

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 40781/2018

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO
2.OF INTEREST TO OTHER JUDGES: NO
3.REVISED NO

Judge Dippenaar

In the matter between:

RIDWAN THOKAN

Plaintiff

And

MARTIN ANDRE KRIEGLER

First Defendant

PAM GOLDING PROPERTIES (PTY) LTD

Second Defendant

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 13th of September 2022.

DIPPENAAR J:

[1] The genesis of this action is a written sale agreement concluded between the plaintiff and the first defendant pertaining to an immovable property in Westcliff ("the property"). The estate agent involved in the transaction, Ms Dods, is employed by the second defendant ("PGP".) The plaintiff instituted action against both the first defendant and PGP for repayment of the deposit of R600 000 paid by him under the agreement.

[2] The first defendant in turn brought a claim in convention against PGP for release of the deposit to him on the ground that it, in breach of the agreement, refused to release the deposit to him and that he was entitled to the deposit.

[3] A settlement agreement was concluded between the parties shortly before commencement of the trial in terms whereof it was acknowledged that the claims of the plaintiff and the first defendant constituted adverse and competing claims and PGP abided the court's decision. The plaintiff and first defendant waived their claims for mora interest against PGP and agreed that no costs order would be made as between PGP and the plaintiff and the first defendant respectively. PGP did not further participate in the proceedings.

[4] The plaintiff, the first defendant and Ms Dods testified at the trial. The main evidence in chief of the first defendant and Ms Dods was received in evidence under s38(2) by agreement between the parties. Upon consideration of all the relevant factors, I concluded that it was fair to allow such evidence on affidavit¹.

¹ Madibeng Local Municipality v Public Investment Corporation 2018 (6) SA 55 (SCA) at [26]

[5] The relevant background facts were not contentious. Prior to the conclusion of the agreement the first defendant had on 27 February 2018 rejected a lower offer made by the plaintiff to purchase the property. The agreement was signed on 13 March 2018 and an addendum thereto on 14 March 2018.

[6] The agreement contained a suspensive condition in the following terms²:

“6.1 This Agreement shall be subject to the suspensive condition (“Suspensive Condition”), listed below:

6.1.1 Mortgage financing

6.1.1.1 Subject to clauses 6.1.1.2 to 6.1.1.4 (both inclusive), the Purchaser obtains approval for a loan to finance the amount of R1 500 000.00 (One million five hundred thousand rand) against security of a mortgage bond registered over the Property and on such terms and subject to such conditions as are ordinarily imposed by mortgage lending financial institutions (“Mortgage Lender”), by no later than the 22nd day of March 2018.

6.1.1.2 The Suspensive Conditions set out in clause 6.1.1.1 shall be deemed to have been fulfilled on the date upon which the Mortgage Lender issues a written loan quotation or similar documentation approving or offering the loan sought (“Loan Approval Document”) to the Purchaser.

6.1.1.3 The Purchaser undertakes to use his/her/its best efforts and endeavours to qualify for such loan and knows of no factors which might prevent a Mortgage Lender from issuing the Loan Approval Document. The Purchaser further undertakes to provide all information required to submit the loan application within 5 (five) business days after being called upon to do so.

6.2 The Suspensive Condition has been inserted for the benefit of the Purchaser who/which may waive the Suspensive Condition by giving notice in writing to the Seller at any time prior to the date for fulfillment or waiver.

² Clause 6.1.1.4 was deleted from the agreement.

6.3 Subject to clause 6.1.1.4, the Parties may only extend the due dates for fulfillment or waiver of the Suspensive Condition by written agreement.

6.4 The Purchaser shall do all things reasonably necessary to procure the timeous fulfillment of the Suspensive Condition.

6.5 If the Suspensive Condition is not fulfilled or waived by the due date therefor then this Agreement shall become null and void and the Deposit and any interest accrued thereon, shall be repaid in full to the Purchaser within 5(five) business days after such date.”

[7] The plaintiff paid the deposit of R600 000 here in issue. On 19 March 2018 an email was sent by Mrs Thokan to Ms Dods requesting an extension of the period to obtain bond approval. The email stated:

“Please note that it would be near on impossible to get the 22th of March 2018 (this date was included in the first offer as per the attached email on the 26/02/2018). Now that the seller has agreed on the agreed conditions, we would need to apply, which we have forwarded on to our banker today. Please allow the required time of 3-4 weeks to get this in place, please note the public holidays are going to impact the dates”.

