

**IN THE HIGH COURT OF SOUTH AFRICA  
(CAPE OF GOODHOPE PROVINCIAL DIVISION)**

***REPORTABLE*  
CASE NO. 460/2005**

**MUSSOLO (PTY) LTD**

**PLAINTIFF**

**and**

**JANUARY JANUSZ LUTEREK  
DEFENDANT  
THE REGISTRAR OF DEEDS,  
CAPE TOWN  
DEFENDANT**

**FIRST**

**SECOND**

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**JUDGMENT DELIVERED ON 27 OCTOBER 2006**

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**DLODLO, J**

**INTRODUCTION**

- (1) The question for determination in this matter is:
- i) Whether the suspensive condition relating to the rezoning of the erven to group housing contained in clause 13.5 of the contract was inserted into the Deed of Sale for the sole or exclusive benefit of the Plaintiff as purchaser; and
  - ii) If it was inserted for the exclusive benefit of the Plaintiff, whether the waiver was at all orally communicated to the Defendant on or about 2 August 2004 as alleged by the Plaintiff.

The dispute arises from the written contract of purchase and sale concluded between the Plaintiff and the First Defendant in respect of two (2) vacant erven situated at Heidelberg, Cape, on 12 June 2004, in terms of which the Plaintiff purchased the said immovable properties from the First Defendant for an amount of R80 000.00. The matter first came before Court by way of opposed motion

proceedings. The dispute could not be resolved on the papers resulting in the referral of the matter to oral evidence. Mr. Van der Merwe appeared for the Plaintiff whilst Mr. Smith appeared for the First Defendant.

### **THE FACTUAL BACKGROUND**

- (2) The Plaintiff is a company duly registered in terms of the laws of this country and has as its registered head office at 14 Springstreet, Mosselbay, Western Cape. The First Defendant is an adult male resident at Flat number 6, Linkside Park, Harry Muller street, Mosselbay, Western Cape. The Second Defendant is the Registrar of Deeds and does not feature in these proceedings but was merely cited in its official capacity in terms of the provisions of Act 47 of 1937 as amended.
- (3) The Plaintiff claims specific performance in the following terms against the First Defendant (hereinafter the “Defendant”) of his obligations in terms of the written Deed of Sale entered into between the parties on the 12<sup>th</sup> of June 2004 in respect of erven 943 and 944 Heidelberg:

**“(1) Dat verklaar sal word dat die koopkontrak aangegaan tussen die partye op 12 Junie 2004 vir die verkoop van erwe 943 en 944 Heidelberg, hierby aangeheg gemerk aanhangsel “A”, geldend en bindend is tussen die partye;**

**2) Dat verklarr sal word dat Eiser geregtig is om oordrag van die eiendom bekend as erwe 943 en 944 Heidelberg te neem in terme van die koopkontrak, aanhangsel “A”, teen betaling van die koopsom en die oordragkoste;**

- 3) Dat Eerste Verweerder gelas sal word om binne 14 dae na datum van die uitspraak in hierdie saak alle dokumente te teken en stappe te neem as wat nodig mag wees ten einde oordrag van die eiendomme hierbo vermeld teen betaling van die koopsom in die naam van Eiser oor te dra, by gebreke waarvan die Balju van Heidelberg, gemagtig en gelas word om al sodanige dokumente te teken en stappe te neem as wat nodig mag wees om oordrag van die eiendomme in die naam van die Eiser te bewerkstellig;**
- (4) Dat Eerste Verweerder gelas sal word om die koste van die saak te betaal.”**

- (4) It is also not in issue that the Plaintiff represented by one of its directors, Jacques Esterhuizen and Defendant in person, on the 12<sup>th</sup> of June 2004 and at Heidelberg, Western Cape Province entered into the written Deed of Sale relied upon by the Plaintiff in this action and in terms whereof Plaintiff bought two vacant plots to wit erven 943 and 944 Heidelberg, Western Cape Province and situated at Middleton and Buitekant Streets, Heidelberg, Western Cape Province, from Defendant at a purchased price of R80 000.00.
- (5) In support of the relief claimed as set out above, the Plaintiff averred in its declaration that the Deed of Sale was subject to a suspensive condition that the Plaintiff as purchaser be in a position to re-zone the property to group housing within six months of the conclusion of the Deed of Sale. This averment by the Plaintiff is admitted by the Defendant but Defendant in addition pleaded that

the parties also agreed that if the rezoning did not take place within the stipulated period, the deposit paid by the Plaintiff to the first Defendant, would be forfeited to the First Defendant.

