IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

....

DATE SIGNATURE

Case No: 07/28371

In the matter between:

BRAY, MICHAEL GEOFFREY Plaintiff

and

GRAND AVIATION (PTY) LTD Defendant

and

DE WET REITZ ATTORNEYS Third Party

JUDGMENT

BARNES AJ

INTRODUCTION

1. This matter began its life as a motion proceeding in November 2007 when the plaintiff launched an application for an order compelling the defendant to comply with the provisions of a sale agreement concluded between the parties.

2. The sale agreement has two components to it: the sale of an erf in a residential estate being developed by the defendant and the construction of a dwelling on the erf. The plaintiff paid the purchase price for the erf, transfer took place and on 29 March 2005 the land was registered in the plaintiff's name. This occurred despite the fact that the sale agreement was never signed by the defendant. In his application, the plaintiff effectively sought an order for specific performance compelling the defendant to build the dwelling on the erf in terms of the sale agreement. The defendant opposed the application on the basis that, not having been signed by it, the sale agreement was invalid for lack of compliance with section 2(1) of the Alienation of Land Act 68 of 1981, and counterclaimed for the return of the land. In the alternative, the defendant contended that it had validly cancelled the sale agreement.

3. There were a number of disputes of fact between the parties on the

papers and on 4 April 2008, this Court referred the matter to trial. On 28 May 2008, the plaintiff delivered his declaration and thereafter on 30 June 2008 the defendant delivered its plea and counter-claim. In terms of his declaration, the plaintiff seeks an order *"directing the Defendant to erect a dwelling on Plaintiff's immovable property in accordance with its obligations as set out in the Agreement concluded between the parties."* The defendant, for its part, seeks a declarator that the sale agreement is null and void for lack of compliance with section 2(1) of the Alienation of Land Act and an order that the erf be transferred back into its name. In the alternative, the defendant seeks a declarator to the effect that the sale agreement was validly cancelled and that it accordingly has no obligation to build the dwelling on the land.

4. Following the delivery of the pleadings in 2008, there were various preliminary skirmishes between the parties and a number of lengthy postponements. The matter finally came before me for trial on 1 December 2014 and ran for four days.

5. The plaintiff, Mr Bray, gave evidence and called Mr Wynand Nel, Senior Operations Manager for homeloans at Nedbank, to testify on his behalf. The defendant called its Chief Executive Officer, Mr Dirk Prochassek, to testify on its behalf.

6. De Wet Reitz Attorneys, the firm of conveyancing attorneys that facilitated

the transfer of the erf into the plaintiff's name was initially joined as a third party in the matter. Ultimately however, no relief was sought against the firm and it played no role in the trial.

7. In what follows below, I will examine the agreement of sale concluded between the parties. Thereafter, I will set out the evidence led and determine, to the extent necessary, the factual disputes between the parties. Finally, I will address the legal issues that arise for determination.

THE AGREEMENT OF SALE

8. The agreement of sale is a standard form purchase agreement in respect of, "Emerald Estate," a residential estate being developed by the defendant in Greenstone Hill, […..], near Modderfontein on the East Rand of Johannesburg.

9. The agreement of sale comprises a "Deed of Sale"; Annexure "A" (which as will become evident below is essentially a building contract); Annexure "B" which is a schedule of building specifications and Annexure "C" which specifies the electric fittings to be installed in the dwelling.[1]

10. Clause 1 of the Deed of Sale is entitled "Description of Property" and provides as follows:

[1] The agreement of sale also comprises a document entitled "House Rules" which is not material for purposes of this judgment.

"ESTATE:	EMERALD ESTATE
ERF NUMBER:	3.84
UNIT TYPE :	E
MEASURING:	183 square metres
TOWNSHIP:	G[……]"

11. Clause 2 of the Deed of Sale provides as follows:

"**2 PURCHASE PRICE**

"2.1 The Purchase Price of the property and the cost of the construction of the dwelling inclusive of VAT are made up as follows:

Cost of land	R 229 000 (two hundred and twenty nine thousand Rand)
Cost of building	R 380 000 (three hundred and eighty thousand rand)
Total:	R639 450.00

2.2 The parties record that the construction and erection of the dwelling house and outbuildings on the Property are to be governed by the terms and conditions contained in Annexure "A" to this Deed of Sale."

12. Clause 3 of the Deed of Sale is entitled "Payment of the Purchase Price" and provides as follows:

"3.2 The purchase price is R639 450.00 payable as follows:

3.2.1 A fee of R5000 as stated in 3.1.1

3.2.2 A deposit… [which was not applicable in this case]

3.3 The balance of the purchase price shall be payable against the registration of transfer into the name of the Purchaser but payment thereof is to be secured by means of a bank guarantee approved by the Seller or the Seller's Conveyancers and to be delivered to the Seller's Conveyancers within 30 days of signature hereof.

3.4 The approved Banker's Guarantee or other acceptable security for the full amount of the building costs referred to in 3.3 above entitles the Seller to receive progress payments as the Works proceed in accordance with the provisions set out in the annexure hereto. In the circumstances where the building is self-financed by the Purchaser the Seller shall be entitled to obtain from the Purchaser a guarantee that payment will be effected timeously."

13. The annexure referred to in clause 3.4 above is Annexure "A" to the Deed of Sale. Annexure "A" defines *"the Works"* as *"the erection of a dwelling house that is to be executed on the property in accordance with the provisions of this Annexure."*

14. Clause 3 of Annexure "A" deals with plans and drawings. Clause 3.1 provides that:

"The Purchaser hereby specifically and separately authorises the Seller to prepare working drawings for the Works and to submit such plans for and on behalf of the Purchaser for approval to the Local Authority concerned."

