HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: A5043/2015

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: No.
(3)	REVISED.

.....	.....
DATE	SIGNATURE

In the matter between:

GRAND AVIATION (PTY) LTD Appellant

and

MICHAEL GEOFFREY BRAY Respondent

Case Summary: **Contract – composite agreement providing for sale of land and the construction of a dwelling house in a residential development – whether underlying agreement for the sale of land and transfer of ownership valid – whether building part of the agreement valid and enforceable – whether composite agreement validly cancelled. Appeal dismissed with costs.**

JUDGMENT

MEYER J (MATOJANE and FRANCIS JJ concurring)

INTRODUCTION

[1] This is an appeal against the judgment and order of the Gauteng Local Division of the High Court (Barnes AJ) on 18 May 2015, granting the claim of the respondent, Mr Michael Geoffrey Bray, for specific performance by the appellant, Grand Aviation (Pty) Ltd, of an obligation arising from a written agreement to construct what had been described as a type E dwelling house measuring

approximately 183 square metres (the unit) for Mr Bray on an erf in a residential estate called Emerald Estate, being developed by Grand Aviation in Greenstone Hill Extension 7, near Modderfontein (the erf, property or land), and dismissing Grand Aviation's counterclaims for an order declaring the written agreement null and void for lack of compliance with the provisions of s 2(1) read with s 28(2) of the Alienation of Land Act 68 of 1981, the re-transfer of ownership of the property into its name and for declaratory relief that the agreement was validly cancelled and that it is in law not required to erect the unit for Mr Bray. The litigation commenced by way of motion proceedings during November 2007, but, on 4 April 2008, the matter was referred to trial due to disputed issues of fact that had arisen on the papers. The appeal to this full court is with the leave of the trial court.

FACTUAL MATRIX

[2] I commence by setting out the facts relevant to the determination of the issues between the parties. In doing so, I essentially follow the same chronology as set out in the trial court's thorough and comprehensive judgment. Mr Bray decided to purchase the erf and to have a dwelling house constructed thereon, for investment purposes. He selected a residential unit that was described as a 'Unit Type E measuring approximately 183 square metres' from among unit options A, B, C, D and E offered by Grand Aviation. On 28 September 2003, he completed and signed Grand Aviation's standard written agreement. It comprises a 'Deed of Sale' part and in respect of the erf, an 'Annexure "A"', which essentially contains the construction of the unit part of the agreement together with an 'Annexure "B"' (a schedule of building specifications) and an 'Annexure "C"' (specifications of the electric fittings to be installed in the unit). I refer to the 'Deed of Sale' part as 'sale of land part of the agreement', to clauses 2.1, 2.2, 3.4 and 3.5 of the 'Deed of Sale' part together with Annexures 'A', 'B' and 'C' as 'the building part of the agreement' and to both parts as 'the agreement'.

[3] The written agreement or offer signed by Mr Bray was never signed by Grand Aviation. Its chief executive officer who testified on its behalf, Mr Prochassek, could not explain the omission. He conceded that Grand Aviation was at all material times under the impression that it had signed the agreement and that a valid and binding

agreement had been concluded with Mr Bray. The trial court correctly in my view found this was borne out by Grand Aviation's conduct, and that-

'[i]t appears that it was only after the plaintiff [Mr Bray] had instituted these proceedings against the defendant [Grand Aviation] 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.'

[4] By way of interpolation I refer to certain provisions of the agreement, which are relevant to the determination of the issues in the appeal. The property is described as follows in clause 1 of the sale of land part of the agreement:

'1 DESCRIPTION OF PROPERTY

ESTATE	EMERALD ESTATE
ERF NUMBER	3.84
UNIT TYPE	E
MEASURING	183 Square metres
Approximately	
TOWNSHIP	GREENSTONE HILL EXT 7'

[5] Clause 2 of this part of the agreement stipulates the purchase price, thus:

'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	R229 000 (Two hundred and twenty nine thousand Rand)
Cost of building	R380 000 (three hundred eighty) [inserted in manuscript]
Total	R639 450.00 [inserted in manuscript]

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.'

[6] The payment of the purchase price is provided for in clause 3, which reads as follows:

'3 PAYMENT OF PURCHASE PRICE

3.1 The Purchaser shall pay the purchase price of the Property as follows:

3.1.1 On signature hereof an initial non-refundable fee of R5 000.00 (FIVE THOUSAND RAND) shall be paid to the Conveyancer of the Seller on date of this offer, which amount will be invested in an interest bearing account in terms of Section 78(2)(A) of Act 53/79 on behalf of the Purchaser, which interest will accrue to the Purchaser.