- (6) The Plaintiff in its declaration further averred that the suspensive condition was included in the Deed of Sale for its sole benefit. This allegation by the Plaintiff is denied by the Defendant who pleaded that the suspensive condition was inserted into the contract in the form in which it appears in annexure "A", for the benefit of the Defendant and the Defendant in paragraphs 6.2.1 to 6.2.3 of his plea has elaborated on this averment. Plaintiff further in its declaration averred that on or about 2<sup>nd</sup> of August 2004, the Plaintiff waived the suspensive condition referred to above and which waiver was orally communicated to an agent of the Defendant, one Quinton Rotherforth (hereinafter "Mr. Rotherforth"). This averment in the declaration as far as the manner in which the communication was done, is elucidated by the Further Particulars and the evidence adduced and is to the effect that the communication was made by the Managing Director of Plaintiff, Mr. Jacques Esterhuizen. The Plaintiff's allegations in this regard are denied as if specifically traversed.
- (7) The Plaintiff further alleged in its declaration that it had complied with all its obligations in terms of the Deed of Sale as far as the payments of the purchase price and delivery of guarantees, are concerned. This allegation by the Plaintiff is denied by the Defendant who, in amplification of the denial pleaded that:
- i) The Plaintiff failed to pay the deposit of R8 000.00 on or before 26<sup>th</sup> June 2004 and that such deposit was only paid to Hahn & Hahn Attorneys on July 2004;
  - ii) The Plaintiff failed to deliver a guarantee for the payment of

the balance of the purchase price of R72 000.00 within thirty days of the signing of the contract by both parties. A guarantee for the payment of R60 000.00 was delivered to Hanh & Hahn Attorneys during November 2004;

- iii) The Plaintiff failed to deliver a guarantee for the payment of the balance of R12 000.00 within the stipulated period, or at all.

(8) The Plaintiff further averred that notwithstanding demand, the Defendant failed to give transfer of the properties into Plaintiff's name, an allegation admitted by the Defendant who further pleaded:

- i) that upon non-fulfilment of the suspensive condition by the Plaintiff within the stipulated period, the contract terminated;
- ii) alternatively that the Defendant cancelled the contract as a result of the Plaintiff's breaches thereof, namely:
  - a) to deliver the guarantee for the payment of the full balance of the purchase price within the stipulated period or at all and/or;
  - b) to attend to the re-zoning of the properties in question to group housing within the stipulated period or at all.

(9) The Plaintiff's further allegation that the Defendant avers that the Deed of Sale has lapsed because of non-fulfilment of the suspensive condition, alternatively that he had lawfully cancelled the Deed of Sale, are admitted. Plaintiff has also, at the request of the Defendant contained in the Rule 37 minute, filed further particulars relating to the Plaintiff's alleged oral communication of the waiver of the suspensive condition.

**THE PLAINTIFF'S CASE**

(10) Mr. Jacques Esterhuizen testified that he is a co-director with his father and managing director of the Plaintiff company. As such he is in charge of the day to day activities of the company. The latter is a development company. According to Mr. Esterhuizen the Plaintiff was initially only interested to take transfer of the properties in the event of the rezoning of the erven to group housing. He mentioned that the Plaintiff was also developing a site direct across the street from the two (2) erven and for which purpose it had also applied for rezoning to group housing. It was Mr. Esterhuizen's evidence that the Plaintiff had insisted that a similar suspensive condition be included in all the contracts which it had entered into during that time in respect of properties which it purchased or offered to purchase in Heidelberg. It was for this reason, testified Mr. Esterhuizen, that he in his own handwriting inserted the first part of clause 13.5, containing the suspensive condition, as a back stop, in the event of the application for rezoning to group housing, not being successful. He further testified that on the date of the signing of the contract on behalf of the Plaintiff, he handed a cheque in respect of the deposit to the estate agent, Mrs. Louw. The Plaintiff then applied for a bond through Mrs. Fischer, the bond originator in the amount of R60 000.00 in respect of the balance of the purchase price of the two (2) erven priced at R80 000.00. He was later on telephonically informed by Mrs. Fischer that the bond had been approved. After a couple of days after the approval of the bond, Mr. Esterhuizen had a telephone conversation with Mr. Rotherforth. It was during this conversation that Mr. Esterhuizen asked Mr. Rotherforth to refund the Plaintiff an amount of R60 000.00 of the R72 000.00 then held in trust by Hahn & Hahn Attorneys. This sum of money, according to Mr. Esterhuizen had been paid over by Attorney Rauch

Gertenbach in respect of the balance of purchase price. According to Mr. Esterhuizen it was during the same conversation that he told Mr. Rotherforth that he should proceed with the transfer of the properties, notwithstanding the fact that the rezoning to group housing had not been approved yet, as the Plaintiff waives this condition and seeks transfer of the erven into its name as soon as possible.