15. Annexure “A” goes on to regulate the commencement, execution and completion of the Works.

16. Clause 9 of Annexure “A” is entitled “Payment” and provides as follows

> “**9 PAYMENT**
>
> The Seller shall, upon reaching the stages of completion of the Works for which payment is to be effected in terms of the Annexure, make written application to the Purchaser for such payment. Payment of the Annexure Sum shall be made to the Seller as set out below and the method of payment shall be determined by the manner in which finance has been secured:
>
> 9.1 **Finance by mortgage bond or self-financed**
>
> Payment to the Seller, if financed by a Bank, shall be made according to the methods and rules for interim payment prescribed by them and if it is financed by the Purchaser the following methods of payment shall apply…..”

17. Clause 9.1 goes on to prescribe the method of payment that is applicable if the construction is self-financed by the purchaser.

18. As will become apparent below, the agreement of sale is far from a model of clarity in certain important respects. However, what is clear from the above is that separate prices are fixed for the sale of the land and the construction of the dwelling respectively. It is also clear that separate and distinct performances are required in respect of the two components of the deal. Therefore, although the sale of land and the construction of the

dwelling are both contained in the same agreement and are linked in a practical sense, juristically they are separate agreements with independent sets of reciprocal rights and obligations.[2] The agreement of sale accordingly comprises two notionally divisible contracts: one for the sale of land, which is largely contained in the Deed of Sale and one for the construction of the dwelling on the land, which is largely contained in Annexure "A".

THE EVIDENCE

19. The plaintiff testified that he sought to purchase an erf in the defendant's Emerald Estate development, and a dwelling to be constructed thereon, for investment purposes. On 28 September 2003, the plaintiff signed the sale agreement.

20. The sale agreement was never signed by the defendant. Mr Prochassek, the defendant's CEO who testified on its behalf, could not explain how this had happened. He conceded that the defendant was at all material times under the impression that it had signed the agreement and that a valid and binding agreement of sale had been concluded with the plaintiff. This, as will become evident below, is borne out by the defendant's conduct.

[2] For the applicable principles in this regard see *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) and *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 23D-E.

21. It appears that it was only after the plaintiff had instituted proceedings against the defendant for specific performance, that the defendant realised that it had not signed the agreement and then contended, rather conveniently, that it was invalid for lack of compliance with the Alienation of Land Act.

22. The cost of the erf and the dwelling have been set out above. It is apparent that when these figures are added together they come to a total of R609 000.00 and not R639 450.00 as is reflected in clause 2 of the Deed of Sale. The difference is explained by an additional premium which was imposed by reason of the fact the plaintiff's dwelling was to be constructed in the third and final phase of the development. The cost of the plaintiff's dwelling was therefore in actual fact R410 450.00 and the total cost of the erf and the dwelling is correctly reflected as R639 450.00 in the sale agreement. This was common cause between the parties.

23. As set out above, the agreement of sale describes the plaintiff's dwelling as a "Unit Type E measuring approximately 183 square metres." The evidence was that the plaintiff selected a type E unit from among unit options A, B, C, D and E offered by the defendant. It was common cause that the defendant provided the plaintiff with its building plan for the type E unit and that this plan formed part of the plaintiff's application for his bond and building loan.

24. The plaintiff duly obtained, from Nedbank, a mortgage bond over the erf and a building loan for the construction of the dwelling. The details of this are confirmed in a letter from Nedbank to De Wet Reitz, the defendant's conveyancing attorneys, dated 2 March 2004, as follows:

> "Kindly attend to the registration of a mortgage bond for the sum of R639 450.00 in accordance with the annexed agreement of loan and the standard procedures applicable to homeloans as set out in the bank's guide to conveyancers.
>
> **Special instructions:**
>
> 1. An amount of R410 540.00 will be retained and advanced as work progresses from time to time.
>
> 2. An amount of R 229 000.00 is available for guarantees/payment.
>
> ….."

25. On 11 October 2004, Nedbank issued a guarantee to De Wet Reitz Attorneys for the amount of R229 000.00, the purchase price of the erf, subject to the following transactions being registered simultaneously:

> "Registrations:
>
> (a) Cancellation of all existing bonds over ERF [.....], GREENSTONE HILL,[.....].
>
> (b) Registration of transfer of the aforesaid property into the name of MICHAEL GEOFFRY BRAY.

(c) Registration of a First mortgage bond over the aforesaid property in favour of Nedbank Limited by MICHAEL GEOFFRY BRAY for R 639 450.00"

26. On 29 March 2005 the mortgage bond over Erf [.....], Greenstone Hill,[.....] was registered in favour of Nedbank and the erf was registered in the plaintiff's name.

27. Meanwhile, on 26 January 2005, a letter had been sent by Mr Charles Lopion of the defendant to all purchasers in the development, including the plaintiff. The subject of the letter was *"the process for finalising building alterations and plans."* The letter stated that different processes were applicable depending on whether units had been scheduled for construction in phase 1, 2 or 3 of the development. "Phase 3 clients," which included the plaintiff, were advised that they would be contacted in March 2005 *"to finalise alterations and placement of houses on stands."*

28. In the months that followed, discussions ensued between the plaintiff and Mr Lopion regarding the alterations that the plaintiff wanted made to his type E unit. On 8 June 2005 Mr Lopion sent the plaintiff an e-mail attaching a "revised quote and floor plan" which incorporated the alterations sought by the plaintiff.

29. The defendant's quote for the alterations came to a total of R79 590.00. There were however two items that had not been quoted. These were "kitchen customisation" and "additional paving." The words "to quote"

were inserted alongside these items. The quote provided further as follows:

> "It is hereby agreed that the purchaser will provide the funds required for this quote within 7 days prior to commencement of the building of the unit. Should this not occur, the original standard unit will be built on the property, with the purchaser liable for payment thereof."