[8] On 31 May 2018, the plaintiff signed a waiver, which was also signed by Mrs Thokan, in the following terms:

“Waiver

I/we the undersigned Ridwaan and Shireen Thokan do hereby waive the benefit of clause 6.1 contained in the agreement of sale ...dated 13 March 2018.

I hereby confirm that the aforementioned Agreement is therefore not subject to the above suspensive condition/s, and acknowledge that I know and fully understand the contents and implications thereof.

[9] At a meeting on 2 August 2018 between the plaintiff, the first defendant and his wife, the plaintiff advised that he was not proceeding with the transaction and discussions ensued regarding the deposit. The first defendant viewed this as a repudiation and addressed a breach notice in terms of the agreement to the plaintiff on

28 August 2018. By way of letter dated 30 August 2018, transmitted to the plaintiff on 5 September 2018, the first defendant formally cancelled the agreement.

[10] The central issue is which of the plaintiff (as purchaser), or the first defendant (as seller) is entitled to payment of the deposit.

[11] The plaintiff's case was that as the suspensive condition in the agreement was not fulfilled, he is entitled to repayment of the deposit³ in terms of the agreement.

[12] The first defendant raised three special pleas and various defences to the plaintiff's claim. The special pleas are: (i) lack of *locus standi* due to non-joinder of Mrs Thokan, (ii) no joint liability as the first defendant never had the deposit and (iii) misjoinder of Mrs Thokan. The defences are: (i) breaches of contract by the plaintiff resulting in the fictional fulfilment of the suspensive condition, (ii) estoppel and (iii) waiver. In his claim against PGP the first defendant claimed payment of the deposit under clause 15.2⁴ of the agreement.

[13] The first and third special pleas raised by the first defendant are related and both predicated on the contention that the plaintiff and his wife, Mrs Shireen Thokan, were joint purchasers and, as Mrs Thokan was not a party to the proceedings, the plaintiff lacked *locus standi* and there was a misjoinder of Mrs Thokan.

[14] Although the exact role and involvement of Mrs Thokan in the transaction remained unclear and she was not called as a witness, I am not persuaded that the evidence established that she was a joint purchaser.

³ Under clause 6.5 of the agreement, which provides: "*If the Suspensive Condition is not fulfilled or waived by the due date therefor then this Agreement shall become null and void and the Deposit and any Interest accrued thereon, shall be repaid in full to the Purchaser within 5 (five) business days after such date.*"

⁴ It provides: "*Where the Purchaser is the Defaulting Party and fails to remedy the breach timeously, the Seller shall be entitled, subject to applicable law and PGP's right to first exercise its right to claim and deduct any amounts due to it in terms of clause 13.4, to retain the Deposit and any other monies paid by the Purchaser on account of the Purchase Price as a cancellation penalty.*"

[15] The confusion on the issue mainly emanated from the documents emanating from PGP. The documentation signed by Mrs Thokan was “*as purchaser’s spouse*” rather than as a joint purchaser. The evidence established that the Thokans were married out of community of property. Moreover, the sale agreement was only signed by the plaintiff as purchaser and both the plaintiff and the first defendant admitted in evidence that they intended to contract with each other. Ms Dod’s evidence on the issue established that she simply assumed the Thokans were joint purchasers.

[16] I conclude that the first and third special pleas must fail. It is apposite to deal with the second special plea later.

Does the doctrine of fictional fulfilment apply?

[17] In his particulars of claim, the plaintiff averred that he complied with his obligations under the sale agreement and that he was entitled to payment of the deposit in terms of clause 6.5 of the agreement because the suspensive condition failed.

[18] The first defendant’s case was squarely predicated on the contention that the suspensive condition should be deemed to be fulfilled as the plaintiff breached various clauses of the agreement, being clauses 6.1.1.3, 6.4 and the warranty in clause 14.2.

[19] I have already referred to the provisions of clause 6 of the agreement. The agreement also contained the following warranty by the plaintiff:

“14.2 It is not aware of the existence of any fact or circumstance that may impair its ability to comply with all of its obligations in terms of this Agreement; and”

[20] It was common cause that the plaintiff did not procure the necessary financing by 22 March 2018, the date inserted on the agreement for fulfilment of the suspensive condition.