- (11) According to Mr. Esterhuizen he similarly indicated to Attorney Pecoraro of P.W. Hoffman Attorneys of Heidelberg, the bond attorneys. Mr. Esterhuizen testified that he probably phoned Mr. Rotherforth from his cellular phone number 082 566 2890. The conversation, according to Mr. Esterhuizen, could have taken place a day or two before or after 2 August 2004. He further testified that the possibility existed that the telephone conversation might have been initiated by Mr. Rotherforth and could have been made on his (Mr. Esterhuizen's) landline and not cell phone. Mr. Esterhuizen testified that by the time he received notification of the bond, the Plaintiff had a change of heart as far as the usefulness of the erven was concerned and had decided to keep and develop the erven, even if the application for rezoning to group housing was not approved. On 17 November 2004 Mr. Esterhuizen had a telephonic conversation with Mr. Rotherforth during which he asked Mr. Rotherforth when can the transfer documentation necessary to effect the transfer of the properties be expected. In December 2004 Mr. Esterhuizen received the letter in Bundle A (A37) with certain documentation for signature by the Plaintiff. He duly signed the documents on behalf of the Plaintiff and returned same to Hahn & Hahn Attorneys. It was on or about 22 December 2004 that Mr. Esterhuizen received a copy of the letter A38 from Attorney Pecoraro to which he responded with letter A40. Mr. Esterhuizen

subsequently received letter A43 from Mr. Rotherforth and a copy of A41 from Mr. Pecoraro. The two letters were in response to the letter A40 which he had written. It was at this stage that Mr. Esterhuizen handed over the matter to his attorneys, Goussard Attorneys of George. His attorneys on his instructions responded to A43 by writing letter A45. Correspondence was then generated between Attorneys.

- (12) Under cross-examination Mr. Esterhuizen conceded that in the declaration it is alleged that the telephonic conversation took place on or about 2 August 2004 but that in his Affidavit filed in support of the earlier application, he under oath stated that it was on 2 August 2004, whilst the Further Particulars provided at the Defendant's request, his attorneys of record stated that the conversation took place during August 2004. He further conceded that his outgoing cellularphone records for the period 2 August 2004 until the end of that month, do not reflect that a call had been made from his cellularphone to the landline of Hahn & Hahn Attorneys. Mr. Esterhuizen testified that on behalf of the Plaintiff he tendered payment of the purchase price of the properties against transfer and confirmed that he insists on specific performance of the First Defendant's obligations in terms of the Deed of Sale. There were numerous contradictions which surfaced when Mr. Esterhuizen was subjected to cross-examination. He obviously faced certain difficulties when he attempted to explain certain aspects of his evidence. These will be dealt with when evidence is evaluated holistically.
- (13) Mr. Carmine Pecoraro testified that he was appointed as the bond attorney in this matter. On 29 July 2004 he received a telephone call from Ms Fischer informing him that a bond in the amount of



R60 000.00 had been approved in favour of the Plaintiff. On or about 4 August 2004 he received confirmation of the bond approval by means of the document filed as A50 from the bond originator Ms Fischer. Mr. Pecoraro thereafter telephonically contacted Mr. Esterhuizen and informed him accordingly. It was during this conversation that Mr. Esterhuizen indicated to him that the Plaintiff had waived the suspensive condition relating to the rezoning of the erven to group housing provided for in the Deed of Sale. On or about 22 December 2004 Mr. Pecoraro received the letter filed of record as A38 and forwarded a copy thereof to Mr. Esterhuizen. He testified that an amount of R72 000.00 was refunded to him by Hahn & Hahn Attorneys. It is from this amount that he paid out R60 000.00 to the Plaintiff. Mr. Pecoraro stated that the balance of R12 000.00 is still in the trust account waiting to be paid over to Hahn & Hahn Attorneys on registration of transfer of the erven into the name of the Plaintiff. According to Mr. Pecoraro, he only became aware that the incorrect amount had been paid over after the first week in December 2004 when the firm's trust account was reconciled. Mr. Pecoraro wrote and sent the letter, (A53) to the transfer Attorneys and he was not thereafter informed that there was any problem pertaining to the transfer of the properties brought about by non-compliance. He believed everything was on track. It came to light when Mr. Pecoraro was cross-examined that his firm P.W. Hoffman had often done work for the Plaintiff and Mr. Esterhuizen prior and subsequent to this transaction. The loan Debit Authority telefaxed to Hahn & Hahn Attorneys by Mr. Pecoraro was not a guarantee and it hardly surprised him that Hahn & Hahn Attorneys did not accept it. Testifying in chief Mr. Pecoraro mentioned that he had no knowledge whether Mr. Esterhuizen informed anyone else besides himself that the Plaintiff was waiving the suspensive condition in the contract.

