found in the fact that both agreements did not require bond finance nor were they subject to a sale of an existing property. It is further clear from the contracts that no space was allowed to write in other suspensive conditions under the heading suspensive conditions.
- [61]. The only space allowed to record any additional conditions and/or terms and it can be accepted suspensive conditions, would be under paragraph 20. OTHER CONDITIONS.
- [62]. It is impossible, to find from the text of the agreements, if **MSM3** and **MSM4** should be treated as suspensive conditions or not. It is furthermore impossible to gauge from the text of the agreements if what is described in the heading under "**OTHER CONDITIONS**" should be just normal terms of the contract or if they should be seen as destructive to the agreements if not complied with.
- [63]. There must be some value to the arguments of the applicant that the mere reference to the other transaction in the first transaction carry some suggestion that



the transactions have a common goal. This is found in **MSM3** on page 9 of the said agreement in paragraph 20 OTHER CONDITIONS it is stated:

- “- ***Subject to registration of Property situated at 1178 Cisticoln Avenue, Zambesi Country Estate;***
- ***Subject to registration of stand situated at 1060 Waxbill Street, Zambesi Country Estate;***
- ***R500 000 deposit will be paid in at attorneys within 7 days...”***

[64]. I found value in the matter of *Novartis v Maphil*<sup>10</sup> para 27: ***“This court has consistently held, for many decades, that the interpretive process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties’ intention.”***

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<sup>10</sup> (20229/2014) [2015] ZASCA 111 (3 September 2015)

and at paragraph [30]:

*“Lord Clarke in Rainy Sky in turn referred to a passage in Society of Lloyd’s v Robinson<sup>11</sup> ‘Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language’.”*

- [65]. Also see *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd*<sup>12</sup>:  
*“Business men often record the most important agreements in crude and summary fashion, modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.”*

<sup>11</sup> [1991] 1 All ER (Comm) at 545, 551.

<sup>12</sup> [1991] ZASCA 130; 1991 (1) SA 508 (a) at 514 B – F, where Hoexter JA repeated the dictum of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* 147 LTR 503 at 514.

- [66]. It is found that if the grammatical and ordinary meaning is attached to the term ***“other conditions”*** in **MSM3** and **MSM4** that such reference in fact should be construed to be suspensive conditions. That would have meant that the agreement in fact never came into existence when the applicant failed to pay the deposit. It is furthermore clear from **MSM4** that the purchase price of R800 000 ***“to be paid in with attorneys within 7 days and will be non-refundable”*** might be further indication that the transactions are linked transactions.
- [67]. It is common cause that the abovementioned amount of money was earmarked to be utilized as partial payment of **MSM3** and this might be grounds to find some link between the two agreements **MSM3** & **MSM4**. In other words the applicant sold Stand 1060 (**MSM4**) for R800,000.00 (Eight Hundred Thousand Rand) and agreed to the proceeds being non-refundable and to be utilised as part payment on Stand 1091 (**MSM3**).
- [68]. Therefore it cannot be excluded, looking at the context within the contract, that there were proximity and connectivity between agreements **MSM3** and **MSM4** and to give effect to these principles a more proper interpretation of ***“OTHER CONDITIONS”*** would have been to add to them the term suspensive conditions.
- [69]. Further in using the tools of interpretation to find the true meaning and intention of the parties we need to analyse the wider context and background evidence. If we



do the above we have two agreements signed the same day by the same parties with the involvement of the same conveyancer and taking into account that the sales price of the one transaction **MSM4** must be utilised as part payment in transaction **MSM3**.

[70]. We should also not make light of the fact that the applicant, on his version, sold a property for R800,000.00 (Eight Hundred Thousand Rand) whilst in truth it was worth R1,200,000.00 (One Million Two Hundred Thousand Rand). The underlying reason being the fact that both parties in transactions **MSM3** and **MSM4** decided to do that to save on transfer duty and other fees. This court does not condone these activities but are not going to punish only one of the parties. The absurdity is the fact that the property (Stand 1060) belongs to somebody else and the purchase price is non-refundable. In other words the applicant is out of pocket to the amount of the property [Either R1,200,000.00 (One Million Two Hundred Thousand Rand) or R800,000.00 (Eight Hundred Thousand Rand) in value] and the money of R800,000.00 (Eight Hundred Thousand Rand) (purchase price for the abovementioned property). This court does not think for one moment that the applicant contracted on this basis or that he foresaw this specific outcome.

[71]. The court finally deals with the rules and/or techniques of interpretation.

