REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 35025/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

10/04/2012 .....
DATE SIGNATURE

In the matter between:

GC PROPERTY DEVELOPERS CC Applicant

and

ENA WATT Respondent

JUDGMENT

MOKGOATLHENG J

(1) In this application, the applicant seeks relief that the respondent be ordered to consent in writing to the issuing of certificates in respect of the:

(a) registered title in respect of Erven 882 and 883 in Ravenswood Extension 76 Township and a real right extension in respect of the sectional title scheme;

(b) consolidated title, and the opening of a sectional title register in respect of the sectional title development situate at Erf 887 Ravenswood Extension 76 Township; and

(c) registered sectional title in respect of certain units forming part of the sectional title scheme to be released from the operation of a mortgage bond, and the registration of a borehole servitude.

FACTUAL MATRIX

(2) On 15 May 2007 the applicant and the respondent concluded a written deed of sale in terms whereof the former purchased from the latter Portion 995 of the Farm Klipfontein for the purchase price of R3 075 000.00 in order to establish a townhouse and sectional title unit development.

(3) The applicant paid a deposit of R1 200 000.00, the balance of R1875 000.00 was payable on the transfer of five townhouses alternatively twelve sectional title units to the respondent. Upon the transfer of such townhouses or sectional title units into the respondent's name and/or her nominee/s, the applicant would procure title to the property, and be discharged from its obligations to the respondent.

(4) The respondent's obligation as a mortgagee in terms of ***Section 11 of the Sectional Title Act 95, 1986 ("the Act"),*** entails that an application to the Deeds Registrar for the opening of a sectional title register must be accompanied by:

(i) any mortgage bond to which the land may be subject;

(ii) the consent of the mortgagee (the respondent) to the opening of the sectional title register;

(iii) the consent of the mortgagee (the respondent) to the endorsement of such bond to the effect that it attaches to:

(a) the sections and common property shown on the sectional plan;

(b) the certificate/s of real right; and

(c) the certificate/s of real right in respect of exclusive use.

(5) ***Section 22(2) of The Act*** requires that on application to register a sectional plan of any sub-division, the consent of the mortgagee to the cancellation of the mortgage bond or to the release of the section from the

mortgage bond must be given, and in terms of ***Section 25(1) of The Act.*** The registration of exclusive rights is subject to the consent of the mortgage bond holder.

(6) The applicant alleges that the respondent unreasonably refuses to grant her consent as the mortgagee in terms of the mortgage bond over the property, in order that it may comply with the abovementioned requirements in respect of the sectional title development.

(7) On 21 April 2011 a mortgage bond over Portion 995 was registered in favour of the respondent pursuant to ***clause 7.4 of the Deed of Sale*** which provides:

"On procuring separate title for the property hereby sold a mortgage bond shall be registered in favour of the seller for an amount equal to the value of the 5 (five) houses or 12 (twelve) sectional title units herein referred to, namely R1 875 000.00 (one million eight hundred and seventy five thousand rand), which bond shall be cancelled on transfer of the 5 (five) houses or 12 (twelve) sectional title units to the seller and/or her nominee/s".

(8) In the mortgage bond it is recorded that:

"And the appearer declared that whereas the appearer's said principal, is truly and lawfully indebted to the mortgagee in the sum of R1 875 000.00 (one million eight hundred and seventy five thousand rands) in respect of the withinmentioned property, being an amount equal to the value of 5 townhouses, alternatively 12 sectional title units to be erected at an agreed

building cost of R2 500.00 (two thousand five hundred rand) VAT inclusive, per square metre of which the minimum size of each house will be 150 square metres and the sectional title units a minimum size of 75 square metres ('which said amount is hereinafter referred to as the initial sum")".

(9) The applicant has duly proceeded with a sectional title unit development on Portion 995 (Ravenswood Extension 76 Township) made up of the two erven 82 and 83 respectively, which in pursuance of the dictates of the Ekhurhuleni Metropolitan Municipality have to be consolidated. Sectional title plans in respect of Phase 1 and Phase 2 and Phase 3 of the sectional development have been approved. Phases 1 and 2 have been complete and phase 3 is partially completed. (my emphasis) This exigency is material to the purpose envisaged in ***clause 7.4,*** and is dealt with later in this judgment.