3.1.2 In the event of this offer failing this offer shall lapse *ipso facto* in which event the Seller will be entitled to retain the fee in clause 3.1.1 as *rouwkoop*.

3.2 The purchase price is R R639 450.00 (……) [the amount of R639 450.00 was inserted in manuscript] payable as follows:

3.2.1 A fee of R5 000 as stated in 3.1.1

3.2.2 [this sub-clause provides for the payment of a deposit, but was deleted]

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 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.

3.5 Any outstanding amounts or instalments due by the Purchaser to the Seller in terms of this deed of sale and/or the annexure hereto, shall bear interest at the prime plus 2% from the due date to date of payment.'

[7] I now refer to certain provisions contained in Annexure A of the building part of the agreement.

'1 INTERPRETATION

1.1 In this Annexure, unless inconsistent with the context, the Works and phrases defined hereunder shall bear the meanings assigned to them in this clause:-

1.1.1 "The Works" shall mean the erection of a dwelling house that is to be executed on the property in accordance with the provisions of this Annexure.

1.1.2 "The Contract Sum" shall mean the sum inclusive of VAT or such other amounts as shall become payable as set out hereunder at the times and in the manner specified herein and shall be payable to the Contractor or at his chosen address being his *domicilium citandi et executandi*. The final amount shall be determined from the area given on the final approved drawings. The contract sum shall be based on the building cost set out in the Deed of Sale.

1.1.3 The Final Drawings shall mean the building plans as annexed hereto or the building plans agreed to by the parties and signed by both for identification purposes together with schedule of finishes (if any) therein referred to. Should no reference

to a schedule of finishes be made in the drawing plans, the attached schedule of finishes will apply.

1.1.4 "The Contract Documents" shall mean

1.1.4.1 this Annexure

1.1.4.2 the Final drawings.

1.1.5 The specifications shall mean the specifications mentioned in the final drawings and the schedule of finishes as set out in annexures "B" and "C" hereto. Unless the specifications and plans are agreed by the parties in writing and annexed to this Annexure the specifications shall be deemed to be the minimum specifications recommended by the National Home Builders registration council. In the event of any discrepancy arising between the drawings and specifications, the provisions of the specifications shall prevail. In the event of any discrepancy arising between the specification and the finishing schedules the provisions of the finishing schedules shall apply, provided, however, that where there are engineers' drawings they shall take precedence.'

[8] Clause 1 of Annexure 'B' (schedule of specifications) provides as follows:

'The units will be erected substantially in compliance with the National Home Building Regulations, SABS 0400, the requirements of the local authority and any major financial institution, but this specification will override those requirements should any conflict arise.'

[9] Clause 3 of the Annexure A provides as follows:

'3 PLANS/DRAWINGS

3.1 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 by the local Authority concerned.

3.2 In the event of the Local Authority, mortgagee, township owner or other statutory body of the purchaser, at any time or for any reason whether before, during or after the construction of the Works, requiring any alteration, variation or amendment to the drawings and/or specifications involving the Seller in additional expense, then the reasonable cost of complying with such alteration, variation or amendment shall be borne and paid for by the Purchaser.'

[10] And finally, clause 9 of the Annexure A provides in relevant parts 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 this 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 in 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

. . .

9.2 *Cession*

In the event of the Annexure price being payable from the proceeds of a building loan secured by a First Mortgage Bond obtained from a Bank or approved Financial Institution, then the Purchaser irrevocably cedes to the Seller a sum equal to the amount of such mortgage bond. 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. In the event of the Purchaser failing an/or refusing to authorise payment of such interim draws, the Seller shall be entitled without prejudice to any other rights which it may have in terms of this Annexure, or in Law, to discontinue the said Works, and all damages arising, costs included and additional interest accruing shall be for the account of the Purchaser provided that the Seller himself is not in default in any way. The Purchaser hereby irrevocably authorises the Seller to sign any release for and on behalf of the Purchaser and to accept all draws on the Purchaser's behalf. In the event of the Mortgagee/s, through error or otherwise, paying the Purchaser or his agent, or assigns, any of the proceeds to the Bond/s hereby ceded, prior to the Seller having been paid the full Annexure price, plus any additional sums herein contained, the Seller may require the Purchaser forthwith to pay such amounts to the Seller plus interest from time to time thereon at a rate of interest equivalent to the prime rate + 2% charged by the Seller's bank in respect of unsecured overdraft facilities as charged from time to time from the due date of such payment until the date of payment thereof to the Seller. No access bond by Purchaser will be accepted.'