30. Mr Lopion's e-mail of 8 June 2005 asked the plaintiff to sign the quote and fax it back to him. Evidently, the plaintiff did not do so and on 13 June 2005 Mr Lopion sent the plaintiff a further e-mail in which he stated as follows:

> "Signed quotes have to be in my possession by 30 June 2005. If not, the developer reserves the right to disregard your request for alterations and build a standard unit in terms of your signed purchase agreement."

31. The plaintiff testified that after receiving this e-mail, he signed the quote, initialled the altered floor plan and e-mailed both back to Mr Lopion on 30 June 2005. The quote signed by the plaintiff and dated 30 June 2005 formed part of the trial bundle. The plaintiff conceded that he could not produce an e-mail which reflected his transmission of these documents to Mr Lopion on 30 June 2005, but maintained that he had done so. Importantly, it was not put to the plaintiff in cross examination by the defendant that he had not done so.

32. Mr Prochassek, in his evidence, initially sought to dispute that the plaintiff

had sent the signed quote back to Mr Lopion, however he was eventually forced to concede that he simply did not know whether the plaintiff had done so or not.

33. In the circumstances, I accept the plaintiff's evidence that he signed the quote and the revised floor plan and e-mailed them back to Mr Lopion on 30 June 2005.

34. Thereafter, the development stalled causing the plaintiff, in September 2005, to write to Nedbank and ask for the effective date of his bond to be extended. The plaintiff attached a supporting letter from the defendant which confirmed that the development had been delayed and that phase 3 was now only scheduled to commence in January 2006. In October 2005, Nedbank advised the plaintiff that it would extend the bond to 1 May 2006.

35. 1 May 2006 came and went and still the development stalled. On 9 June 2006 the plaintiff wrote to Nedbank requesting that his bond be extended to April 2007. Again the plaintiff attached a supporting letter from the defendant, dated 31 May 2006, which stated that phase 3 of the development was now only scheduled to commence in January 2007. Nedbank agreed to extend the bond to 1 April 2007.

36. The plaintiff testified that he had purchased the property for investment

purposes and so was not overly concerned about these delays.

37. Meanwhile, on 30 May 2006, the plaintiff had received an e-mail from Ms Linda Weiland of the defendant which attached detailed plans of the plaintiff's unit, incorporating the alterations he sought. Ms Weiland's e-mail asked the plaintiff to check the plans and advise whether they were in order. The plaintiff testified that he responded to Ms Weiland on the same day and advised that the plans looked good but that he still needed to go through them in detail. The plaintiff testified that he also asked Ms Weiland for a revised quote for the alterations and for a letter for his bank stating that due to further delays the construction of phase 3 would now only commence in January 2007. As we have seen above, the plaintiff received such a letter from the defendant the very next day, viz 31 May 2006, and Nedbank ultimately agreed to extend the bond.

38. On 24 August 2006, the plaintiff received an e-mail from Ms Weiland. Attached was defendant's revised quote for the alterations. The revised quote was incorporated into an Addendum to the Deed of Sale which the plaintiff was requested to sign.

39. The revised quote was however identical to the initial quote in respect of the items quoted, their description and cost. Furthermore, the two items which had not been quoted in the initial quote, viz "kitchen customisation" and "additional paving" had still not been quoted. The only difference

between the initial quote and the revised quote was that the revised quote included as a new item 24 a “modification fee” in the amount of R110 000.00. This took the total quote up from R79 590.00 to R189 590.00.

40. What this modification fee was for was the subject of a dispute between the parties. It was common cause that the defendant sought to impose the modification fee not only on the plaintiff but also on other purchasers in phase 3 of the development. The plaintiff testified that he was told by Mr Prochassek that the fee was imposed in order to cover the increased building costs which had arisen as a result of the delay in the development. In his evidence, Mr Prochassek vehemently denied this. He testified that the modification fee was for the “basket of finishes” to be applied to the plaintiff’s unit (as well as other units in phase 3 of the development) and that the plaintiff had been informed of this. Mr Prochassek’s evidence in this regard was wholly unsatisfactory. He was evasive when asked what the “basket of finishes” comprised of and could give no detail. Moreover, it was put to Mr Prochassek in cross examination that his answering affidavit created the impression that the modification fee was indeed to cover increased building costs and that there was no mention there of it being for a “basket of finishes.” Mr Prochassek did not merely create this impression in his answering affidavit, he said so in terms. Thus in response to the plaintiff’s statement in his founding affidavit that he refused to accept the defendant’s revised

quote, Mr Prochassek said the following:

> "What the Applicant omits to mention, is that I told him, that due to the undue delay in the commencement of the building and more specifically due to the fact that there had been an increase in building costs, the Applicant would have to pay for such increased building costs."

41. Mr Prochassek could not explain this contradiction. Mr Prochassek could also not explain why he had not stated in his answering affidavit – or anywhere else – that the modification fee was to cover the "basket of finishes."

42. Mr Prochassek's evidence on this score therefore falls to be rejected. I accordingly accept the plaintiff's version that he was told by Mr Prochassek that the modification fee was to cover the increased building costs that had arisen as a result of the delay in the development.

43. The next dispute between the parties was whether or not the plaintiff had agreed to pay the modification fee.

44. The plaintiff testified that he regarded the modification fee as unacceptable, was not prepared to pay it and told the defendant so. The plaintiff testified that he could not recall precisely who he had communicated his attitude to, although it would likely have been Mr Lopion or Ms Weiland. The plaintiff testified that this communication must have been oral. Certainly, there is nothing in writing before me which

records an objection by the plaintiff to the modification fee.