(14) Mrs. Louw testified that Mr. Esterhuizen mentioned a condition regarding the rezoning of the properties in question and asked for a time period. She was very uncertain whether Mr. Esterhuizen mentioned the six (6) month as it later appeared in the condition. She was, however, sure that she would have first discussed the period with the First Defendant. When cross-examined on this aspect, Mrs. Louw conceded that the First Defendant could have mentioned six (6) month period as she was under the impression that the Plaintiff would attend to the rezoning of the properties in a much shorter period because it was busy with the rezoning of other properties in the area. Mrs. Louw further testified that the First Defendant had insisted on the sanction of "Deposit NOT REFUNDABLE" which she understood to mean that the Plaintiff would have to forfeit the deposit if the sale fell through. She added that she did discuss this with Mr. Esterhuizen who accepted it. Under cross-examination she conceded that the words "Deposit NOT REFUNDABLE" related to paragraph 13.5 only and not to the other conditions contained in paragraph 13. Mrs. Louw testified that the First Defendant telephoned her at some stage and told her that the transaction had fallen through and asked her to market the properties again at a higher price and not to tell Mr. Esterhuizen about it. This, according to her concession could have taken place during January 2005. Mrs. Fischer testified that she knew Mr. Esterhuizen and that she attended to the Plaintiff's bond application for R60 000.00 which was approved during July 2004 whereafter she advised Mr. Esterhuizen and Mr. Pecoraro accordingly.

#### **THE FIRST DEFENDANT'S CASE**

(15) Mr. Luterek testified that he instructed Mrs. Louw to market his two

(2) properties in Heidelberg for approximately R80 000.00. Mrs. Louw later contacted him to advise him that she had a purchaser and she discussed certain standard conditions with him as well as her commission and that he was satisfied with such conditions. He testified that Mrs. Louw later contacted him to inform him that the purchaser intended rezoning the properties and wanted a further condition inserted into the contract in this regard. He was concerned that this could delay the transaction indefinitely and he discussed this aspect with her and he suggested giving the purchaser the period of six (6) months to attend to the rezoning. He further insisted that such rezoning would be for the purchaser's account. When he received the written contract for signature, he read paragraph 13.5 and he then inserted the words "Deposit NOT REFUNDABLE" at the end of such paragraph as he wanted some compensation if the sale fell through after having to wait six (6) months for the rezoning to take place. He further discussed this with Mrs. Louw before returning the contract to her.

(16) Under cross-examination he confirmed the above and testified further that the period of 6 months was important to him as he did not want to wait indefinitely for his money and that he would never have agreed to an open ended condition. He testified further that he was not in a hurry to sell the properties and that he had no prior offers to that of the Plaintiff. He testified further that he was a suspicious person and that he did not want to have to pay any costs for the rezoning if the purchaser resiled from the contract, hence his insistence that the rezoning would be for the purchaser's account.

(17) Mr. Luterek testified in chief that he regularly spoke to his brother at attorneys Hahn & Hahn and on occasion he also spoke to Mr.

Rotherforth about the progress in this transaction. He was never advised by anyone that the Plaintiff had waived the suspensive condition and it was only about four (4) to five (5) months after the contract was signed that he was advised that the Plaintiff wanted a refund of the money already paid to Hahn & Hahn. During December 2004 he was advised that the Plaintiff had not rezoned the properties and he instructed Hahn & Hahn to put them to terms and if they failed to do so, then to cancel the contract. He was advised in January 2005 that the contract was cancelled and that he could re-market his properties, which he did.