(10) Pursuant to ***clause 3.3.6*** on 5 July 2011, one year from date of proclamation of the township, the respondent was entitled to demand transfer of all twelve sectional title units. On 7 July 2011 the applicant in writing sought the respondent's consent as the holder of the mortgage bond registered over the property to enable it to attend to the requirements arising from the dictates of ***clauses, 11, 22 and 25 of The Act.***

(11) On 8 July 2011 the respondent's attorney responded, and contended that the correct interpretation of the deed of sale and the applicant's obligations thereunder were that:

"In terms of the agreement of sale that the parties concluded on 15 May 2007 your client was obliged to transfer all twelve sectional title units to our client within a period of one year from the date of proclamation of the relevant township. That date has already arrived but there is still no indication from your client as to when it proposes to fulfil its obligations in terms of the agreement.

Until such time as your client can satisfy our client of its intentions regarding the fulfilment of its outstanding performance in terms of the agreement of sale, our client will not sign any further documents, especially any documents to remove the existing units from the operation of her bond.

Unless your client can unequivocally confirm that twelve units are ready to be transferred to our client, our client will not sign any documents and will insist that the proceedings she had instituted against your client in the South Gauteng High Court, Johannesburg under case number 24512/11 should first be finalised".

THE APPLICANT'S SUBMISSIONS

(12) The applicant states that it has sold certain sectional title units, but because the respondent refuses to grant her written consent as required as elaborated above, it is unable to execute the terms of the agreements of sale concluded with purchasers of the sectional title units and cannot give transfer of the said units without:

(a) the opening of a sectional title register;

(b) the issuing of certificates of registered sectional title; and

(c) the release of those units from the operation of the respondent's mortgage bond.

(13) The applicant contends that the application instituted by the respondent for specific performance in specie under case number 2451/2011 pursuant to which she sought a declaratory order that the applicant be obliged to transfer twelve sectional title units to her and which order was granted by Kgomo J on 17 August 2011, is a separate issue which does not affect the relief it presently seeks.

(14) The applicant argues that respondent's entitlement in terms of ***clause 7.4*** will be determined only once the application for leave to appeal and the appeal against the order of Kgomo J are ultimately finalised. In the interim the applicant seeks relief in order to be allowed to proceed with the transfer of the sectional title units sold.

(15) Further the applicant contends, that the issue of the respondent's security under the mortgage bond, her entitlement to any specific performance in specie under appeal, and her concomitant obligation to consent, are two distinct issues which can be determined separately. The consent sought cannot diminish the respondent's security, even if this were the case, it must be taken to have been agreed by the parties as an inevitable consequence from the conclusion of the deed of sale.

(16) The applicant concedes that there is a dispute between the parties as to the correct interpretation of the deed of sale, the terms of the applicant's obligations and the respondent's entitlement thereunder. The applicant argues that the respondent seeks an interpretation of ***clause 7.4*** to the effect that it is obliged to transfer twelve sectional title units to her regardless of the cost thereof. The applicant contends that the cost of each sectional title unit in the development built to date is approximately R600 000.00, effectively therefore, the respondent seeks specific performance to

the value of R7 200 000.00 in respect of the balance of the purchase price of R1 875 000.00.

(17) ***Clause 3.3.1*** which deals specifically with the balance of the purchase price provides as follows:

"3.3.1 For the balance of the purchase price the purchaser shall transfer to the seller 5 (five) proposed houses in the development to be erected at a building cost of R2 500.00 (two thousand five hundred rand) per square metre and of which the minimum size of each house shall be 150 (one hundred and fifty) square metres, alternatively 12 (twelve) sectional title units of a minimum size of 75 (seventy five) square metres. The purchaser shall satisfy the seller, by producing to the seller a list of specifications, fixtures and fittings which will be incorporated in the building cost of R2 500.00 (two thousand five hundred rand) per square metre".