45. The defendant disputed this. In his evidence in chief Mr Prochassek referred to what he claimed was a file note in Ms Weiland's handwriting. The note appears to be dated 27 March 2006 and states *"M R Bray phones, happy to pay mod fee."* Mr Prochassek contended that this established both that the plaintiff had been sent the addendum much earlier than he claimed and that the plaintiff was happy to pay the modification fee. Notably, however Ms Weiland, who would have had personal knowledge of this, was not called to testify. No explanation was given for this. Furthermore, it was not put to the plaintiff that he had been prepared to pay the modification fee and that he had communicated this to Ms Weiland. Mr Novitz, who appeared for the defendant, argued that it was not necessary to put this to the plaintiff because Ms Weiland's note, which had been attached to the defendant's answering affidavit had not been disputed by the plaintiff in reply. Mr Novitz submitted that in a matter such as this, which had commenced as an application proceeding and had thereafter been referred to trial, reliance could be placed on the fact that a matter had not been disputed on the papers and in those circumstances it was not necessary to take the matter up with the relevant witness. This is not correct. The correct position is that where a motion proceeding has been referred to trial, the affidavits filed therein are of no probative value save for admissions contained therein.[3] The

[3] *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA)

plaintiff did not admit on affidavit that he had been prepared to pay the modification fee.

46. In the witness box, the plaintiff was adamant that the first time he saw the modification fee was when Ms Weiland e-mailed him the addendum on 24 August 2006, that he regarded it as unacceptable, was not prepared to pay it and told the defendant so. If the defendant sought to challenge this, it needed to put its version to the plaintiff in cross examination. It did not.

47. Matters did not improve for the defendant when Mr Prochassek testified, for the first time in cross examination, that he had had a meeting with the plaintiff sometime in 2005 during which he had showed him the addendum and the plaintiff had raised no objection to the modification fee. Here again Mr Prochassek was vague about the details of this meeting. But in any event, this too was never put to the plaintiff.

48. What is not in dispute between the parties is that the plaintiff never signed the addendum to the agreement. If the plaintiff had had no difficulty with the modification fee it is difficult to understand why he would not have signed the addendum. There is no suggestion on the evidence that the plaintiff had any other complaint in relation to the deal. I am therefore of the view that the probabilities also support the plaintiff's version on this score.

49. For all of the above reasons, I accept the plaintiff's version that he was not prepared to pay the modification fee and that he communicated this to the defendant.

50. Following Ms Weiland's e-mail to the plaintiff on 24 August 2006, there was no written communication between the parties for a period of eight months. On 23 April 2007 the defendant addressed a letter to the plaintiff in the following terms:

> "We hereby correspond on a strictly without prejudice basis and advise as follows"
>
> 1. We wish to schedule your unit into our construction program and require you, in terms of Clause 5.1 of Annexure A to Deed of Sale, to provide us with an approved Banker's Guarantee or other acceptable security for the full amount of the building cost from a recognised Financial Institution referred to in clause 3.4 of the Deed of Sale. This Banker's Guarantee should be in the format of the pro-forma document attached hereto. Please note that the suitability of the said recognised financial institution will be within our sole and absolute discretion.
>
> 2. The above Banker's Guarantee is required in terms of the Deed of Sale in order for us to waive our builder's lien over the work in favour of the registered bond holder. Financial institutions usually insist on us waiving our builder's lien over the work before they will make any progress payments.
>
> 3. Please further note that we require your urgent response to the aforegoing within the next seven day period, in order that we may schedule your unit into our construction program and commence with the Works.
>
> Alternative options available to clients whose properties have transferred prior to June 2005 are as follows:

- Clients can elect to utilise their own builder to construct their unit. A Memorandum of Agreement will have to be entered into with the Developer, cancelling the Building component of the Deed of Sale. This can be done on an individual request. All obligations towards the Home Owners Association remain in force.

- Clients can cancel their building contract with the Developer and sell their stand out of hand through an Estate Agent approved by the Home Owners Association if they so wish. All obligations to the Home Owners Association remain in force."

51. The Banker's Guarantee attached to the letter as a *pro forma* was a demand guarantee. In other words, what the defendant now sought from the plaintiff was a demand guarantee for the full amount of the building costs.

52. The plaintiff testified that he was surprised by this letter because, as the defendant well knew, security for the cost of the building had been in place from an early stage and progress payments would be released once construction commenced. The plaintiff testified that the defendant had always been aware of this and had never suggested that those financial arrangements were inadequate or that anything else was required. The plaintiff advised Ms Weiland that he would respond to the defendant's letter within 7 days. In the event, the plaintiff did not do so and exactly 7 days later, on 7 May 2007, the plaintiff received another letter from the defendant. This letter repeated that the defendant required an *"approved Banker's Guarantee or other acceptable security for the full amount of the building cost from a recognised Financial Institution referred to in clause 3.4 of the Deed of Sale"* and that "*this Banker's*

Guarantee should be in the format of the pro-forma document attached hereto." The letter went on to state the following;

> "If you are not able to comply with our Banker's Guarantee requirements in this regard, then we have no alternative but to place you on written notice as we hereby do that you are afforded seven days after this registered letter has been received by you to furnish the suitable guarantee which Banker's Guarantee must be to our satisfaction.
>
> In the event of you failing to comply with the aforegoing, then and as is provided for in terms of clause 8 of the Deed of Sale, you shall be in breach in that you are unable to provide a Banker's Guarantee to give effect to Annexure A of the Deed of Sale and that the Deed of Sale shall thereafter immediately be cancelled. We shall be entitled to proceed against you and claim may damages which we may suffer as a result of your breach."

53. The plaintiff did not provide a written response within 7 days. On 17 May 2007 the defendant wrote a further letter to the plaintiff in terms of which it purported to cancel the agreement of sale. It did so in the following terms:

> "Due to your failure to provide the Banker's Guarantee requested in our letter dated 7 May 2007 we hereby cancel the Deed of Sale in terms of Clause 8.
>
> We reserve all our rights to claim any damages which may have been suffered as a result of the cancellation of the Deed of Sale."