[21] It is trite that a party relying on the fulfilment of a condition must establish it.⁵ It is further well established that when a contract of sale is subject to a true suspensive condition, no contract exists unless and until the condition is fulfilled and no reliance can be placed on the terms of the contract⁶. The agreement does not provide that a breach of those terms would result in the agreement being fulfilled.

[22] The general principle was enunciated thus by Wallis AJA in *Mia v Verimark Holdings (Pty) Ltd*⁷:

“No action lies to compel a party to fulfil a suspensive condition. If it is not fulfilled the contract falls away and no claim for damages flows from its failure. In the absence of a stipulation to the contrary in the contract itself, the only exception to that is where the party has designedly prevented the fulfilment of the condition”.

[23] For the first defendant to succeed he must thus establish both the breaches of the agreement contended for and that the plaintiff intentionally prevented the fulfilment of the condition. The first defendant bore the onus to prove that the plaintiff, by deliberate commission or omission prevented fulfilment of the suspensive condition “... *with the intention of avoiding its obligations under the contract*”⁸. Put differently, that the breach of duty by the defendant was “*committed with the intention of frustrating fulfilment of the conditions*”⁹.

[24] The first defendant's case falters at the requirement that the plaintiff intentionally prevented the fulfilment of the condition. As explained by Cloete JA in *Lekup Prop Co No 4 (Pty) Ltd v Wright*¹⁰:

“[6] I propose dealing first with the law relating to fictional fulfilment. The remedy is an equitable one that had its origins in Roman law, that View Parallel Citation was accepted in Roman-Dutch law and that

⁵ *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A)

⁶ *Corondimas v Badat* 1946 AD 548; *Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch* 2011 (2) SA 525 (SCA) para [17]

⁷ [2010] 1 All SA 280 (SCA) at para [11]

⁸ *Lekup Prop Co no 4 (Pty) Ltd v Wright* [2012] 4 All SA 136 (SCA)

⁹ *Scott v Poupard* 1971 (2) SA 373 (A) See quotation in para 7 of *Lekup*, infra.

¹⁰ 2012 (5) SA 246 (SCA) para [7]

was first analysed by this court in two decisions handed down in 1924, namely, *Gowan v Bownern* 1924 AD 550 and *MacDuff and Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573. In the latter case, Innes CJ succinctly stated the position as follows: “[B]y our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfilment, be bound by an obligation, and who has designedly prevented its fulfilment, unless the nature of the contract or the circumstances show an absence of *dolus* on his part.” For present purposes, two aspects require emphasis: the meaning of *dolus*, and the requirement that nothing short of *dolus* will suffice.

[7] *Dolus* in this context does not bear its usual meaning of deliberate wrongdoing or fraudulent intent but a more specific meaning, namely, deliberate intention of preventing the fulfilment of the condition in order to escape the obligation subject to it. In *Gowan v Bownern* (*supra*), Wessels JA said: “The Court must hold that if a contract is made subject to a casual condition then if the person in whose interest it is that it should not be fulfilled deliberately does some act by which he hinders the accomplishment of the condition, he is liable as if the condition had been fulfilled. But a party cannot be said to frustrate a condition unless he actively does something by which he hinders its performance. There must be an intention on his part to prevent his obligation coming into force. There is nothing to prevent his folding his arms and allowing events to take their course.... The nature of the contract is always an important element. In some cases the person benefitted by the non-performance of the condition can sit still and do nothing to assist in its fulfilment; in other cases it is his legal duty to assist in the condition being fulfilled, and in all cases if he deliberately and in bad faith prevents the fulfilment of the condition in order to escape the consequences of the contract the law will consider the unfulfilled condition to have been fulfilled as against the person guilty of bad faith.” In *Scott and another v Poupard and another* 1971 (2) SA 373 (A) at 378H [also reported at [1971] 2 All SA 539 (A) – Ed] Holmes JA, who delivered the majority judgment, said that the principle underlying the doctrine of fictional fulfilment may be stated thus: “Where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him.”

[8] If the intention was to escape the obligation, it matters not whether the person concerned was actuated by the purest or the basest of motives, because the doctrine is concerned with intention, not motive.