- (18) Mr. Rotherforth testified that during 2004 he was a professional assistant at Hahn & Hahn and dealt with this transaction. In preparation for the hearing of the matter during 2005 he went through all the message books and the firm's telephone records for the period July 2004 to December 2004 and he could only find one reference to one telephonic discussion with Mr. Esterhuizen and that was on 17 November 2004 when Mr. Esterhuizen asked him when Hahn & Hahn was going to refund the R60 000.00 to the Plaintiff. He recalled that Mr. Esterhuizen was somewhat rude to him and the impression he got was that Mr. Esterhuizen desperately needed the money. He further went through the office file and was satisfied that all the relevant documentation for this trial had been discovered by the First Defendant. He denied that he spoke to Mr. Esterhuizen on 2 August 2004 and further denied that Mr. Esterhuizen ever informed him that the Plaintiff was waiving the suspensive condition. He knew the importance of suspensive conditions in a contract and he would have confirmed such a waiver in writing if Mr. Esterhuizen had informed him thereof. He only became aware of the suspensive condition when the First Defendant contacted him in December 2004 to enquire whether

the rezoning of the properties had taken place. He then contacted the Heidelberg municipality and was advised that the Plaintiff's application for rezoning had not been granted because certain fees had not been paid by the Plaintiff. Mr. Rotherforth testified further that he only became aware of the alleged waiver of the suspensive condition when he read Mr. Esterhuizen's letter dated 28 December 2004, when his office reopened on 3 January 2005. He confirmed the letters received and written by him with regard to this transaction and readily made concessions in favour of the Plaintiff. He was diagnosed as being HIV positive in August 2005 and as a result of this and the increased pressure at work he resigned from Hahn & Hahn in November 2005. He is currently employed as a legal advisor at Legal Wise and he has no interest in the outcome of this trial.

## **THE APPLICABLE LAW**

(19) A party claiming specific performance in terms of a contract must:

- i) allege and prove the terms of the contract;
- ii) allege and prove compliance with its antecedent or reciprocal obligations or must tender to perform them;

See: ***SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle*** 1955 (3) SA 541 (D)

- iii) allege non-performance by the defendant;
- iv) claim specific performance.

See Harms, **Amler's Precedent of Pleadings**, 6<sup>th</sup> edition, p. 316

It is trite law that a Court will, as far as possible, give effect to a Plaintiff's choice to claim specific performance. The Court, however, does have a discretion in a fitting case to refuse such relief and to leave it to the Plaintiff to claim damages. This discretion must be exercised judicially and it is not circumscribed by rules. Each case has to be judged in the light of its own circumstances. Further on,

the discretion has to be exercised with reference to the facts as they exist when performance is claimed and not as they were when the contract was concluded.

See eg: ***Santos Professional Football Club (Pty) Ltd v Igesund and Another*** 2002 (5) SA 697 (C); (on appeal reported as 2003 (5) SA 73 (C); Harms, ***Amler's Precedent of Pleadings*** 316. It is for a defendant to allege and prove facts on which the Court can and must exercise its discretion in his/her/its favour in this regard.

See eg: ***Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*** 1982 (1) SA 398 (A).

With regard to suspensive condition for sole benefit of the purchaser the legal position applicable is as follows:

- a) Whether a suspensive condition in a Deed of Sale was inserted for the sole or exclusive benefit of a particular party, is a matter of interpretation of the contract and the normal rules applicable to the interpretation of the contract apply.

See: ***Westmore v Crestanello*** 1995 (2) SA 733 (W) 735 E-G; ***Meyer v Barnardo and Another*** 1984 (2) SA 580 (W) 586 J-H; ***Van Jaarsveld v Coetzee*** 1973 (3) SA 241 (A); ***Marais v Van Niekerk*** 1991 (3) SA 724 (E).

Non-fulfilment of a condition that is exclusively for the benefit of one party may be unilaterally waived by that party and cannot be relied upon by the other party. Two riders must be added to this proposition:

- i) it must be clear that the parties intended the condition to be exclusively for the benefit of the one party;
- ii) if the contract places a time limit on the fulfilment of the condition, the party for whose exclusive benefit it was imposed, cannot waive it after the time-limit has expired.

See eg: ***Christie, The Law of Contract in South Africa***, 5<sup>th</sup>

edition, 146; ***Ming-Chieh Shen v Meyer*** 1992 (3) SA 496; ***Westmore v Crestanello*** 1995 (2) SA 733 (W).