54. This provoked a flurry of e-mails from the plaintiff to Ms Weiland. He protested that *"the bond on the property has been in place since day one, it is ready for release on submission of proof that building is proceeding."* The plaintiff also placed on record that he *"did not accept the defendant's*

attempted cancellation of the building contract" and requested a meeting with the defendant to discuss the matter.

55. A meeting was eventually held between the plaintiff and Mr Prochassek on 13 June 2007. The matter could not be resolved.

THE LEGAL ISSUES TO BE DETERMINED

56. Against that background, and having regard to the relief sought by the parties, four issues arise for determination. They are the following:

56.1 Has ownership of the land been validly transferred to the plaintiff?

56.2 Did the parties conclude a contract for the construction of a dwelling on the land and if so on what terms?

56.3 If such a contract was concluded between the parties, was it validly cancelled by the defendant?

56.4 If such contract was not validly cancelled by the defendant, is the plaintiff entitled to specific performance and if so in what form?

57. I will address each of these issues in turn below.

HAS OWNERSHIP OF THE LAND BEEN VALIDLY TRANSFERRED TO THE PLAINTIFF?

58. Logically, the first question which arises is whether ownership of Erf [.....], Greenstone Hill,[.....] has been validly transferred to the plaintiff. If it has, then the defendant's counterclaim cannot succeed.

59. This question falls to be answered with reference to the abstract theory of transfer, which at least since the SCA judgment in *Legator McKenna and Another v Shea and Others 2010 (1) SA 35 (SCA)* has been held to apply to immovable as well as movable property in our law.

60. In *Legator McKenna,* the SCA explained the requirements for the passing of ownership in terms of the abstract theory of transfer as follows:

> "In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property is effected by registration of transfer in the deeds office – coupled with a so-called real agreement or 'saaklike ooreenkoms.' The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and an intention on the part of the transferee to become the owner of the property. Broadly stated the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement."[4] (references omitted)

61. In this case, delivery of the immovable property in the form of registration

[4] At para 22.

of transfer in the deeds office is clearly established. Counsel for the plaintiff, Mr Kairinos, submitted that the defendant's intention to transfer ownership is evidenced by it giving its attorneys the necessary power of attorney to effect transfer. The plaintiff, for his part, testified that he intended to receive ownership of the land and of course this is borne out by his conduct. Mr Kairinos submitted that a real agreement between the parties is accordingly established. I agree. There is, moreover, no suggestion, on the facts of this case, of the real agreement being tainted by any defect such as fraud. In my view this is a clear case of the parties intending to transfer and receive ownership of the land in question. Mr Novitz, counsel for the defendant, did not seriously contend otherwise. I am therefore satisfied that the requirements of the abstract theory of transfer of property are met in this case.

62. That however is not the end of the matter. It is also necessary to have regard to section 28(2) of the Alienation of Land Act which provides as follows:

> "Any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee."

63. Transfer of the land having been established, counsel focussed their energy on the question of whether the second condition stipulated in the section has been fulfilled: viz whether the plaintiff has performed in full in

terms of the sale agreement. The argument centered around whether the performance contemplated by the section is confined to the obligations relating to the sale of the land or whether it includes the obligations arising out of the building portion of the agreement. Mr Kairinos took the former position and argued that since there had clearly been full performance of the land obligations, section 28(2) has been complied with. Mr Novitz took the latter position and argued that since (on his submission) the plaintiff had not fulfilled certain obligations arising out of the building portion of the agreement, the condition in section 28(2) has not been met and the alienation is invalid. Mr Novitz sought to rely, in support of his argument, on an unreported judgment by Blieden J in the matter of *McCreadie and Another v Grand Aviation* handed down on 25 November 2005. The judgment does not deal with section 28(2) of the Alienation of Land Act and is therefore not directly on point.

64. It is not necessary for me to decide whether the performance contemplated in section 28(2) of the Alienation of Land Act is confined to the obligations relating to the sale of land in all cases. This is because, in my view, Mr Novitz's argument is, on the facts of this case, misconceived. This is so for two reasons. Firstly, on a proper understanding of the sale agreement in this case, there is no contract for the sale of a dwelling. The defendant agreed to construct a dwelling on an erf, which by the time construction commenced, would have been transferred to the plaintiff. The dwelling would accede to the erf upon construction. Therefore, the

defendant has never owned and would never own the dwelling and so properly understood could not have agreed to alienate the unbuilt dwelling.

65. Secondly, the sale agreement in this case is not a unitary contract but is comprised of two notionally separate contracts: one for the sale of land and one for the construction of a dwelling on the land. It is only in relation to the contract for the sale of land that the formality of signature is required. It follows that it is only in relation to that contract that section 2(1) of the Alienation of Land Act has been breached and that section 28(2) is triggered. There being no formalities required for the contract for the construction of the dwelling, there can be no breach of section 2(1) of the Alienation of Land Act and section 28(2) does not come into play.

66. For those reasons, it is clear that the performance contemplated by section 28(2) of the Alienation of Land Act is, in this case, confined to the obligations in relation to the sale of the land. There was no real dispute between the parties that those obligations have been performed in full by the plaintiff. I am therefore satisfied that the requirements of section 28(2) of the Alienation of Land Act have been met.

67. What is the consequence of this? Mr Kairinos submitted that the consequence is to render the agreement of sale valid *ab initio.* I disagree. What is rendered valid *ab initio* is the act of alienation, the transfer of the

land, not the underlying contract of sale. This is clear from the section itself which provides that *"any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid ab initio if…."*

68. The Alienation of Land Act defines *"'alienate'" as "in relation to land, sell, exchange or donate … and 'alienation' has a corresponding meaning." "Contract" is defined as " a deed of alienation under which land is sold….." and "deed of alienation" is defined as "a document or documents under which land is alienated."* Had the legislature intended the underlying contract to be valid *ab initio* in terms of section 28(2) it would have used the terms "contract" or "deed of alienation" rather than "alienation."