(18) The applicant contends that it was at all times intended by the parties that the value of the townhouses and/or sectional title units to be erected at a specified building cost/value of R2 500.00 per square metre was the determinant of the payment of the balance of R1875 000.00 and not the number of townhouses and/or sectional title units in and of themselves. The applicant argues that this intention is borne out by the fact that specifically as agreed by the parties, the mortgage bond envisaged to be registered in accordance with ***clause 7.4*** in favour of the respondent was *"to be registered in favour of the seller for an amount equal to the value of the 5 (five) houses or 12 (twelve) sectional title units herein referred to namely R1 875 000.00".*

(19) The applicant contends that the mortgage bond clearly relates to the security intended to cover a specific value and indicate the securitization of an indebtedness expressed in monetary terms. Further the *causa* on the mortgage bond declares that the applicant is indebted to the respondent "*in the sum of R1 875 000.00 being the outstanding balance of the purchase price of R3 075 000.00*" and "*being an amount equal to the value of 5 (five) townhouses alternatively 12 (twelve) sectional title units to be erected at an agreed building cost of R2 500.00 VAT inclusive per square metre*".

(20) The applicant argues that to perform in terms of the order granted by Kgomo J for specific performance, the respondent would first be required to grant her consent. The respondent's withholding of her consent is *mala fide* and is intended to compel the applicant to transfer to her twelve sectional title units to which she is not contractually entitled to.

THE RESPONDENT'S SUBMISSIONS

(21) The respondent contends that the right the applicant seeks to enforce must be accompanied by a concomitant obligation on the part of the respondent in terms of the contractual relationship which exists between the parties in terms of ***clause 7.4*** which provides:

"On procuring separate title for the property hereby sold a mortgage bond shall be registered in favour of the seller for an amount equal to the value of the five (5) houses or twelve (12) sectional title units herein referred to, namely R1 875 000.00 (one million eight hundred and seventy five thousand rand), which bond shall be cancelled on transfer of the five (5) houses or twelve (12) sectional title units, to the seller and/or her nominee/s".(my emphases)

(22) The mortgage bond was registered in favour of the respondent in order to give effect to the provisions of the ***clause 7.4.*** In terms of ***clause 12 of the mortgage bond***, as security for the applicant's (mortgagor's) obligations, the entire Portion 995 is specifically bound. The respondent argues that in effect the applicant seeks the release of sold sectional title units from the operation of the mortgage bond so as to give effect to the transfer thereof to the relevant purchasers and to register the sectional title units in their names.

(23) The relief the applicant seeks if granted, argues the respondent will amount to a partial release of the security held by the respondent pursuant to the mortgage bond, which partial release, and partial cancellation is not contemplated in the deed of sale nor the mortgage bond and will amount to the enforcement of a right in the applicant's favour in circumstances in which the respondent does not have an associated obligation.

(24) The respondent contends that it is evident from the deed of sale, that neither party intended partial performance by the applicant of its obligations with regard to the delivery of the townhouses or sectional title units. Further, neither the deed of sale nor the mortgage bond, makes provision for the partial cancellation or release of any portion of the property from the mortgage bond.

(25) The respondent argues that by seeking the partial release of sold sectional title units from the mortgage bond, the applicant intends to diminish her security and delay the performance of its outstanding obligations. The consent the applicant seeks is to achieve the realisation of the partial cancellation of the mortgage bond. Nothing entitles the applicant to insist

that the respondent should consent to the partial cancellation of the mortgage bond before the applicant complies with ***clause 7.4.***

(26) The respondent contends that ***clause 7.4*** expressly records that it is only against transfer of the twelve sectional title units to the respondent and/or her nominees that the mortgage bond is to be cancelled. It is common cause that no such transfer has taken place because the applicant has noted an appeal against Kgomo J's order, and as a consequence, there is no obligation on her to release the security provided by the mortgage bond, either in whole or in part.

(27) In terms of ***clauses 3.3.3 and 3.3.4*** the transfer of the sectional title units into the respondent's or nominees' names discharges the applicant from its obligation in respect of the payment of the balance of the purchase price. The respondent contends that the clear wording of these clauses demonstrates that what the parties intended, was not the delivery of sectional title units up to a value of R1 875 000.00, but the actual delivery of twelve sectional title units in lieu of the balance of the purchase price.