[11] Grand Aviation provided Mr Bray with its standard building plan for the type E dwelling unit and the plan, according to Mr Bray, formed part of his application for a home loan. He obtained a loan from Nedbank Limited in the amount of R639 450 against the security of a first mortgage bond, which was to be registered over the property. Nedbank agreed to make an amount of R229 000 available for guarantees

and payment against transfer of ownership of the property into Mr Bray's name and to retain and advance the amount of R410 540 as the works progressed from time to time. The details of this were confirmed in a letter dated 2 March 2004, from Nedbank to the conveyancing attorneys, De Wet Reitz Attorneys. On 11 October 2004, Nedbank furnished a guarantee to the conveyancing attorneys for payment of the amount of R229 000 against registration of transfer of ownership of the property into Mr Bray's name and the registration of a first mortgage bond in its favour over the property to secure payment of the loan amount of for R639 450. Transfer of ownership of the property into the name of Mr Bray and the registration of the first mortgage bond in favour of Nedbank were effected simultaneously in the Deeds Office on 29 March 2005.

[12] It appears from the evidence that Grand Aviation furnished purchasers in the Emerald Estate with standard drawings and specifications for the different unit options to which the residential units would be built. Agreement was to be reached on alterations to the standard drawings and specifications and on the placement of houses on the properties. Mr Bray sought certain alterations to his type E unit and, on 8 June 2005, Grand Aviation's Mr Lopion furnished him with a written 'revised quote and floor plan' which incorporated his proposed alterations for the total amount of R79 500, but there were two outstanding items – 'kitchen customisation' and 'additional paving' – that still had to be quoted for. Mr Bray was required to sign the quotation and return it to Mr Lopes. The following contractual term was also included:

'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.'

On 13 June 2005, Mr Lopion notified the purchasers, including Mr Bray, that-

'[s]igned quotes have to be in [his] possession by 30 June 2005. If not, the developer reserves the right to disregard [Mr Bray's] request for alterations and build a standard unit in terms of [his] signed purchase agreement.'

Mr Bray thereupon signed the quotation, initialled the altered floor plan and returned both to Mr Lopion on 30 June 2005.

[13] On 30 May 2006, Grand Aviation's Ms Linda Weiland furnished Mr Bray with detailed plans of his unit, which incorporated the alterations he sought, for his

approval. At his request, she also, on 24 August 2006, furnished him with a revised quotation for the alterations, which quotation was then incorporated into an 'Addendum to the Deed of Sale' that he was requested to sign (the addendum). The revised quotation was identical to the initial quotation in respect of the items that had been quoted for, but it included a so-called 'modification fee' in the amount of R110 000, which increased the total amount for the alterations from R79 590 to R189 590. The trial court, in my view correctly, accepted the evidence of Mr Bray that he had been told by Mr Prochassek that the modification fee was to cover the increased building costs that had arisen because of the delay in the development. As a result, the construction of phase 3 of the development, which included Mr Bray's unit, was scheduled to commence only in January 2007. Mr Bray never signed the addendum.

[14] The trial court rejected Mr Prochassek's version that Mr Bray had raised no objection to the modification fee and that he agreed to pay it (despite the fact that he never signed the addendum) and it accepted Mr Bray's evidence that he had not been prepared to pay the modification fee and that he had communicated this to Grand Aviation. In this regard, the trial court found as follows:

'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 "*Mr 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. [*Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA).] The 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 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 a meeting with the plaintiff sometime during 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.

47. 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.'

[15] The trial court's reasoning and conclusion on this disputed issue of fact can, in my view, not be faulted. Furthermore, Grand Aviation argues that Ms Weiland's note referred to in the above-quoted passage was pertinently raised in the answering affidavit and not challenged by Mr Bray in his replying affidavit. Thus, it is argued, its contents are deemed to be admitted. There is no merit in this argument. It is trite that 'quiescence is not necessarily acquiescence'. (*Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 422.) Mr Bray's failure to repudiate the allegation relating to Ms Weiland's note in his replying affidavit should have been canvassed with him when he was cross-examined, because he might well have proffered a satisfactorily explanation for his silence. As was said by Miller JA in *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10-

'[b]ut in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute.'