69. To conclude this section then, ownership of the land has been validly transferred to the plaintiff both in terms of the abstract theory of transfer and section 28(2) of the Alienation of Land Act. The defendant's counter claim can therefore not succeed and falls to be dismissed.

70. The effect of section 28(2) however is not to render the contract of sale valid *ab initio* but only the transfer itself. There is accordingly no valid contract for the sale of the land between the parties. The question arises whether there is a valid contract for the construction of a dwelling on the land. This brings me to the next issue to be determined.

DID THE PARTIES CONCLUDE A CONTRACT FOR THE CONSTUCTION OF A DWELLING ON THE LAND AND IF SO ON WHAT TERMS?

71. In my view, the evidence establishes that the parties reached a conscious accord, in September 2003, to conclude a contract:

71.1 for the defendant to construct a type E unit measuring 183 square metres on Erf [.....], Greenstone Hill,[.....] at a cost of R410 540.00;

71.2 on the terms set out in the sale agreement.

72. Even however, if it cannot be said that such a contract was concluded expressly, l am satisfied that such a contract was concluded tacitly.

73. Whether a tacit agreement has been concluded is determined by considering the conduct of the parties in the light of the relevant circumstances. There must be evidence that the parties intended to, and did, reach consensus on the terms alleged. Two different tests have been endorsed by the SCA to determine whether a tacit agreement exists. The first is known as the traditional approach and was articulated by Corbett JA in *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) at 292B as follows:

> "In order to establish a tacit contract, it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact contract on the terms alleged. It must be proved that there was in fact consensus *ad idem*."

74. However, in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 165B-C, the AD, also per Corbett JA, articulated a somewhat less stringent test in the following terms:

> "In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances, is that a contract came into existence."

75. As the Cape Provincial Division held in *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd* 2001 (1) SA 313 (C) *"proof of the primary facts on a balance of probabilities is required by either test and the main difference between them lies in the strength of the inferences to be drawn from the facts so proved."*[5]

76. Thus, the difference between the two tests lies in whether the inference to be drawn from the proved facts must be one that is capable of no other reasonable interpretation or whether it may be the most plausible probable conclusion. In this case, it is not necessary for me to consider the merits and de-merits of the two tests as I am satisfied that the more stringent test is met here.

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[5] At p 320.

77. The plaintiff signed the sale agreement. There can be no clearer indication that he intended to contract on the terms set out in the agreement. While the defendant did not sign the agreement, it clearly indicated by its conduct that it contracted to construct a standard type E unit on the plaintiff's erf on the terms set out in the agreement. As we have seen above, the defendant was prepared to entertain alterations to the standard unit, however it repeatedly stated that if certain stipulations were not met it reserved the right to build the standard unit in terms of the sale agreement. There can be no clearer indication of this than the e-mail from Mr Lopion to the plaintiff dated 13 June 2005 which stated as follows:

> "Signed quotes have to be in my possession by 30 June 2005. If not, the developer reserves the right to disregard your request for alterations and build a standard unit in terms of your signed purchase agreement."

78. Importantly, Mr Prochassek conceded under cross examination that if there was no agreement between the parties on the alterations, the defendant was obliged to build a standard E type unit on the plaintiff's erf.

79. This brings me to the next question: namely whether the parties did reach agreement on the alterations to be made to the standard unit. It was submitted on behalf of the plaintiff that agreement was reached in this regard, on the terms of the initial quote signed by the plaintiff on 30 June

2005. The argument here was that the presentation of the quote by the defendant to the plaintiff on 8 June 2005 constituted the offer, and that by signing the quote and sending back to the defendant on 30 June 2005, the plaintiff accepted the offer, thus concluding the agreement. As noted above, I have accepted the plaintiff's version that he signed the quote and sent it back to the defendant on 30 June 2005. The difficulty however is that in terms of the initial quote, there were two items that had not been quoted. These were "kitchen customisation" and "additional paving." In the absence of these items having been quoted and the quotes having been accepted by the plaintiff, I do not think it can be said that there was agreement between the parties on the cost of the alterations as at 30 June 2005.

80. The plaintiff did not contend that the parties reached agreement on the alterations after 30 June 2005. Nor could he. After June 2005, a dispute arose between the parties regarding the modification fee, which the defendant demanded and the plaintiff refused to pay. There were still no figures for "kitchen customisation" and "additional paving." An addendum was prepared but never signed.

81. For all these reasons, I am of the view that the parties did not reach agreement on the alterations to be made to the standard unit. There was however a valid and binding contract between the parties for the construction of a standard type E unit on the erf at a cost of R410 450.00.

The next question which arises is whether that contract was validly cancelled by the defendant.

WAS THE CONTRACT FOR THE CONSTUCTION OF THE DWELLING VALIDLY CANCELLED BY THE DEFENDANT?

82. The defendant purported to cancel the agreement on the basis that it was entitled, prior to commencing construction, to a demand guarantee for the full amount for the building costs, and that despite demand, the plaintiff failed to provide this.

83. For its contention that it was entitled to a demand guarantee for the full amount of the building costs, the defendant relied on clause 3 of the Deed of Sale[6] and in particular clause 3.3 thereof which provides that *"the balance of the purchase price shall be payable against the registration of transfer into the name of the Purchaser but payment thereof is to be secured by means of a bank guarantee…"* The defendant submitted that since the purchase price is stipulated as R639 450 000 in clause 3.2 (this was inserted by hand), clause 3.3 clearly entitled it to a bank guarantee for the cost of the erf and the building costs. The defendant submitted that this reading is reinforced by the portion of clause 3.4 of the Deed of Sale which provides that *"the approved Banker's Guarantee or other acceptable security for the full amount of the building costs referred to in*

[6] The relevant portions of clause 3 have been quoted in paragraph 12 above.