[9] The other point that requires emphasis is that for the doctrine to be applied to the action or inaction of a contracting party, what must be proved is intention in the sense just discussed – negligence does not suffice. That is apparent from a number of judgments delivered in this Court. In *Gowan v Bownern* (*supra*), Innes CJ said: “It is difficult to see how the principle of fictional fulfilment of a condition can

operate on the mere ground of culpa. It will I think be found that in cases in which there may be duty on the promissor to take any active steps to bring about the fulfilment of a condition, that duty arises either from a term of the contract itself, or because the omission of such steps will render the happening of the condition impossible. In the last mentioned case the neglect to take the steps will generally be due to a desire to defeat the condition, and the doctrine would apply." ...

[25] The first defendant, relying on *Scott and Another v Poupard and Another*¹¹ argued that the intention to frustrate could be inferred from the facts surrounding the plaintiff's breaches of the agreement already referred to. No direct evidence was presented and the first defendant relied on circumstantial evidence and inferential reasoning.

[26] I agree with the first defendant that by the time the plaintiff and Mrs Thokan decided to buy a property in Houghton property in July 2018, the plaintiff may well have formed the intention to frustrate the agreement. But by then however, the time for fulfilment of the suspensive condition had long come and gone and the agreement was accordingly null and void. I am thus not persuaded that the intention to frustrate can be inferred from the evidence.

[27] The intention of all parties at the time the agreement was concluded and in the period thereafter, was for the agreement to continue. This is corroborated by the plaintiff's request for an extension in Mrs Thokan's email of 19 March 2018 and the informal attempts at procuring more time extensions, albeit not in accordance with the agreement. Had the plaintiff's intention been to frustrate the agreement, those extensions would not have been sought. The common thread in the evidence was that the parties all wanted the sale to continue at least until the plaintiff made an alternative decision and the 7th Street Houghton property was purchased during July 2018. These issues only came to the fore at the meeting of 2 August 2018.

[28] The plaintiff's failure to advise the first defendant about his difficulties was aimed at keeping the agreement in place, rather than to scupper the agreement. Thus, even if

¹¹ [1971] 2 All SA 538 (A)

the plaintiff's silence and omissions were deliberate, it cannot be concluded that it was aimed at frustrating the agreement, quite the contrary. The parties all conducted themselves as if the agreement was valid, up to the time of the meeting at the first defendant's home on 2 August 2018. It was only after Mrs Thokan purchased the Houghton property on 23 July 2018 that it was clear the plaintiff did not want to proceed with the agreement.

[29] As explained in *Lekup*¹²:

"Where the non fulfilment of the condition is due to the deliberate and calculated action of the debtor, dolus will ordinarily be present. But the nature of the contract or the established intention of the parties may conceivably negate it even then- and in such a case the doctrine would not operate."

[30] In my view, applying this principle, the evidence did not establish that the plaintiff, by deliberate commission or omission, prevented the necessary finance being granted, with the intention of avoiding his obligations under the agreement¹³ or that the plaintiff intended to frustrate the sale agreement.

[31] It follows that the doctrine of fictional fulfilment does not apply and this defence must fail.

[32] The next defence raised was that of estoppel. The first defendant's case was that the plaintiff should be estopped from relying on the lapsing of the sale agreement or non-fulfilment of the suspensive condition as the plaintiff and Mrs Thokan at all times from 22 March 2018 to 2 August 2018 represented that the agreement was valid to induce the first defendant to perform all its obligation thereunder and not to market or sell the property to any other purchasers, thus resulting in his prejudice.

¹² Para [28]

¹³ Lekup para [12], [24]

[33] The first defendant bore the onus¹⁴ to prove he requirements for estoppel by representation¹⁵, which in sum are: a representation made by a principal, not an agent, by words or conduct in such a way that the principal would expect someone to rely on it; reasonable reliance on the representation by the party relying on the representation and consequent prejudice to that party. Negligence is usually a requirement¹⁶. The representation must be one of an existing fact¹⁷.

[34] The test in relation to a representation made by conduct is whether the *representor* should reasonably have expected that the *representee* might be misled by his conduct and if the *representee* acted reasonably in construing the representation in the sense in which the *representee* did¹⁸.