Furthermore, the Constitutional Court, in *President of the Republic of South Africa v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) held that:

'[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* [(1893) 6 R 67 (HL)] and has been adopted and consistently followed by our courts.'

(Footnotes omitted.)

[16] By letter dated 23 April 2007, Grand Aviation demanded that Mr Bray furnished it within seven days with a demand guarantee from a bank or suitable financial institution for the full amount of the building costs in order for it to waive its 'builder's lien over the work in favour of the registered bond holder', because financial institutions usually insist on it waiving its builder's lien before any progress payments are made. Mr Bray (and other purchasers) was also given the option of utilising his own builder to construct his unit or to sell his property in which event a consensual cancellation of the 'building component of the deed of sale' was required. Mr Bray did not respond. Seven days later, on 7 May 2007, Grand Aviation in writing repeated the same demand, afforded him seven days after receipt of the letter to comply with the demand and notified him that if he failed to comply-

'. . . then and as is provided for in terms of clause 8 of the Deed of Sale, [he] shall be in breach in that [he is] 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. [Grand Aviation] shall be entitled to proceed against [him] and may claim damages which [it] may suffer as a result of [his] breach.'

[17] Mr Bray did not accede to Grand Aviation's demand for a demand guarantee for the full amount of the building costs. By letter dated 17 May 2007, addressed to Mr Bray, Grand Aviation purported to cancel the agreement in terms of clause 8 thereof due to his failure to provide the banker's guarantee. Mr Bray placed it on record that he 'did not accept the defendant's attempted cancellation of the agreement'. The matter could not be resolved and hence the litigation that culminated in this appeal.

TRIAL COURT'S PRINCIPAL FINDINGS

[18] The following principal questions arose for determination by the trial: (a) whether ownership of the property had been validly transferred to Mr Bray; (b) whether the parties concluded a binding agreement for the construction of a dwelling on the land, and, if so, on what terms; (c) if such contract was concluded, whether it was validly cancelled by Grand Aviation; and (d) if it was not validly cancelled, whether Mr Bray was entitled to specific performance, and, if so, in what form.

[19] The trial court found that: (a) the agreement incorporated two distinct agreements, a sale of land and a building contract for the erection of a dwelling on the property, that the requirements of the abstract theory of transfer of ownership of land and of s 28 (2) of the Alienation of Land Act have been met and that ownership of the property, therefore, been validly transferred to Mr Bray; (b) even if it cannot be said that the parties expressly concluded a contract for the construction of a dwelling on the property, they did so tacitly, but that they did not reach agreement on the alterations to be made to the standard Type E unit; (c) on a proper construction of clause 3 of the deed of sale part of the agreement, clause 3.2 was intended to refer to the purchase price for the land only, clause 3.3 was intended to deal with the method of payment of the purchase price for the land only and required a bank guarantee for payment of the purchase price of the land against transfer of ownership, clause 3.4 was intended to deal with the method of payment for the building costs only and required a bank guarantee *or other acceptable security* for the full amount of the building costs, that Mr Bray had provided such acceptable security for the building costs in terms of the agreement, that Grand Aviation had no entitlement to insist on a *demand guarantee* from Mr Bray as it did and that its purported cancellation of the agreement was accordingly invalid; and (d) the

agreement was not 'inchoate' because final drawings or building plans were not annexed to it as was contended for by Grand Aviation, the parties were *ad idem* on what is to be built – a standard Type E unit measuring 183 square metres, that Grand Aviation had sufficient information to draw up plans for a Type E unit on the property and to submit the plans to the local authority concerned for approval and that Grand Aviation was thus '. . . ordered to do all things necessary in preparation for and to effect the construction of a standard type E unit on Erf 444, Greenstone Hill, Extension 7 at a cost of R410 540 in terms of the agreement of sale concluded between the parties in September 2003.'

[20] The appeal raises questions relating to the validity of the underlying agreement and of the transfer of ownership, the validity and enforceability of the construction part of the agreement and the validity of the cancellation of the agreement.

VALIDITY OF THE UNDERLYING AGREEMENT AND TRANSFER OF OWNERHIP

[21] The trial court, in my view, was correct in applying the abstract theory for the passing of ownership of immovable property and in finding that its requirements have been met in this instance. The trial court correctly relied on *Legator McKenna and Another v Shea and Others* 2010 (1) SA (SCA), para 22, wherein it was held that-

'[i]n 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.'