3.3 above….."

84. The defendant submitted that it needed a demand guarantee in order for it to waive its builder's lien in favour of the registered bondholder since financial institutions, including Nedbank, required it to waive its builder's lien before they would make progress payments.

85. The plaintiff submitted that the agreement could not be interpreted in the manner contended for by the defendant. Mr Kairinos pointed out that clause 9 of Annexure "A" explicitly entitled the plaintiff to finance the construction of the dwelling by means of a mortgage bond and a building loan as he had done. The defendant had been aware of the financial arrangements made by the plaintiff for an extended period of time and had never suggested that they were inadequate or that anything else was required. Mr Kairinos submitted that the security furnished by the plaintiff constituted "acceptable security" within the meaning of clause 3.4 of the Deed of Sale.

86. It was submitted further that there could be no necessity for the defendant to have a demand guarantee for the building costs when the plaintiff bound himself, in terms of clause 9.2 of Annexure "A", to sign the

authority for interim payments as and when required by the defendant.[7]

87. Ultimately, the plaintiff contended that the defendant had had no legal entitlement to insist on a demand guarantee and that its purported cancellation of the agreement was therefore invalid.

88. In order to decide whether the defendant's cancellation of the agreement was valid, it is accordingly necessary for me to interpret clause 3 of the Deed of Sale.

89. It is necessary to begin by setting out the correct approach to the interpretation of contracts. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) *("Endumeni")* the SCA provided a comprehensive exposition of the rules of interpretation applicable to contracts in our law:

> "The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading a particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one

[7] Clause 9.2 of Annexure 'A" provides *inter alia* as follows: *"The Seller is hereby authorised to receive interim draws from the Mortgagee/s and the Purchaser agrees to sign the authority for such payments as and when required by the Seller."*

> which leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in the contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[8]

90. I was referred in argument by Mr Kairinos to the unreported judgment of the SCA in *Sakhiwo Health Solutions (Limpopo) (Pty) Ltd v MEC of Health, Limpopo Provincial Government* [2014] ZASCA 206, handed down on 28 November 2014, in which the SCA stressed the following key principles of interpretation of contracts:

90.1 In interpreting a contract a court must consider all of its provisions and not isolate any of them and consider them in a vacuum.

90.2 Even when there is no ambiguity in a contract, in ascertaining what the parties' intention is, a court must have regard to the factual matrix.

90.3 A contract must be interpreted so as to give effect to its purpose and to make business sense.

91. Interpretation ought to be conducted as a single cohesive exercise and it

[8] At para 18.

is no longer appropriate to split the process up into different stages. Thus in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), the SCA held as follows:

> "While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at the perceived literal meaning of those words but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise.'"[9]

92. On the process of interpretation itself, the SCA in *Endumeni* held as follows:

> "Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used…….The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language used in order to avoid the identified absurdity." (references omitted)[10]

93. Applying these principles to the matter at hand, I have three fundamental

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[9] At para 12.
[10] At para 25.

difficulties with the interpretation contended for by the defendant:

93.1 Firstly, the defendant's interpretation conflicts with a number of clauses in the sale agreement. The first and most obvious of these is clause 9 of Annexure "A" which explicitly entitled the plaintiff to finance the construction of the dwelling by means of a mortgage bond and a building loan as he did. The defendant's interpretation also conflicts with the words *"or other acceptable security"* in clause 3.4 of the Deed of Sale which must indicate that a demand guarantee is not the only acceptable form of security. The defendant's interpretation fails to take account of the distinction, which runs like a thread through the sale agreement, between construction costs which are financed through a mortgage bond and construction costs which are self-financed by a purchaser. Both methods of finance are clearly permitted. Thus clause 9.1 which is entitled *"Finance by mortgage bond or self-financed"* provides that *"payment to the Seller, if financed by a Bank, shall be made according to the methods and rules for interim payments prescribed by them…"* Where payment is self-financed by a purchaser, clause 9 prescribes a different method of payment. This distinction is also evident in clause 3.4 of the Deed of Sale which provides *inter alia* that *"in the circumstances where the building is self-financed by the Purchaser the Seller shall be entitled to obtain from the Purchaser a guarantee that payment*

will be effected timeously." This would appear to indicate that a demand guarantee is required only where the construction costs are self-financed by the purchaser. If the defendant's interpretation were correct and the sale agreement required such a guarantee in all circumstances there would have been no need for the above sentence.

93.2 The second difficulty I have with the defendant's interpretation is that it is entirely at odds with the conduct of the parties. It is clear from the evidence that the defendant was fully aware of the financial arrangements that the plaintiff had made. Indeed, on two occasions the defendant wrote letters in support of the plaintiff's requests to Nedbank to extend the effective date of the bond because the delays in the commencement of construction. At no stage over an extended period of time did the defendant suggest to the plaintiff that the financial arrangements he had made were inadequate or that anything else was required. Notably, when Mr Prochassek was asked under cross examination what he understood clauses 3.3 and 3.4 of the Deed of Sale to mean he gave the following answer: "*We were basically looking for security for the purchase price and the buildings costs and for this we required a guarantee or other acceptable security."* This answer reveals that it was not Mr Prochassek's understanding that the sale agreement required a demand guarantee in all

circumstances.

