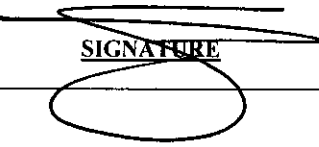


**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	<input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	<input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO.
(3) REVISED.	<input type="checkbox"/>
22/8/2014 <u>DATE</u>	 <u>SIGNATURE</u>

22/8/14  
Case Number: A853/11

In the matter between:

**JR 209 INVESTMENTS (PTY) LTD**

Appellant

and

**SANDI CAREL DYONASE**

Respondent

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**JUDGMENT**

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**POTTERILL J**

[1] The appellant is appealing against the judgment of the court *a quo* wherein the following order was made:

*"The plaintiff is to be repaid the deposit paid of R46 600.00 plus costs and costs of counsel ..."*

For ease of reference I refer to the appellant as the defendant and the respondent as the plaintiff. The plaintiff has not filed heads and has informed the court that he is to abide by the court's decision.

[2] The following common cause facts set out the background to the appeal:

2.1 The plaintiff and the respondent on 24 March 2005 concluded a written agreement of sale pertaining to a property. A deposit of R46 600.00 was to be paid on signature of the agreement. The parties however agreed that the deposit would be paid in instalments and 8 instalments were paid with the plaintiff alleging that the final payment of R5 000 was made electronically in September 2005 whereas the defendant averred that the last instalment was received on the 7<sup>th</sup> of July 2005 in the amount of R43 200.00 leaving a balance of R5 000 outstanding.

- 2.2 The agreement of sale had a suspensive condition that the plaintiff must obtain a loan within 21 days from 24 March 2005 for the amount of R419 400.00.
- 2.3 On 7 April 2005 the bank (Absa) informed the plaintiff that his loan was provisionally granted.
- 2.4 In September 2006 Meyers Attorneys contacted the plaintiff to sign documents to facilitate the transfer of the property.
- 2.5 In September 2006 the plaintiff received a letter requesting proof of payment of the last instalment of R5 000.00 and also a request to pay the bond and transfer costs. The plaintiff never paid the bond and transfer costs.
- 2.6 On 13 December 2006 a letter from Meyer Attorneys is sent to the plaintiff that the sale agreement was cancelled.

- 2.7 The bond was granted on the 18<sup>th</sup> of November 2005 for the full amount of R419 400.00. The bond was accordingly granted more than three years after the date of the conclusion of the contract. The suspensive condition of 21 days was thus not nearly met.
- 2.8 The defendant cancelled the agreement due to the breach of the plaintiff in not paying the last instalment of R5 000 as well as the transfer and bond costs by the 13<sup>th</sup> of December 2006.
- 2.9 Summons was issued on the 5<sup>th</sup> of June 2009. It is not before this court when the summons was in fact served.
- 2.10 In a nutshell the plaintiff averred that he became aware of the fact that the suspensive condition was not fulfilled within 21 days in terms of the contract on the 25<sup>th</sup> of May 2009 when the bank informed him that the bond was in fact granted on the 18<sup>th</sup> of November 2005. It was thus submitted that the contract had lapsed as the suspensive condition was not fulfilled and therefore the plaintiff is entitled to the return of the deposit paid.

2.11 The defendant on the other hand submitted that they were entitled to cancel the agreement and that in terms of clause 6.1 of the agreement the defendant was entitled to retain all deposits of the plaintiff as a "roukoop" or by way of penalty as liquidated damages. The plaintiff's breach lay therein that he did not pay the final instalment of R5 000 and his non-payment of the transfer and bond costs despite demand thereof.

2.12 It was thus submitted that the plaintiff's claim had prescribed alternatively that the parties had waived compliance with the suspensive condition. The waiver consisted therein that the plaintiff continued to make deposit payments in instalments in terms of the agreement even though this period of paying the instalments was long past the 21 days prescribed for the loan to be granted. After the 21 days the plaintiff proceeded to sign documents for the loan and for the transfer of the property.

[3] The Magistrate allowed evidence pertaining to the special plea and the merits to be heard simultaneously. As far as prescription is concerned the counsel for the defendant conceded that prescription could not be successful on the defence of valid cancellation of the agreement. The reason for this being that the last day of the instalment payment of 9 September 2005 is not the relevant date from which

prescription ran. The relevant date is the date of cancellation being the 13<sup>th</sup> of December 2006. Summons was accordingly served within 3 years after the date of cancellation.

[4] I do not find it necessary to address whether the court should have found the plaintiff a credible witness or not. I also do not find it necessary to make a finding on whether the R5 000 was in effect paid or not. The reason for this is that on the common cause facts it is clear that both parties waived the suspensive condition.

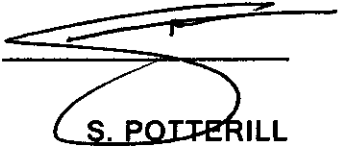
[5] The suspensive condition was waived already at the time of signing the contract in that an annexure to the contract set out the instalments for the paying of the deposit and those dates already being beyond the 21 days required for obtaining a bond. The further factual matrix relied on is that the plaintiff in fact signed further documentation to obtain the bond despite the 21 days already have lapsed. The defendant at trial proved that the plaintiff tacitly waived the suspensive condition – ***Borstlap v Spangenberg 1974 (3) SA 695 (A)***. In cross-examination *a quo* the plaintiff acknowledged that he was aware of the suspensive condition and its meaning. The plaintiff's conduct was in stark contradiction to the suspensive condition of obtaining a loan within 21 days. Objectively the plaintiff's outward manifestations adjudged from the perspective of a reasonable person can only be

found to be that he waived the suspensive condition – *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at paragraphs [16]-[17]. The plaintiff furthermore on his own version for three years tried to make contact with Mr. Meyer pertaining to this transaction; clearly willing to proceed despite the suspensive condition. It is quite clear that the plaintiff himself by signing documents, proceeding with instalment payments, and knowing that the bond was provisionally granted the 7<sup>th</sup> of April 2005 waived the suspensive condition and cannot accordingly now cry wolf and rely on the suspensive condition for the return of the merits.

[6] I accordingly make the following order:

The appeal is upheld with costs.

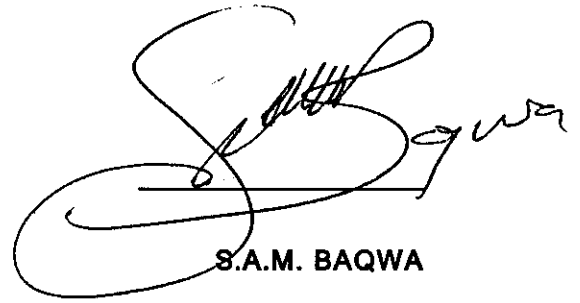
The plaintiff's claim is dismissed with costs.



S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

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**S.A.M. BAQWA**  
**JUDGE OF THE HIGH COURT**

I agree

A handwritten signature in black ink, consisting of a large, stylized 'A' and 'B' that are connected, with the letters 'A.J. Bam' written in a smaller, more legible script to the right.

**A.J. BAM**  
**JUDGE OF THE HIGH COURT**



CASE NO: A853/11

HEARD ON: 20 August 2014

FOR THE APPELLANT: ADV. D.R. DU TOIT

INSTRUCTED BY: A B Löwe Attorneys

FOR THE RESPONDENT: NO APPEARANCE

DATE OF JUDGMENT: 22 August 2014