(28) The respondent argues that her refusal not to consent is due to the applicant's breach of ***clause 7.4*** and Kgomo J's order. The respondent argues that although the execution of order may be suspended in terms of ***Rule 49(11)***, it exists until set aside consequently, there is no obligation on her to comply with the applicant's demands. For this submission the respondent relies for authority on ***Ouderkraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at par [26]***

(29) The respondent contends that the application for specific performance dealt with the interpretation of the agreement and the applicant's

obligations thereunder, and submits that there has been an interpretation by Kgomo J of the parties respective rights and obligations arising from the deed of sale and mortgage bond, that pursuant to the interpretation thereof, Kgomo J has ordered the applicant to immediately transfer twelve sectional title units to her, consequently, the issues are authoratively decided between the parties and are therefore *res judicata.*

THE ANALYSIS OF EVIDENCE

(30) There is a dispute between the parties as to the correct interpretation of ***clause 7.4*** and the terms of the mortgage bond, and about whether the respondent as a mortgagee can refuse to consent in terms of ***clauses 11, 22 and 25 of The Act,*** if the applicant's obligations pursuant to ***clause 7.4*** are not met due to the lodgement of a notice in terms of ***Rule 49 (11).***

(31) The applicant contends that if the respondent does not consent, in order to comply with Kgomo J's order, it cannot effect transfer of the twelve sectional title units to the respondent if there is no sectional title register opened and the erven are not consolidated, consequently, the requirements of the ***Sectional Title Act and the Deeds Registry Act*** cannot be met, and the applicant cannot transfer the sold sectional title units into the names of the purchasers.

(32) In the mortgage bond it is declared that the applicant is firmly bound to and on behalf the respondent in the sum of R1.875 million. The mortgage bond is a continuing covering security for amounts owed by the applicant to the respondent in respect of the outstanding balance of the purchase price. ***Clause 5*** of the mortgage bond provides that: "*the applicant shall not as long as the bond remains in force, mortgage or in any way alienate or encumber the mortgaged property or any part thereof without the written*

consent of the respondent having been first had obtained", consequently, applicant's argument that the mortgage bond remains extant is untenable because should the respondent grant consent pursuant to ***The Act*** and should the applicant thereafter effect transfer of the sold sectional title units, the mortgage bond will in effect be diminished in extent and value. Logically this amounts to partial alienation and encumbrance and part cancellation thereof, due to the fact that separate title to the sold units would have been procured by the individual units purchasers.

(33) The applicant's contention that: "*if applicant's entitlement to the respondent's consent is not to be found in the express wording of the contract itself, then the implication necessarily arises that the parties must have contemplated that the respondent's obligation to consent is necessary to give commercial efficacy to the deed of sale, that the tender equates to full payment of the purchase price,*" is untenable, because the envisaged performance by the applicant in terms of ***clause 7.4*** does not contractually encapsulate performance by tender, which notion is in any event extraneous to the contract. In any event, the interpretation of and application of the implied terms to the deed of sale are *res judicata* or *lis pendens* pursuant to Kgomo J's order.

(34) It is legally untenable and futile for the applicant to argue that the transfer to respondent of the twelve sectional title units as ordered by Kgomo J cannot eventuate without the respondent's consent. The fact of the matter is that the applicant cannot compel the respondent to consent without first setting aside Kgomo J's order on appeal. The material term in respect of which the respondent's legal obligation to consent is derived, implied or inferred, arises from the deed of sale and is of necessity predicated on the

interpretation of ***clause 7.4*** which Kgomo J's order by logically implication encapsulates.

(35) Mr Smit submitted that when the contract was concluded, it was within the contemplation of the parties that the respondent would readily consent to the opening of a sectional title register, and the consolidation of the two erven constituting the development. Counsel further submitted that an implied term must be inferred from the contract that payment of the balance of the purchase price could be paid by a reasonable tender. I demur.