93.3 The third difficulty I have with the defendant's interpretation is that it simply does not make business sense. The effect of the defendant's interpretation is that it would be entitled to a demand guarantee for the full amount of the building costs before a single brick had been laid. Mr Nel, Senior Operations Manager for Nedbank who gave evidence on behalf of the plaintiff, testified that Nedbank would never have issued a guarantee for the full amount of the land portion and the building costs. He testified that the most that Nedbank would have done was issue a guarantee for the land portion and that the balance would be held on retention and paid out in progress payments as the construction progressed. When Mr Prochassek was asked whether he considered it reasonable for an agreement to require a demand guarantee for the full amount of the building costs before a single brick had been laid, he answered that he personally would not have signed such an agreement.

93.4 Finally, I am also not convinced that the defendant's position regarding the builder's lien makes a demand guarantee a necessity. There can be no such necessity where, as here, the plaintiff bound himself contractually to ensure that the defendant received progress payments for the building work.

94. For all of the above reasons, I am of the view that the interpretation contended for by the defendant is untenable and cannot be accepted.

95. The sale agreement, and clause 3 of the Deed of Sale in particular, is no model of clarity. The clause must however be interpreted in the light of the provisions in the agreement as a whole, in order to give effect to the purpose of the agreement and in a manner that makes business sense.

96. Interpreted in this manner, I am of the view that clause 3.3 is intended to deal with the method of payment for the purchase price of the erf only. This is apparent from the reference in the clause to registration of transfer. Thus the clause provides that *"the balance of the purchase price shall be payable <u>against the registration of transfer</u> into the name of the Purchaser but payment thereof is to be secured by means of bank guarantee…."* In my view the figure of R639 450.00 was erroneously inserted in clause 3.2 as the purchase price. What ought to have been inserted there was R229 000.00 – the purchase price for the land only.

97. Turning to clause 3.4, I am of the view that this clause was intended to deal with the method of payment for the building costs only and should not refer back to clause 3.3. In other words, the portion of clause 3.4 which reads "referred to in 3.3 above" is an error.

98. Interpreted in this way:

98.1 Clause 3.3 requires a bank guarantee for the purchase price of the erf;

98.2 Clause 3.4 requires a bank guarantee or other acceptable security for the full amount of the building costs;

98.3 Clause 3.4 provides that where the building costs are to be self-financed by the purchaser, the seller must be provided with a guarantee that payment will be effected timeously.

99. In the result, clause 3 of the Deed of Sale does not require a demand guarantee in all circumstances, but only possibly where the building costs are to be self-financed by the purchaser. In all other cases, "other acceptable security" for the building costs is sufficient.

100. This interpretation coheres with the other provisions of the agreement and its overall scheme which permits the building costs to be financed through a mortgage bond or self-financed and explicitly provides that in the former case *"payment may be made according to the methods and rules for interim payments prescribed by the bank."* It accords with the fundamental purpose of the building contract as far as the seller is concerned which is to ensure that adequate security is in place for the building costs and that progress payments are received as the construction progresses. It accords with the subsequent conduct of the

parties and certainly appears to be how both parties understood the agreement. Finally, it is an interpretation that makes business sense. Conversely, it would not ordinarily make business sense for a seller to be able to insist on a demand guarantee for the full amount of building costs before a single brick had been laid, particularly in circumstances where the purchaser had secured a mortgage bond over the erf. It may however be justifiable from a business sense point of view to require a greater level of security from purchasers who are self-financing the building costs.

101. I am therefore of the view that the plaintiff had provided acceptable security for the building costs in terms of the agreement, that the defendant had no entitlement to insist on a demand guarantee from the plaintiff and that the defendant's purported cancellation of the agreement was accordingly invalid.

102. I now turn to the question of the relief that ought to be granted to the plaintiff.

IS THE PLAINTIFF ENTITLED TO SPECIFIC PERFORMANCE AND IF SO IN WHAT FORM?

103. The defendant raised a special pea to the effect that the agreement was "inchoate" because no final drawings or building plans were annexed to it. The defendant contended that the consequence of this was that the relief

sought by the plaintiff was not competent in law.

104. The agreement does not explicitly state that final drawings or building plans are required to be attached. The reason for this seems obvious: final drawings and plans would not have been in existence at the time of the conclusion of the agreement. This is clear from clause 3.1 which provides that *"the Purchaser authorises the Seller to prepare working drawings for the Works and to submit such plans for and on behalf of the Purchaser to the Local Authority concerned."* This was yet to be done at the time of the conclusion of the agreement.

105. The only plan that was in existence at the time of the conclusion of the agreement was the defendant's building plan for the type E unit. As stated above, it was common cause that the defendant provided the plaintiff with this plan and that it formed part of the plaintiff's application for his bond and building loan.

106. The agreement itself clearly identifies the dwelling to be constructed as a type E unit. I do not think the fact that the defendant's plan is not attached to the agreement renders it inchoate. Mr Novitz did not refer me to any authority in support of such a proposition. There is accordingly no merit in the special plea.

107. Mr Novitz did not suggest that there was any other reason why specific

performance ought not to be granted in this case. The parties were *ad idem* on the obligation to build. As stated above, Mr Prochassek conceded that if the parties failed to reach agreement on the alterations, the defendant was obliged to build a standard unit in terms of the agreement. The parties were also *ad idem* on what is to be built – a standard type E unit.

108. As for costs, there was some argument over the costs that have been reserved over the years. I am not convinced that there is any reason why those costs should not be costs in the cause.

109. I accordingly make the following order:

1. The defendant's counter-claim is dismissed.

2. The plaintiff's claim succeeds.

3. The defendant is ordered to do all things necessary in preparation for and to effect the construction of a standard type E unit on Erf [.....], Greenstone Hill,[.....] at a cost of R410 540.00 in terms of the agreement of sale concluded between the parties in September 2003.

4. The defendant is ordered to pay the costs of the action and the application that preceded it.

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H BARNES

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Heard: 1 – 4 December 2014

Delivered: 18 May 2015

Appearances:

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Attorneys: Jurgens Bekker Attorneys

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Attorneys: Novitz Attorneys