(Footnotes omitted.)

[22] First, delivery – registration of transfer of ownership into the name of Mr Bray in the deeds office - was effected on 29 March 2005. Second, the intention of Grand Aviation as transferor to transfer ownership had been established by Grand Aviation having given a power of attorney to the conveyancing attorneys to effect transfer of

ownership of the property into the name of Mr Bray, and he, as transferee, indisputably had the intention of becoming the owner of the property. Mr Bray testified that he intended to receive ownership of the property and this was, as the trial court correctly found, borne out by his conduct. There was also no suggestion of any defect in the real agreement. The validity or otherwise of the underlying agreement for want of compliance with s 2(1) of the Alienation of Land Act, which provides that-

'[n]o alienation of land after the commencement of this section shall, subject to the provision of section 28, be of any force or effect unless it is contained in a deed of alienation agreed to by the parties thereto or by their agents acting on their written authority',

is, therefore, irrelevant. The abstract theory does not require a valid underlying agreement. The ownership of the property, therefore, had been validly transferred to Mr Bray. Grand Aviation's claim in its counterclaim for the re-transfer of ownership of the property into its name was correctly dismissed by the trial court.

VALIDITY AND ENFORCEABILITY OF THE BUILDING PART OF THE AGREEMENT

[23] The trial court, in my view, correctly held that '. . . 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. The relevant provisions of the agreement must be interpreted in accordance with the established principles of interpretation (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12).

[24] The 'Deed of Sale' section of the agreement, except for clauses 2.1, 2.2, 3.4 and 3.5 thereof, exclusively constitutes the sale of land part of the agreement and clauses 2.1, 2.2, 3.4 and 3.5 thereof together with Annexures 'A', 'B' and 'C' the building part of the agreement. Clause 2.1 of the sale of land part of the agreement distinguishes between the cost of the land (which is stated to be R229 000) and the cost of building (which is stated to be R380 000). This clause makes it clear that the cost of the land was separate and distinct from the cost of construction. In clause 2.2 the parties expressly and unambiguously recorded that the construction and

erection of the dwelling and outbuildings on the land are governed by the terms and conditions contained in the Annexure A part of the agreement. This provision makes it plain that the parties contemplated that the sale of the property was to be governed by the terms of the sale of land part of the agreement and the construction of the dwelling by the building part of the agreement, in other words that the parties intended to conclude two separate and distinct agreements albeit in one document.

[25] Clause 3.1 makes provision for the method of payment of the purchase price of the property only. Even though the parties inserted in clause 3.1 in manuscript the total amount for the price of the land and the cost of the building (‘R639 450), their clear and unambiguous intention with this clause was to provide for the method of payment of the purchase price for the property only, which was R229 000 and not R639 450. Clause 3.2.2 provides for a deposit of ‘R nil’ and the balance of the purchase price to be secured by a guarantee payable ‘against registration of transfer’. This clearly refers to the purchase price of the property (as defined in clause 2.1 – being R229 000) and not the ‘cost of construction of the dwelling’ as defined in clause 2.1, since only the purchase price for the land was to be paid against registration of transfer and not the building costs. This was also confirmed by the evidence of both parties and it was never suggested by either party that the full contract price of R639 450 was payable against registration of transfer.

[26] Clause 3.4 then provides for the furnishing of security in respect of the building costs. It is therein stated that ‘[t]he 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.’ The reference to clause 3.3 was clearly contemplated to be a reference to clause 2.1 since clause 2.1 refers to the cost of building and clause 3.3 does not refer to the cost of building at all but to the payment of the balance of the purchase price of the land. Clause 3.4 further entitles the seller to obtain a guarantee that payments would be effected timeously, only from a purchaser who self-finances the building. The method of payment of the building costs is provided for in clause 9 of the building part of the agreement (Annexure A). Clause 9.1 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 the bank. Clause 9.2 contains a cession to the seller of the proceeds of the building loan secured by a first mortgage bond obtained from a bank or financial institution.