(36) A court may not make a contract for the parties because that is contrary to public policy. See ***Laws v Rutherford 1924 AD 261- 264.*** Express terms may exclude the possibility of importing implied terms, if the construction of such express terms cannot sustain such inference. An implied term is a term presumed by law and is normally imported into a contract to give it business efficacy for its execution. The importation of an implied term to the effect that the balance of the purchase price may be paid by tender cannot pass construction muster because such interpretation is in conflict with ***clause 7.4.***

(37) Consequently, it could never have been in the contemplation of the parties when they concluded the deed of sale that tenders would be offered by the applicant as payment of the balance of the purchase price. The express terms deliberately exclude the possibility of importing such implied terms as advocated by Mr Smit. The parties in ***clause 7.4*** have set out how payment is to be made. See ***Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1 KB 592 605 and Wilkins v Voges 1994 3 SA 130 (A) 137; SA Mutual Aid Society v Cape Town Chamber of***

Commerce 1962 1 SA 598 (A) 615D; Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd 1965 3 SA 150 (A) 175C.

(38) ***Clause 3.3.6*** stipulates that the five townhouses or twelve sectional title units to be transferred shall be completed and be ready for occupation within one year from the date of proclamation of the township. The period elapsed on 11 July 2010, consequently, the applicant's tender that if the respondent grants her consent, it is prepared without admitting liability to set aside sufficient land to erect twelve sectional title units to the specifications of ***clause 7.4*** to be eventually transferred to the respondent, is an admission that the applicant's paramount intention is first to effect transfer of the sold sectional title units and transfer same into the purchasers names, before transferring the tendered twelve sectional title units to the respondent. This tender and proposed *modus operandi* by the applicant would be a breach of its contractual obligations to the respondent pursuant to ***clause 3.3.6***.

(39) Besides because of the fact that the tender does not arise *ex contractu*, this court cannot order the respondent to accept the applicant's tender as effective payment or the discharge of the monetary debt owed and secured between the parties in terms of the mortgage bond even if its value exceed the amount secured under the mortgage bond. Such an order, would be in conflict with the order made by Kgomo J. In any event, as the matter is *lis pendens* before Kgomo J for leave to appeal, there is a possibility that any order this court makes may pre-empt or be in conflict with an order the appeal court would possibly make.

(40) Mr Smit argued that the *causa* for the present application is predicated on the interpretation of the mortgage bond and not the deed of sale. With due

respect counsel misconceives the gravamen of the *causa*. The course of action arises from ***Clause 7.4*** which for emphasis is repeated, and provides: *"on procuring separate title for the property hereby sold a mortgage bond shall be registered in favour of the seller for an amount equal to the value of the five houses or twelve sectional title units referred to, namely R1875 000.00 which bond shall be cancelled on transfer of the five houses or twelve sectional title units to the seller and/or her nominees."* (my emphasis)

(41) Similarly, the mortgage bond provides that "*the appearers said principal is truly and lawfully indebted to the mortgagee in the sum of R1875 000.00 being the outstanding balance of the purchase price of R3 075.000.000.00 in respect of the within mentioned property, being an amount equal to the value of five townhouses, alternatively twelve sectional title units to be erected at an agreed building cost of R2 500.00 per square metre……..."* (my emphasis)

(42) From a consideration of these aforequoted clauses, it is patent that there is a symbiotic relationship between the two documents, which logically have to be interpreted together to determine the *causa* therefrom. The mortgage bond cannot exist without its proginator and precursor ***clause 7.4*** of the deed of sale, I agree with Mr Mundell that one cannot consider and interpret the mortgage bond without considering the source document, the deed of sale. The two documents are interrelated, they constitute and complement the *causa*.

(43) The submission by the applicant's counsel that interpreting the mortgage bond together with ***clause 7.4*** of the deed of sale one would be importing extrinsic evidence into the mortgage bond contrary to the ***Parol Evidence***

Rule has no merit because the font of the genesis of the mortgage bond is the deed of sale.

(44) The applicant's tender of three sectional title units worth R2.2 million as payment of the balance of the purchase price, and its suggestion that if Kgomo J's order is upheld, the respondent would hypothetically still be entitled to the transfer of nine sectional title units is a disingenuous stratagem to circumvent and subvert Kgomo J's order, and a ploy to induce this court to effect Kgomo J's order by compelling the respondent to accept the tender as payment, such an order would be to the respondent's prejudice. It is patent that such an order would be in conflict with Kgomo J's order. In essence Kgomo J's order is that he has upheld the respondent's interpretation of ***clause 7.4,*** that twelve sectional title units are the equivalent to the monetary value of R1. 875 million which is the balance of the purchase price.