[35] As the principle of estoppel by representation is based on considerations of fairness and justice and aimed at preventing prejudice and an injustice, it may be open to a court to disallow the defence to prevent an injustice.¹⁹

[36] The plaintiff challenged the existence of a representation, whether reliance on such representation was reasonable and causation.

[37] The plaintiff's version was that he relied on Ms Dods for the extension and was guided by her and the first defendant. All parties continued as if the agreement was valid and had been validly extended on a mutual understanding. Under cross examination, the first defendant conceded that nobody checked whether the extension had been done properly in accordance with the agreement. It was clear that he too, relied on Ms Dods. He also conceded that it is possible that everybody made an assumption that the contract was valid and may have simply been wrong about that.

¹⁴ Blackie Swart Argitekte v Van Heerden 1986 (1) SA 249 (A) at 260

¹⁵ Pangbourne Properties Limited v Basinview (381/10) [2011] ZASCA 20 (17 March 2011) para [15]

¹⁶ Stellenbosch farmers Winery Ltd v Vlachos t/a Liqour Den 2001 (3) SA 597 (SCA)

¹⁷ Alfred Mc Alpine & Son (Pty) Ltd v t/vl Provincial Administration 1977 (4) SA 310 (T) 335A-B

¹⁸ B7B Hardware Distributors (Pty) Ltd v Administrator, Cape 1989 (1) SA 957 (A)

¹⁹ MEC for Economic Affairs, Environment and Tourism v Kruisenga [2010] 4 All SA 23 (SCA) para [21]

[38] It is apposite to refer to *Africast v Pangbourne Properties Ltd*²⁰, where in circumstances similar to the present, the defendant over several months acted as if there was a binding contract, which he later established was wrong as the agreement had lapsed. The relevant principles were enunciated thus:

“ [44] Thus, so it is argued on defendant's behalf there was no "deception" that misled the plaintiff, and without a deception and reasonableness in the estoppel asserter's reliance on the deception, there can be no room for estoppel to be invoked (see *Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd* (supra) at paragraphs [16]–[17]; and *Rabie & Sonnekus The Law of Estoppel in South Africa*, Butterworths (2 ed, 2000) at 63 paragraph 5.1, where the authors state: "In general, the premise applicable in all circumstances is that the estoppel assessor can only successfully rely on estoppel if the reasonable person in the street, in the position of the estoppel assessor would also have been misled by the conduct on which the estoppel is founded. To determine whether the reasonable person would have been misled, it might be helpful to answer the applicable question in the negative: The reasonable person would have been misled if it can be ascertained that the circumstances were such that they would have put the reasonable person on his guard and compelled him to ask more questions before accepting the allegations or representations of the representor at face value. If in reality the estoppel assessor had under the same circumstances neglected to ask for further explanation or had not been on his guard due to the fact that he tends to be more gullible than reasonable person would have been, then the conduct of the representor is not to objectively be classified as unreasonable or wrongful, and the reliance on estoppel must fail. It has already been emphasised that the doctrine of estoppel cannot be misused to protect the naïve or gullible against his own stupidity. Even the man in the street must take cognisance of facts that may have a bearing on his legal position. Formulated otherwise, this qualification is also referred to when it is said that the reliance on representation must be reasonable. The person who bases an estoppel on a representation made to him, must establish that he reasonably understood the representation in the sense contended for by him. It follows that he has to prove that his reliance on the representation was reasonable. He will therefore have to show that he did not know that the representation was untrue or incorrect, that he did not have information which put him upon enquiry, or, if he did, that he exercised reasonable care and diligence to learn the truth, and, generally that he was not misled by a lack of reasonable care on his part" (see too *LAWSA*, Volume 9 (2 ed) (2005); *Estoppel* (Rabie & Daniels) at paragraph 657).