[27] Clause 8 of the sale of land part of the agreement is a breach clause which allows a defaulting party three days to remedy its breach, whereas clause 11 of the building part of the agreement (Annexure A), which is also a breach clause, provides for eleven days to remedy a breach of the provisions of the building part of the agreement. The sale of land part and the building part of this composite agreement thus each has its own breach clause, which would have been unnecessary if the parties had intended a single indivisible agreement. Furthermore, Grand Aviation's own conduct in affording purchasers the option of utilising their own builders to construct their units or to sell their properties and for the consensual cancellation of 'the building component' of the deeds of sale militates against its contention that the parties intended a single indivisible agreement.

[28] In support of its contention that the agreement is a single indivisible agreement and not a composite one comprising an agreement of sale and a construction agreement, Grand Aviation relies heavily on the unreported judgment of Blieden J in *McCreadie and Another v Grand Aviation* (WLD (case no. 14817/05) delivered on 25 November 2005), wherein he, in respect of a similar agreement, held that-

'. . . it is plain from a reading of the document as a whole that what was sold is land and improvements thereto which in this case are still to be constructed. "Land" in this country includes all improvements which accrue to it.'

[29] I respectfully agree that '"[l]and" in this country includes all improvements which accrue to it', but I do not believe Blieden J intended to find that land includes future improvements that 'are still to be constructed'. I agree with the trial court's finding that-

'. . . 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.'

The building part of the agreement in this instance is not a sale, but a *locatio conductio operis* (letting and hiring of work). (See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A)).

[30] The trial court then applied the principles of tacit agreements to the building agreement to find that-

'[e]ven however, if it cannot be said that such contract was concluded expressly, I am satisfied that such contract was concluded tacitly.'

However, the terms and conditions of the building part of the agreement are express and in writing and the signing thereof by the parties is not a legal requirement for a valid building agreement. The parties concluded an express agreement for Grand Aviation to construct a Type E unit measuring 183 square metres on the property on the terms and conditions set out in the building part of the agreement.

[31] The trial court, therefore, was correct in finding that the agreement contains two distinct contracts – a sale of land agreement and a building agreement. I also agree with the trial court's finding that the building part of the agreement did not require signature for its validity in terms of s 2(1) of the Alienation of Land Act and, therefore, that s 28(2) of that Act, which provides that-

'[a]ny 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'

was not applicable to the building agreement. I accordingly do not need to enter the debate whether the performance contemplated by s 28(2) is confined to the obligations arising from the sale of land part of the agreement, as was contended for by Mr Bray, or whether it includes the obligations arising from the building part of the agreement, as was contended for by Grand Aviation. The counterclaim of Grand Aviation for declaratory relief that the agreement is null and void for lack of compliance with the provisions of s 2(1) read with s 28(2) of the Alienation of Land Act, therefore, was correctly dismissed by the trial court.

[32] I now turn to the question whether the building part of the agreement is inchoate and unenforceable. Grand Aviation contends that it is inchoate for want of compliance with clauses 1.1.3 and 1.1.4 thereof (annexure A) since no final drawings were annexed to the agreement and no building plans were agreed to by the parties.

Mr Bray, on the other hand, contends that valid, binding and enforceable building contract came into existence.

[33] In *CGEE Alsthom Equipments et Enterprises Electrique, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A), at 92A-E, Corbett JA said the following about inchoate agreements:

'There is no doubt that, where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force. A good example of this kind if situation is provided by the case of *OK Bazaars v Bloch* (supra) (see also *Pitout v North Cape Livestock Co-operative Ltd* (supra)). Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that consensus on the outstanding matters would have to be reached before a binding contract could come into existence (see Pitout's case supra at 815B-C). The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand. (See generally Christie *The Law of Contract in South Africa* at 27-8.) Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances (see Pitout's case supra at 815D-G).'

[34] The provisions of the building part of the agreement referred to in paragraphs 7-9 *supra* are pertinent to this enquiry. The parties agreed that Grand Aviation would construct and erect a standard Type E dwelling house measuring183 square metres on the property in accordance with the provisions of the building part of the agreement (clause 1 of the Deed of Sale and clause 1.1.1 of annexure A). The parties agreed on standard specifications, materials and fittings to which the dwelling house would be built, which could be varied consensually (clauses 1.1.3, 1.1.5, 2.4, 3.2 of annexure A and the schedules of specifications and of electric fittings (annexures B and C)).

[35] The only outstanding matter upon which the parties still needed to agree was the final building plans for a Type E residential unit (clause 1.1.3 of Annexure A). Mr Bray, however, specifically authorised Grand Aviation to prepare the drawings and to submit them for and on his behalf for approval to the local authority concerned (clause 3.1 of Annexure A). This was part of its obligations which it was compelled to perform when the trial court ordered it to 'do all things necessary in preparation for and to effect the construction of a standard type E unit'.