### **EVALUATION OF EVIDENCE AND APPLICATION OF LAW TO FACTS**

- (20) The words “Deposit NOT REFUNDABLE” appearing at the end of paragraph 13.5 of the agreement, according to Mr. Esterhuizen, were written into the contract prior to him appending his signature thereon. In his view these words related to all the conditions contained in clause 13.5. This, however, is difficult to comprehend since the words were only inserted by the First Defendant when Mr. Esterhuizen had inserted the Afrikaans words appearing in clause 13.5. Of significance though is Mr. Esterhuizen’s concession that he signed the contract and initialled this clause containing the word “Deposit NOT REFUNDABLE”, with full knowledge and understanding that if the Plaintiff did not waive the suspensive condition contained in clause 13.5 before 12 December 2004 or if the Plaintiff did not rezone the properties to group housing before such date and the sale fell through, the Plaintiff would then forfeit the deposit paid. This concession is strangely consistent with the First Defendant’s evidence that he had no interest in what the Plaintiff intended to do with the properties but that his only concern was that the time for the rezoning was limited and that such rezoning was for the Plaintiff’s account and that he would be compensated for the waiting period if the sale fell through.
- (21) I found it rather strange that Mr. Esterhuizen’s testimony is that there was no negotiation regarding the period of six (6) months mentioned in clause 13.5, a period within which the rezoning had to be done and that it was himself who suggested such a period to Mrs. Louw, the estate agent. It is of note that Mrs. Louw readily conceded that the First Defendant could possibly have suggested

the time period of six (6) months as she was under the impression that the Plaintiff could attend to the rezoning of the two properties within a much shorter period because it was already busy with such rezoning in the area. This Court cannot also lose sight of the fact that Mr. Esterhuizen during January 2005 deposed to an Affidavit filed in support of an urgent application the Plaintiff brought against the First Defendant. Significantly Mr. Esterhuizen stated in that Affidavit *inter alia* that the said suspensive condition was negotiated (beding) for the exclusive benefit of the Plaintiff. To now testify that there was no negotiation on this aspect, is indeed not only contradictory, but is most certainly disingenuous to say the least.

- (22) It is important to mention that the application proceedings the Plaintiff Company brought against the First Defendant form an integral part of this matter. In the same Founding Affidavit Mr. Esterhuizen also stated that on 2 August 2004 he expressly orally informed Mr. Rotherforth of the firm Hahn & Hahn Attorneys in Pretoria (the appointed conveyancers by the First Defendant who were to attend to the registration of transfer) that the Plaintiff was waiving the said suspensive condition and that it desired that the registration of transfer should take place as quickly as possible. The First Defendant and Mr. Rotherforth in answer to the Founding Affidavit told a totally different story. The First Defendant denied that the suspensive condition in the form in which it appears in the contract was inserted into the contract for the exclusive benefit of the Plaintiff. Mr. Rotherforth denied that Mr. Esterhuizen or any other person on behalf of the Plaintiff orally advised him that the Plaintiff had waived the provisions of the suspensive condition and that the first time that he became aware of the alleged waiver of the rezoning clause in the contract was when he received a letter



from the Plaintiff dated 28 December 2004.

- (23) It was initially alleged by Mr. Esterhuizen that he used his cellular phone number 082 566 2890 in telephoning Mr. Rotherforth about the waiver of clause 13.5. However, the cellular phone records in respect of the above-named cellular phone number generated by Vodacom covering the period 1 August 2004 to 31 August 2004 handed in by the consent of the Plaintiff and marked as Exhibit "B", do not show that Mr. Esterhuizen did infact, make that call. Mere intention or mental resolution to waive a right which is not communicated to the other party affected by such waiver and which is not evidenced by any overt act known to him, cannot in law constitute a waiver of the right by the person entitled to enforce it (***Mutual Life Insurance Co of New York v Ingle*** 1910 TPD 540).
- (24) Mr. Esterhuizen did concede when he was cross-examined that there was no record of any telephone call made from his cellular phone to Attorneys Hahn & Hahn during the period stretching from 1 August 2004 to 31 August 2004 on Exhibit "B". He then suggested that Mr. Rotherforth could have telephoned him or that he had used another telephone to communicate the waiver to Mr. Rotherforth. The latter assertion apart from the fact that it contradicts Mr. Esterhuizen's Affidavit as well as his previous evidence in the same matter and on the same aspect, in my view, smacks of untruthfulness and dishonesty on the part of Mr. Esterhuizen. With regards to the refund of R60 000.00 Mr. Esterhuizen testified he informed Mr. Rotherforth that the Plaintiff's bond had been approved and that he requested Mr. Rotherforth to refund to him an amount of R60 000.00 which Mr. Rotherforth agreed to do. When cross-examined on this Mr. Esterhuizen