(45) The only time the respondent is obliged to consent to the cancellation of the mortgage bond is on transfer of the twelve sectional title units as per Kgomo J's order. Until the applicant complies with ***clause 7.4,*** the respondent is entitled to refuse to consent. Importantly with Kgomo J's order under appeal, if the respondent consents, and the applicant commences transferring and granting title to sold units, her mortgage bond security is rendered nugatory and worthless.

(46) In any event the compromise tender proposed by the applicant is impermissible in law as it would amount to ordering the respondent to waive part of her entitlement in terms Kgomo J's order, namely;

(a) the transfer of nine sectional title units;

(b) payment of R870 187.50 in respect of the escalated purchase price due in respect of the property and above the transfer of the aforesaid sectional title units; and

(c) payment of an amount equal to 10% of R1875 000.00 calculated pro rata from 16 May 2011 to the date of transfer of the aforesaid sectional title units.

(47) It is indisputable that the respondent's security extends over the entire property, consequently cancellation of the mortgage bond only ensues on transfer of twelve sectional title units. On a strict interpretation of the ***clause 7.4*** such transfer takes precedence over the transfer of the sold sectional title units the applicant seeks to transfer first, which conduct will have a deleterious effect on the respondent's security.

(48) The applicant's machiavellian sleight of hand with regard to the tender can be gleaned from the fact that it offers to set aside sufficient land to build twelve sectional title units for the benefit of the respondent, an exigency which complies with the respondent's interpretation of ***clause 7.4*** and Kgomo J's order. This proposition, begs the question about the applicant's integrity, *bona fides* and sincerity in pursuing an appeal against Kgomo J's order. The applicant's tender to comply with Kgomo J's order at its leisure, raises the question about the whether the leave to appeal is lodged purely as a legal stratagem to first sell and transfer sectional title units to purchasers, thereby eroding the respondent's mortgage bond security and weakening her bargaining power with regard to the date of the transfer of the twelve sectional title units to which she is entitled pursuant to ***clause 7.4.*** In my view this is a breach of contract and an abuse of process, an issue I address later in this judgement.

(49) The submission that the applicant desires to perform but cannot unless the respondent grants her consent is mischievous because the applicant's desire to perform is neither predicated upon ***clause 7.4,*** nor ***clause 12*** of the mortgage bond, nor on Kgomo J's order, but specifically relates to the sold sectional title units which conduct which is extraneous to the terms of the deed of sale.

(50) The applicant's counsel Mr Smit submitted that it was in the contemplation of the parties that the respondent would give her written consent for the achievement of the development, further that in any event such consent to facilitate the requirements of the ***Sectional Title and Deed Registry's Act*** were implied in the deed of sale, consequently, that the respondent could not be heard to say that to grant her written consent was not contemplated when she concluded the deed of sale. Distilled, counsel's submission is that the respondent is estopped from so contending, this in my view raises the concept of issue estoppel, which I address later in this judgment.

THE ISSUE OF *RES JUDICATA AND LIS PENDENS*

(51) The respondent contends that the issue regarding the interpretation of ***clause 7.4*** is *res judicata* in view of Kgomo J's order, further that the applicant by the lodging an application for leave to appeal Kgomo J's order to the full bench, entitles her to invoke the plea and defence of *lis pendens*. I agree.

(52) The requirement for a successful plea *of lis pendens* is that there must be litigation pending between the same parties, based on the same cause of action and in respect of the same subject matter. In view of the respondent's invocation of the pleas of *lis pendens* and *res judicata* it is

necessary to consider their underlying principles. It is trite that a plea of *res judicata* cannot succeed if the applicant has a viable alternative *causa*.

(53) In ***Nestle (South Africa) (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA) para 16*** this court said the following:

'The defence of lis alibi pendens shares features in common with the defencne of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties, should be brought once and finally.'

(54) A comparison ***clause 7.4*** and ***clauses 1 and 12*** in the mortgage bond demonstrates a commonality of a cause of action in the present matter, and in the matter before Kgomo J which is subject to appeal. To succeed in either in matter entails the interpretation of the commonality of the said clauses in both documents. Consequently, my view is that the application before court relates to the same subject matter (*eadem res*) and the same cause of action (*eadem patendi causa*) as those determined by Kgomo J.