[36] Turning to the conduct of the parties and the surrounding circumstances, Mr Bray's evidence was that Grand Aviation provided Mr Bray with its standard building plan for the Type E unit and that plan, according to Mr Bray, formed part of his application for a home loan. Mr Bray sought certain alterations to the standard drawings and specifications for the Type E unit. On 8 June 2005, Grand Aviation's Mr Lopion furnished him with a written 'revised quote and floor plan', which incorporated his proposed alterations. Mr Bray was required to sign the quotation and furnish it to Mr Lopion and thereby agreeing to provide the funds required for the alterations within 7 days prior to commencement of the building of the unit and, should that not occur, the original standard unit would be built on the property. On 13 June 2005, Mr Lopion notified Mr Bray and other purchasers that the signed quotations had to be in his possession by 30 June 2005, failing which Grand Aviation would have the right to disregard their requests for alterations and to build standard units in terms of their agreements. Mr Bray testified that Grand Aviation, represented by Mr Lopion, had been aware of the placement of the dwelling on the property that he had sought and he had been satisfied with its placement on the floor plans which Mr Lopion had furnished to him. He signed the quote, initialled the altered floor plan and e-mailed both back to Mr Lopion on 30 June 2005.

[37] On 30 May 2006, Ms Linda Weiland furnished Mr Bray with detailed plans for his unit and they accorded with the plans he had approved in June 2005. Detailed plans, according to the evidence of Mr Bray, had therefore been drawn up by 30 May 2006, which could be submitted to the local authority concerned. He had signed the detailed plans for the standard Type E unit to be built on the property on two occasions for identification purposes as required by the agreement (clause 1.1.3 of annexure A). Grand Aviation did not call Mr Charles Lopion or Mr Linda Weiland as

witnesses and Mr Bray's evidence concerning his discussions with them and the document which he had received from and had sent to them, was not refuted with credible evidence.

[38] Mr Prochassek, in giving evidence on behalf of Grand Aviation, conceded that it had information from Mr Bray as to where he wanted the dwelling to be placed on the property and that its architects would be able to draft working drawings or plans. He also conceded that Grand Aviation could not dispute Mr Bray's account that he had sent the signed quotation and plans to Mr Lopion. (It was also not put to Mr Bray during his cross-examination that he did not do so.) Mr Prochassek also testified that the altered plans were for the alterations that Mr Bray had requested and that the alterations were merely extensions to the standard Type E plan. He conceded that Grand Aviation could have built a standard Type E on the property but for the dispute about the demand guarantee to which I return.

[39] The trial's court finding that no variation was agreed to in respect of Grand Aviation's obligation to build a standard Type E unit on the property is not attacked on appeal before us. This finding, therefore, meant that Grand Aviation was not obliged to build a modified Type E unit. Having regard to the intention of the parties, as gathered from their conduct, the terms of the building part of the agreement and the surrounding circumstances, the building part of the agreement, in my view, acquired contractual force. It was not inchoate and was and is capable of performance in accordance with the order of the trial court. I thus agree with the trial court's conclusion that the parties concluded a valid and enforceable contract for the construction of a Type E dwelling on the property.

VALIDITY OF THE CANCELLATION OF THE COMPOSITE AGREEMENT

[40] The determination of the question whether Grand Aviation legally validly cancelled the agreement depends on whether it had been entitled to demand a guarantee in the form of a demand guarantee from Mr Bray for the building costs. The determination of this issue raises the proper interpretation of the provisions of the agreement in respect of payment and the provision of security, and, if the provision of acceptable security had been contemplated, the determination of the issue whether Mr Bray had in fact provided acceptable security. The trial court found

that in terms of the agreement Mr Bray was obliged to provide a bank guarantee or other acceptable security for the building costs and that he had indeed provided acceptable security as contemplated in the agreement.

[41] I have referred to the contractual clauses relevant to this part of the enquiry in paragraphs 6 and 10 *supra* and a determination of their meaning appears in paragraphs 24-26 *supra*. The parties, in clause 3.3 (Deed of Sale), contemplated only payment of the balance of the purchase price for the land against registration of transfer into the name of the Mr Bray, which balance purchase price was to be secured by means of a bank guarantee approved by Grand Aviation or its conveyancing attorneys, and it was to be delivered to the conveyancing attorneys within 30 days of signature of the agreement. Mr Bray provided a guarantee for payment of the purchase price for the land in the sum of R229 000 as sought and approved by Grand Aviation's conveyancing attorneys and in terms of the guarantee payment of the purchase price was effected against transfer of the property into the name of Mr Bray.