conceded that it was more probable that he would have telephoned Mr. Rotherforth as he wanted to inform him about the waiver of the suspensive condition and he wanted to request him to refund the R60 000.00. His problems compounded, however, even on this point because when it was pointed out to him that Mr. Rotherforth would not have agreed to such a refund at that stage as the R72 000.00 had not yet been received by Hahn & Hahn Attorneys, he suggested that the telephone call must have been on a date after Hahn & Hahn Attorneys had received the sum of R72 000.00. I hasten to mention without comment that when a witness jumps from one assertion to the other whenever he finds himself in some difficulty, then it would not be misplaced for any trial Court to come to an inescapable conclusion that such witness is engaged in a game the aim of which is certainly to mislead the Court. I am very much aware that the Deed of Sale *in casu* contains no provision in terms of which any waiver could be communicated to the other side. But then, any form of clear and unequivocal intimation of waiver would suffice (See **De Villiers and Another NNO v BOE Bank Ltd** 2004 (3) SA 1 (SCA); **Alesandrello v Hewit** 1981 (4) SA 97 (W)). I accept that the waiver in the context of this matter could have been made orally and would have had legal force. What troubles me though is whether or not this waiver was made at all no matter how. If the Plaintiff succeeded in proving that the waiver was infact communicated to Mr. Rotherforth (who then acted as the First Defendant's agent) that waiver could have been deemed to be a communication to the First Defendant. (See **Basson v Remini and Another** 1992 (2) SA 322 (D)).

- 25) Another aspect of Mr. Esterhuizen that somewhat must be considered in an endeavour to find if anybody else knew timeously about this waiver, is to be gleamed from his communications with

his own Attorneys P.W. Hoffman. It is to be recalled that in his testimony Mr. Esterhuizen stated that his Attorneys P.W. Hoffman made several written requests to Hahn & Hahn Attorneys to refund the R60 000.00 between 16 August 2004 and 28 October 2004. We know that Attorneys P.W. Hoffman eventually received a refund. What I find strange and somewhat telling is that regard being had to correspondence as a whole written by P.W. Hoffman to Hahn & Hahn Attorneys over the period mentioned *supra* one does not find even a single correspondence that mentions waiver. It is most certainly not unreasonable to have expected the Plaintiff's Attorneys to emphasize this aspect, especially because the bond had already been approved during July 2004. We now know from Mr. Esterhuizen's testimony and from the annexures filed of record that Messrs. Bailey & Le Roux land surveyors were given instruction by Mr. Esterhuizen to attend to the rezoning applications including the rezoning of the First Defendant's properties which are the subject matter in this litigation. It was totally an insurmountable mountain to climb for Mr. Esterhuizen when he was asked to explain why he had allegedly waived the suspensive condition on 2 August 2004 and yet instructed the land surveyors during September 2004 to proceed with such rezoning application as evidenced in Exhibit "A" page 56-57.

- (26) Mr. van der Merwe referred to the approach to be adopted where a Court is confronted with two (2) irreconcilable versions as authoritatively dealt with in ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell et kie and Others*** 2003 (1) SA 11 (SCA). It is common cause that the latter judgment was indeed followed and applied by the Supreme Court of Appeal in ***Santam Bank Beperk v Biddulph*** 2004 (5) 586 (SCA) and ***Louwrens Oldwage*** 2006 (2) SA 161 (SCA). I am indeed bound to

follow the approach as enunciated by our Supreme Court of Appeal. In fact, in **Santam Bank Beperk v Biddulph** 2004 (5) SA 586 (SCA) 592 B-C, the Court held that even if a witness may not have been a satisfactory one, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities, the essential feature of the story which he tells are true. Bearing the above guidance in mind, I pause and rhetorically ask a question, which essential features of the story told by Mr. Esterhuizen in the instant matter can infact be labelled as truthful? I hope to find answers to this rhetoric question as I proceed to analyze the testimony in this case and marry the facts to the legal principles.