[45] Moreover, in my view, it seems plain that a "misrepresentation" that qualifies to be a misrepresentation for the purposes of an estoppel must be a misrepresentation of a fact, ie the estoppel denier must be shown to have initially told or insinuated by conduct, a falsehood or induced a reasonable

²⁰ [2013] 2 All SA 574 (GSJ)

*belief in a falsehood. In this case, no misrepresentation of a fact is relied upon, ie that the suspensive condition was met. The defendant's "belief" that it had a binding agreement, as evidenced by its common cause conduct, is invoked as the "misrepresentation". This, in my view, is not good enough. An estoppel cannot be raised against a party who says that it thought it had a contract but, it turns out that, in law, it was wrong to think so. In *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 56H–57D it was held: ..."The following statement of the doctrine of estoppel by Spencer Bower Estoppel by Representation para. 15, was cited, apparently with approval, by WATERMEYER, J.A. (as he then was) in *Union Government v Vianini Ferro Concrete Pipes (Pty.) Ltd.*, supra at p. 49: 'Where one person (the representor) has made a representation to another person (the representee) in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time and in the proper manner objects thereto.'*

*In amplification of this statement it may be emphasized that the representation must relate to a statement of an existing fact (see *Baumann v Thomas*, supra at p. 436; *Spencer Bower*, pp. 39–48; *Halsbury*, 3rd ed. vol. 15 pp. 224–5) and that a mere statement as to, for instance, a future intention will not found an estoppel (see *Kelsen v Imperial Tobacco Co. Ltd.*, 1957 (1) A.E.R. 343). The representation may be made expressly or by conduct. It must be made with the intention that it should be acted upon in the manner in which it was acted upon or the conduct of the representor must be such as to lead a reasonable man to take the representation to be true and believe that it was meant that he should act upon it in that manner (see *Halsbury*, 3rd ed., vol. 15 p. 228; *Service Motor Supplies (1946) (Pty) Ltd v Hyper Investments (Pty) Ltd.*, 1961 (4) SA 842 (AD) at p. 849). ... If he knows, or believes, that the real facts are not as stated in the representation, he cannot be heard to say that he was induced to act to his prejudice on the faith of the representation. (*Spencer Bower*, paras. 137, 138, 199; *Halsbury*, 3rd ed. vol. 15 pp. 229–30; cf. *Angehern & Piel v Federal Cold Storage Co. Ltd.*, 1908 T.S. 761)" (also see *Simpson v Selfmed Medical Scheme* 1992 (1) SA 855 (C) at 866D).*

[46] At best for the plaintiff, the ostensible non-fulfilment of the suspensive condition or the late giving of the notice gave rise to a patent uncertainty about the effect of the contract. It was obliged to take steps to clarify that ambiguity in order to be regarded as having acted reasonably in the circumstances. It did not (cf *Concor Holdings (Pty) Limited t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA) [also reported at [2004] JOL 12738 (SCA) – Ed] at especially 496D)."

[39] On the undisputed facts, and applying these principles, it cannot in my view be concluded that the plaintiff made a representation or that the alleged representation expressed an existing fact. Rather he expressed a belief, which was shared both by the first defendant and Ms Dods.

[40] Moreover, the first defendant relied on what Ms Dods told him regarding the extension of the agreement, rather than on any representations made by the plaintiff. I am further not persuaded that the first defendant acted reasonably in relying on the representation made to him. The contract was readily available to all involved and the requirements of clause 6.3 pertaining to an extension were available for all to read. A simple investigation would have revealed what was required.

[41] The wording of clauses 6.2 and 6.3 are clear²¹. To extend the agreement, either a prior written waiver was required or a written agreement signed by both parties to extend. Ms Dod's evidence seeking to elevate the email correspondence between her and the Thokans into an extension in writing, does not pass muster. The simple fact is that it was Ms Dod's responsibility to extend the agreement. Both the plaintiff and first defendant relied on her to do so and she was mandated to do so by the first defendant. They also relied on her advices that the agreement had been extended. Ms Dods in cross examination conceded that there was no representation by the plaintiff as to the extension of the agreement.

[42] In those circumstances it cannot be concluded that the first defendant's reliance was not actuated by any external influence or a factor other than the representation allegedly made by the plaintiff.²²

[43] In my view, the requirements for estoppel to operate such that the agreement was enforceable against plaintiff have not been met. It follows that the estoppel defence must fail.

²¹ Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash 2015 (2) SA 118 (SCA) par [13]

²² Standard Bank of SA Ltd v Stama (Pty) Ltd 1975 (1) SA 730 (A) 743; Stellenbosch Farmers Winery supra

[44] The first defendant also raised waiver as a defence. It is trite that the onus rests on a party that invokes a waiver²³ and requires it to be shown that the plaintiff with full knowledge of his rights decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.