(55) In ***Janse van Rensburg NO and Others v Steenkamp and Another; Janse van Rensburg and Others v Myburgh and Others [2009] 1 ALL SA 539 (SCA),*** in dealing with the legal concepts of *res judicata, lis pendens,* issue estoppel and the abuse of process, I can do no better for purposes of a full appreciation and understanding thereof than cite Heher J's compendium in full. Heher JA remarked that: "(54) *[20] The*

application of the principles of res judicata in the form of issue estoppel was discussed ***in Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A) at 666D-670C [also reported at [1995] 1 ALL SA 517 (A) –Ed].*** *This Court affirmed that the source of the finding by Greenberg J in* ***Boshoff v Union Government 1932 TPD 345*** *(that in order to uphold a defence of res judicata the cause of action need not be precisely the same in both actions) lay in our own common law authorities rather than English law and "Voet's example" (concerning reliance on the actio redhibitoria and the actio quanti minoris as the same cause): "and the acceptance by Greenberg J of a broader meaning of petendi causa both carry the necessary implication that for a defence of res judicata it is not an immutable requirement that the same thing must be claimed."* (My translation.)

[21] Botha J nevertheless added the following cautionary, remarks.....The true meaning of ***Boshoff v Union Government*** *is that the judgment has the effect that the strict requirements of the common law for a defence of res judicata (in particular, eadem res and eadem petendi causa) should not be understood literally in all circumstances and applied as inflexible rules, but there is room for adaptation and extension, according to the basic requirement of eadem quaestio and the ratio of the defence.....*

.....

Each case must be decided according to its own facts. It is not practical to try to formulate guidelines in abstract terms which can be made applicable to all situation. For example, one of the facts in ***Boshoff v Union Government*** *was that default judgment was taken in the previous case. From a passing remark of Greenberg J at 351 it appears that that fact was not raised by the plaintiff in answering to the defence of res judicata* (my emphasis)

[22].....Consequently, the possibility of extending the principles of res judicata to any particular case of issue estoppel must be approached with great circumspection." (My translation.)

[23] The question arose once more in ***National Sorghum Breweries Ltd (t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 (SCA) [also reported at [2001] 1 ALL SA 417 (A) – Ed].*** Olivier JA (writing for the majority) referred to the previous authorities but limited his formulation of the question before the court to the following statement (at ***239H-I***):

"[3]The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the court been finally disposed of in the first action?" (my emphasis)

[24] In ***Smith v Porritt 2008 (6) SA 303 (SCA) at 307J [also reported at [2007]JOL 19499 (SCA) – Ed]*** Scott JA summarised the law:

.....

That remain are that the parties must be the same (idem actor) and that the requirements those the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. (my emphasis) *Where the plea of res judicata is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in* ***Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A) at 669D, 670J – 671B,*** *this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of res judicata. The recognition of the defence in*

*such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (**Kommissaris van Binnelandse Inkomste v Absa Bank Bpk (supra) at 670E-F.**) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others.* (my emphasis) *As pointed out by De Villiers CJ as long ago as 1893 in **Bertram v Wood (1983) 10 SC 177 at 180,** 'unless carefully circumscribed, [the defence of res judicata] is capable of producing great hardship and even positive injustice to individuals."*

[25] It is apparent that the first duty of the court is to compare the relevant facts of the two cases upon which reliance is placed for the contention that the cause of action (in the extended sense of an essential element) is the same in both.....

[26].....because a plea of res judicata (whether in its classical or extended form) cannot succeed unless it nullifies the legal force of the cause of action (put otherwise, it cannot be raised successfully if it leaves the plaintiff with a viable cause of action) (my emphasis)

*[27] The scope of the "once and for all" rule was said, in **the National Sorghum case (supra) at 241D-E**, to require that all claims generated by the same cause of action be instituted in one action* (my emphasis)

*By a dictum from **Henderson v Henderson (1843) 3 Hare 100 at 114-115, [1843-1860] ALL ER 378 VC at 381 – Z**.....*