1). Equitable interpretation



It is trite that the unambiguous wording of a contract must not be departed from on equitable grounds.<sup>13</sup> If however the wording is ambiguous as in this case in terms of the conditions then the court is allowed to intervene. In **Rand Rietfontein Estate Ltd v Cohn**<sup>14</sup> De Wet JA quoted with approval these words from Wessels:

***“The court will lean to that interpretation which will put an equitable construction upon the contract and will not, unless the intention of the parties is manifest, so construe the contract as to give one of the parties an unfair or unreasonable advantage over the other.”***

[72]. It is important that an agreement must be so interpreted that it does not give one party an unfair or unreasonable advantage over the other.

[73]. The applicant also argued that the construction *contra proferentem* benefits him. It was argued by counsel for the applicant that the agreements were presented to him by the estate agent (third respondent). It is trite that this rule is not concerned with ascertaining the common intention of the parties. They, the *contra proferentem* or *contra stipulatorem*, are only to be applied as a last resort, when all methods of ascertaining the common intention of the parties have failed, in order to cut the

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<sup>13</sup> Olivier v National Manganese Mines (Pty) Ltd 1996 (1) SA 669 (T) 672 B – C.

<sup>14</sup> 1937 AD 317 330 – 331.

Gordian knot<sup>15</sup>. I think that even if this is to be considered that it would indeed favour the applicant.

[74]. The court finds:

1. The agreements pertaining to the sale of Stands 1060 and 1091 (**MSM3** & **MSM4**) must be considered as linked transactions.
2. The failure by the applicant to comply with the full deposit in terms of the transaction relating to Stand 1091 (**MSM3**) had the effect that there was non-compliance. The whole agreement was subject to the performance in terms of the deposit of R500,000.00 (Five Hundred Thousand Rand).
3. It is clear from the wording of the transaction relating to Stand 1060 (**MSM4**) that the purchase price of R800,000.00 (Eight Hundred Thousand Rand) must be a non-refundable deposit that should be utilised as part payment of stand 1091 (**MSM3**) and because of this nexus the agreements are linked.
4. It is further found that, because of the non-compliance of the deposit, that both agreements must be found to be *ab initio* of no effect and there should be restitution even though there was full compliance and effect to the sale of Stand 1060.

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<sup>15</sup> See The law of contract, 4<sup>th</sup> Edition, RH Christie, page 255, (1).

5. Should this not be done it would lead to dire consequences for the applicant that could not have been foreseen by the applicant.
6. The counterclaim by the third respondent in the amount of R108,000.00 (One Hundred and Eight Thousand Rand) must succeed.
7. The payment of R18,711.39 (Eighteen Thousand Seven Hundred and Eleven Rand and Thirty Nine Cents) to the second respondent must stand because such payment was made by the applicant to the second respondent by agreement.
8. The payment of R50,000.00 (Fifty Thousand Rand) paid to the third respondent must also stand because such payment was made by the applicant to the second respondent by agreement.
9. The property known as Stand 1060 must be returned to the applicant and the purchase price of R800,000.00 (Eight Hundred Thousand Rand) plus interest, held by the second respondent must be returned to the first respondent.

[75]. It is ordered as follows:

1. Both sale agreements **MSM3** and **MSM4** are *ab initio* cancelled and of no effect.
2. The property known as Stand 1060 must be transferred back into the name of the applicant and the applicant must pay all the costs to effect such transfer back to him.
3. The first respondent is ordered to sign all the documentation required in order to effect the transfer of the property known as stand 1060, Montana Tuine, Ext 46, situated at Waxbill, Zambesi Country Estate, Pretoria back into the name of the applicant or should he refuse to sign the necessary documentation, the Sheriff of the High Court is authorised to sign all necessary documentation on behalf of the 1<sup>st</sup> respondent in order to comply with this court order.
4. The second respondent must pay the purchase price presently held in his trust account back to the first respondent including any interest so accumulated.
5. The deposit of R250,000.00 (Two Hundred and Fifty Thousand Rand) paid by the applicant into the trust account of the second respondent must be dealt with as follows:



- 5.1. Payment of R18,711.39 (Eighteen Thousand Seven Hundred and Eleven Rand and Thirty Nine Cents) to the second respondent, unless such amount has already been paid;
- 5.2. Payment of R50,000.00 (Fifty Thousand Rand) and R108,000.00 (One Hundred and Eight Thousand Rand) to the third respondent unless such amounts has already been paid;
- 5.3. The balance must then be paid back to the applicant including any interest so accumulated.

[76]. All parties to pay their own costs except in terms of the counterclaim by the third respondent where the applicant must pay the costs of the counterclaim on a party party scale.

  
**HATTINGH AJ**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**