[45] I have already referred to the provisions of clause 6 of the agreement which deal with the suspensive condition and the requirement in clause 6.3 requiring a written extension of the agreement. I have also referred to the waiver dated 31 May 2018.

[46] As there was no written agreement for an extension before the agreed deadline date, the agreement lapsed and a unilateral waiver could not reinstate it²⁴. The plaintiff argued that the waiver was thus of no consequence.

[47] The first defendant sought to overcome this difficulty by arguing that upon a proper interpretation of “*the benefit of clause/s 6.1*” in the waiver of 31 May 2018, there are two benefits envisaged. The first, to be released from the obligations under the agreement, which can only be waived on or before the due date for performance. The second, the right under clause 6.5 to the repayment of the deposit, which does not lapse after the due date for satisfaction of the suspensive condition but necessarily arises only after that date and which arises precisely because the agreement has become null and void.

[48] Adopting the golden rules of interpretation²⁵ and on considering clause 6 in context and on a purposive interpretation, I agree with the first defendant’s interpretation that clause 6.1 cannot be viewed in isolation, but must be considered in the context of all the provisions of clause 6. The very purpose of a waiver of the entitlement to rely on

²³ *Laws v Rutherford* 1924 AD 261 at 263

²⁴ *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A); *Trans-Natal Steenkoolkorporasie Bpk v Lombard* 1988 (3) SA 625 (A) at 640

²⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

the non-compliance with the suspensive condition is related to the right to claim back the deposit.

[49] However, even if it is accepted that the benefit in clause 6.1 includes the right to claim back the deposit as created in clause 6.5, this does not avail the first defendant as clause 6 must also be interpreted in the context of clause 6.3. Although clause 19.5²⁶ of the agreement envisages signature of a waiver by one of the parties, on a proper interpretation of clause 6 of the agreement, read in context, clause 6.3 is still applicable to a waiver of the suspensive condition, which specifically requires the extension of any due date for waiver by written agreement between the parties.

[50] The waiver was not signed by the first defendant and the period within which waiver could be effected was not extended. The waiver document of 31 May 2018 thus does not avail the first defendant as it remains a unilateral waiver which could not extend the period within which the waiver could be effected.

[51] Inasmuch as it was Ms Dods's obligation to ensure the agreement was extended in accordance with clause 6.3 it was also her obligation to ensure that any waiver complied with clause 6.3. The waiver of 31 May 2018 did not comply with the necessary requirements.

[52] I conclude that even if the plaintiff had signed the waiver with full knowledge of his rights, which he conceded in cross examination, the waiver did not comply with clause 6.3 of the agreement. It follows that the waiver defence must fail.

[53] As the defences of fictional fulfilment, estoppel and waiver fail, it follows that the plaintiff is entitled to repayment of the deposit in terms of clause 6.5 of the agreement.

²⁶ The clause provides: "*19.5 No waiver*
No waiver by any party of any right arising out of or in connection with this Agreement will be of any force or effect unless in writing and signed by such party. Any such waiver will be effective only in the specific instance and for the purpose given."

[54] I turn to the first defendant's second special plea of no joint liability, in which the issue was raised whether the plaintiff has any additional or independent claim to the deposit under the deed of sale against the first defendant. The plaintiff's relief claimed was framed as:

"An order directing the defendants to repay the sum of R600 000 to the plaintiff together with interest....."

[55] The plaintiff's claims against the first defendant and PGP had not been instituted in the alternative, but judgment was sought against the first defendant and PGP jointly.

[56] The first defendant sought the dismissal of the plaintiff's claim, together with costs on the scale as between attorney and own client²⁷ on the basis that he was not and had never been in possession of the deposit and the plaintiff should have withdrawn his claim against the first defendant together with a tender for costs.

[57] At the hearing, it was common cause that the first defendant was never in possession of the deposit. The plaintiff's evidence was that he did not know which of the defendant's was in possession of the deposit and only established during the course of the proceedings that the deposit was in possession of PGP.

[58] The plaintiff's pleadings were however never amended, even after becoming aware that the first defendant was never in possession of the deposit. This would have become self-evident after the first defendant delivered his affidavit resisting summary judgment.