[42] Clause 3.4 (Deed of Sale) and clause 9 (Annexure A) regulate the provision of security for the full amount of the building costs. The security contemplated in terms of clause 3.4 is a banker's guarantee or other acceptable security for the full amount of the building costs which would entitle Grand Aviation to receive progress payments as the building works proceeded in accordance with the provisions of the building part of the agreement, and, only if the building is self-financed by a purchaser, a guarantee that payment of the progress payments would be effected timeously. Clause 9.1, read with clause 9, provides that progress payments to Grand Aviation, if financed by a bank, shall be made according to the methods and rules for interim payments prescribed by the bank. Clause 9.2 contains a cession to Grand Aviation of the proceeds of the building loan secured by a first mortgage bond obtained from a bank or approved financial institution. The provisions of this clause further authorise Grand Aviation to receive interim draws from the mortgagee, to sign any release for and on behalf of Mr Bray and to accept all draws on his behalf.

[43] An objective test – 'what would satisfy the reasonable man?' – is to be applied in determining whether the security provided by Mr Bray was 'acceptable security' as contemplated in clause 3.4 (Deed of Sale). In *Koumantarakis Group CC v mystic*

River Investments 45 (Pty) Ltd and Another 2008 (5) SA 159 (SCA), the Supreme Court of Appeal held as follows in respect of the acceptability requirement of a guarantee:

'[39] The final issue to be determined is whether the seller acted reasonably when it rejected the guarantee. Put simply, what is at the heart of this part of the case, is the so-called "whimsical revocability" of the guarantee. In order to determine this issue, the court must consider the grounds expressed by the seller and apply a double requirement. First, a seller must exercise an honest judgment in deciding whether to accept or reject a guarantee. (Honesty was not in issue here.) Second, the seller's decision to reject must objectively viewed, be based on reasonable grounds.

[40] In *Herbert Porter & Co Ltd and Another v Johannesburg Stock Exchange* [1974 (4) SA 781 (W)] the court held:

"When parties have stipulated in their contract that something must be done to the "satisfaction" of one of them, the Court have applied an objective test – what would satisfy a reasonable man?'

[44] I agree with the trial court's finding that Grand Aviation had been provided with acceptable security for payment of the building costs and that it was not entitled in addition to demand a guarantee in the form of a demand guarantee from Mr Bray. The parties agreed on the provision of security for the full amount of the building costs which would entitle Grand Aviation to receive progress payments as the building works proceeded in accordance with the provisions of the building part of the agreement. The building costs are to be paid from the proceeds of the building loan that Nedbank had granted to Mr Bray, which loan is secured by the first mortgage bond that had been registered over the property. The proceeds of the loan had been ceded to Grand Aviation and it had been authorised to receive interim draws from Nedbank, to sign any release of the funds for and on behalf of Mr Bray and to accept all draws on his behalf, which interim payments, so the parties agreed, are to be made according to the methods and rules for interim payments prescribed by Nedbank. The demand guarantee demanded by Grand Aviation would have enabled it to demand the total building costs at any time and before it had laid one brick. This was clearly not what the agreement contemplated.

[45] Grand Aviation was not acting reasonably in demanding a guarantee in the form of a demand guarantee. Indeed, it appeared to have been satisfied with the

security that had been provided until Mr Bray refused to agree to the payment of the relatively substantial modification fee when it suddenly demanded a demand guarantee. Grand Aviation's purported cancellation of the agreement, therefore, was invalid.

ORDER

[46] In the result the following order is made:
The appeal is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

I agree.

K.E. MATOJANE
JUDGE OF THE HIGH COURT

I agree.

E.J. FRANCIS
JUDGE OF THE HIGH COURT

Date of hearing:	17 March 2017
Date of judgment:	24 March 2017
Appellant's counsel:	M Nowitz
Instructed by:	Nowitz Attorneys, Hyde Park, Johannesburg
Respondent's counsel:	G Kairinos SC
Instructed by:	Jurgens Bekker Attorneys, Bedfordview, Johannesburg