*[28] Murphy J expressed the view (in concurrence with that of Blignaut J in **Consol Ltd t/a Consol Glass v Twee Jonge Gezellen and Another (2) 2005 (6) SA 23 (C) at 46H [also reported at [2005] 4 ALL SA 517 (C) – Ed])** that "the Henderson principle" is not in conflict with the approach of Botha JA in **Kommissaris van Binnekandse Inkomste v Absa Bpk (supra)** and that 'logic and equity will justify its application in appropriate*

cases". While that may be so, I think that any such application must depend on an understanding of its true foundations.(my emphasis)

[29] Although Henderson's was a case of action estoppel, the statement of the law has been held to be applicable also to issue estoppel..... Law Lord had earlier ***referred (at 48e) to Brisbane City Council v A-G for Queensland [1978] 2 ALL ER 30 (PC) at 35-36; [1979] AC 411 at 425****, where Lord Wilberforce said*

"the second defence is one of res judicata. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram VC in ***Henderson v Henderson (1843) 3 Hare 100, [1843-60] ALL ER Rep 378 VC*** *and its existence has been reaffirmed by this Board in* ***Hoystead v Taxation Comr [1926] AC 155 ER Rep 5.*** *A recent application of it is to be found in the decision of the Board in* ***Yat Tung Co v Heng Bank [1975] 581.*** *It was, in the judgment of the Board, there described in these words (at 590):.....there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should hve been litigated in earlier proceedings'.*(my emphasis)

This reference to "abuse of process" had previously been made in ***Greenhalgh v Mallard [1974] 2 ALL ER 255 at 257*** *per Somervell LJ, and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."* (my emphasis)

[30] I respectfully agree. The identification with abuse of the process accords with the policy expressed in the maxim nemo debet bis vexari pro una et eadem causa which underlies the principle of res judicata. As was said in the ***National Sorghum case (supra) (at 241D-E)*** *the abuse arises when the same cause of action is raised against a defendant a second time.....*

[35] Lis alibi pendens is a discretionary remedy. It requires a balance of the interests of the affected parties to achieve a fair result: ***cf Van As v Apollus 1993 (1) SA 606 (C) at 610D-G [also reported at [1993] 3 ALL SA 402 (C) – Ed}.....***"

(56) The only alternative viable cause of action the applicant had, was to apply for the rectification of the deed of sale to include the applicant's discretion to firstly or contemporaneously transfer or sell sectional title units to purchasers, or subsequent to the 21 July 2010, at its discretion to transfer of twelve sectional title units to the respondent, by agreement with the respondent irrespective of whether it elects to first sell and transfer sold sectional title units to purchasers.

(57) The applicant did not file an answering affidavit in the proceedings before Kgomo J, despite the fact that on the 8 July 2011 it was categorically advised by the respondent that she was not prepared to sign any documents intended to solicit her consent "*to remove existing units from the operation of her bond unless the applicant can unequivocally confirm that twelve units are ready to be transferred to her*," it instituted an application in terms of ***Rule 30,*** and argued that the application for specific performance was an irregular procedure. In ***Henderson v Henderson supra at 381-2*** it was held *"the Henderson principle" "that where a given matter becomes the subject of litigation in..... the court*

requires the parties to the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject matter in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time". In my view the applicant's conduct falls squarely within the purview of the aforequoted ratio.

(58) In applying the afore described legal principles, together with the factual and legal conclusions I have reached with great caution and circumspection, it is my view that it would be an abuse of the process to accede to the applicant's relief. The matter is still pending before Kgomo J for an application for leave to appeal to a full bench and is possibly *lis pendens* before such full bench or the Supreme Court of Appeal by way of petition. The interpretation of the deed of sale and mortgage bond until reversed are *res judicata.* The applicant elected not to engage all the issues raised in the application for specific performance by lodging an answering affidavit thereto where the issue of consent would have been raised and ventilated without prejudicing its right to appeal any unfavourable judgment and order.

THE ORDER

(59) In the premises:

(i) The application is dismissed with costs;

(ii) The applicant is ordered to pay the respondent's costs.

DATED THE 19 DAY OF MARCH 2012 AT JOHANNESBURG.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE OF HEARING: 3 NOVEMBER 2011

DATE OF JUDGMENT: 30 MARCH 2012

ON BEHALF OF THE APPLICANT: JAN G SMIT

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