[59] During the hearing, the plaintiff's counsel conceded that all the plaintiff could ask for is an order directing the second defendant to repay the R600 000 to the plaintiff and that a finding could not be made against the first defendant to repay the deposit. It was

²⁷ Under clause 15.3 of the agreement

however argued that the claim against the first defendant was effectively a *plus petitio* which could be ignored²⁸.

[60] That argument however ignores the fact that the first defendant was put to the substantial expense of defending the action and resisting a summary judgment application in respect of which the costs were reserved. Seen from the perspective of the first defendant, the claim against him is not superfluous and he was obliged to defend the action to avoid default judgment being taken against him.

[61] The agreement in its express terms provided for the deposit to be paid to and controlled by PGP²⁹ and did not impose any obligation on the first defendant to pay, repay or refund the deposit plus interest to the plaintiff. The obligation in relation to the deposit in terms of clause 6.5 is an obligation which must be performed by the holder of the deposit. The same would apply in relation to the seller's entitlement to retain the deposit under clause 15.2 of the agreement. It was undisputed that the plaintiff had paid the deposit to the second defendant.

[62] Ultimately the issue crystallises into a costs issue as dismissal of the plaintiff's claim against the first defendant would not be dispositive of the entire matter or resolve the central issue between the parties of who is entitled to the deposit.

[63] The second special plea must thus be considered in the context of an appropriate costs order. The first defendant argued that costs should be granted as provided in clause 15.3 of the agreement, which provides:

"15.3 Should a party choose to enforce rights by way of legal proceedings then the parties agree that any costs awarded will be recoverable on the scale as between attorney and own client,

²⁸ Dhalrumpal Transport (Pty) Ltd v Dhalrumpal 1956 (1) SA 700 (A) 705-706

²⁹ Under clause 5.2, which provides: "*The deposit shall be paid into the trust account of PGP at Standard Bank of South Africa Limited, with account number 071 864 504 and branch code 025109, and held in an interest bearing account for the benefit of the Purchaser until receipt of written notification from the Conveyancers of the lodgement of the Transfer documents ("Lodgement"), at which point and subject to clause 13.3 and the remaining provisions of this Agreement, such Deposit plus any interest earned thereon shall be paid over to the Conveyancers less an amount equal to the brokerage in clause 13.2*".

unless the court specifically determines that such scale shall not apply, in which event the costs will be recoverable in accordance with the scale of costs so ordered."

[64] I have concluded that the second special plea has merit and that payment should not have been sought from the first defendant nor should summary judgment have been sought against him. Payment should rather have been claimed from PGP.

[65] As such the special plea must be upheld and the plaintiff should be held liable for the first defendant's costs.

[66] I am not however, in agreement with the submission that the plaintiff should be directed to pay the first defendant's costs of suit on the scale as between attorney and own client, given the conclusions reached in relation to the defences raised by the first defendant and that the agreement has lapsed. An order for costs on the normal scale as between party and party would be fair to the parties in the circumstances and give adequate adherence to the normal principle that costs follow the result.

[67] Turning to the first defendant's claim against the second defendant for payment of the deposit, in light of the conclusions reached in relation to the lapsing of the agreement and as the first defendant's defences cannot be upheld, the first defendant's claim must fail. In light of the agreement reached with PGP, no costs order will be granted.

[68] I grant the following order:

[1] It is declared that the plaintiff is entitled to return of the deposit in the sum of R600 000;

[2] The second defendant is directed forthwith to release to the plaintiff the deposit in the sum of R600 000, together with interest thereon at the rate paid by the Standard Bank of South Africa from time to time on retail call deposits as from the date of payment of

the deposit by the plaintiff to the second defendant until date of payment thereof by the second defendant to the plaintiff.

[3] The first defendant's second special plea is upheld and the plaintiff's claim against the first defendant is dismissed;

[4] The plaintiff is directed to pay the costs of suit of the first defendant;

[5] The first defendant's claim against the second defendant is dismissed with no order as to costs.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 12, 13, 14 April, 10 & 15 June 2022

DATE OF JUDGMENT : 13 September 2022

PLAINTIFF'S COUNSEL : Adv. Y. Alli

PLAINTIFF'S ATTORNEYS : Thokan Attorneys

DEFENDANT'S COUNSEL : Adv. L. Schäfer

DEFENDANT'S ATTORNEYS : Amod Van Schalk Attorneys