- (27) Mr. van der Merwe submitted that in his view Mr. Esterhuizen's version was corroborated by A37 and in particular by Mr. Rotherforth's responses to A40 and A45, A41, A43 and A47 respectively. Mr. van der Merwe relied for this submission on authorities such as **Seeff Commercial and Industrial Properties (Pty) Ltd. v Silberman** 2001 (3) SA 952 (SCA) 952 H; **McWilliams v First Consolidated Holdings (Pty) Ltd** 1982 (2) SA 1 (A); **Decro Paints and Hardware (Pty) Ltd v Plascon-Evans Paints (TVL) (Pty) Ltd.** 1982 (1) SA 213 (O) 220 F-H; **Hamilton v Van Zyl** 1983 (4) SA 379 (E) 388E – 389B.
- (28) Even if I have already referred to this aspect of the Plaintiff's case, I undertake to revisit same in order to ensure that I do not lose sight of the content of this submission by Mr. van der Merwe. Mr. van der Merwe submitted further that Mr. Rotherforth's evidence denying the oral communication of the waiver to him must be rejected by the Court because in his view such evidence is unreliable, untruthful and not credible regard being had to the improbabilities

therein contained. Mr. van der Merwe was very critical of Mr. Rotherforth's memory and the practice followed by Hahn & Hahn Attorneys. I will obviously evaluate Mr. Rotherforth's testimony.

- (29) Mr. Pecoraro telefaxed a Loan Debit Authority to Hahn & Hahn Attorneys but when cross-examined he readily conceded that this was not a guarantee (kantoor waarborg) and that it came as no surprise to him when Hahn & Hahn Attorneys did not accept it. I find it rather strange that when Mr. Pecoraro discovered through reconciliation that the sum of R72 000.00 had been refunded, he did not merely pay back to Hahn & Hahn Attorneys the sum of R12 000.00. This, he could do simultaneously with the refund of R60 000.00 he made to the Plaintiff. Mr. Pecoraro's testimony that he had no knowledge whether Mr. Esterhuizen informed anyone else beside himself that the Plaintiff was waiving the suspensive condition in the contract is to me of some importance. It serves as an indicator that the probabilities are such that Mr. Esterhuizen in fact never waived and/or communicated his waiver to Mr. Rotherforth as testified by the former. It is not out of the ordinary for this Court to have expected an experienced businessman in the person of Mr. Esterhuizen to have advised his own attorney of such a crucial fact, if he indeed informed the seller (First Defendant) of the said waiver.
- (30) Mrs. Louw's, as well as Ms Fischer's evidence did not, in my view, advance the Plaintiff's case any further especially on the aspect of importance in this matter. The facts in the instant matter strangely lend themselves squarely on the following law, succinctly set out in ***Design and Planning Service v Kruger*** 1974 (1) SA 689 (T) 697G:

**"In my view, when a suspensive condition, of a kind**

**which has not been inserted in the contract for the specific benefit of one of the parties only, remains unfulfilled after the lapse of a reasonable time for fulfilment, the contract is discharged automatically, by virtue of an implied term to that effect, unless there is something in the contract negating the implication of such a term, and subject to the possibility of fictional fulfilment of the condition by reason of the conduct or inaction of either of the parties. Ordinarily, no action on the part of either of the parties' equivalent to a placing in *mora* of the other in relation to the fulfilment of the condition as such is required before the contract comes to an end."**

There is, in my view, nothing in the contract in the instant matter that negatives the implied term to the effect that non-fulfilment of the suspensive condition renders the contract a nullity. It is well established that a suspensive condition in a contract makes the operation of the contract subject to the occurrence of a future event. Once the condition is fulfilled, the contract becomes binding and its terms can be enforced. See: ***Tuckers Land and Development Corp (Pty) Ltd. v Strydom*** 1984 (1) SA (A).

- 31) It is important to note that the suspensive condition must be fulfilled on or before the time limit stated in the contract and if this does not happen, the operation of the contract terminates automatically and immediately upon such non-fulfilment. See: ***Phillip v Townsend*** 1983 (3) SA 403 (C); ***Dirk Fourie Trust v Gerber*** 1986 (1) SA 763 (A). I was very much impressed with the straight forward and logical manner used by Mr. Rotherforth in testifying. He was in my view a very good witness. I have no reason to doubt his honesty on the aspects he testified about.

Mr. van der Merwe subjected this witness to thorough cross-examination dealing at length not only with evidence he presented but also Mr. Rotherforth's professional and even personal life. Mr. Rotherforth has no reason to protect any party in this litigation. He long left Hahn & Hahn Attorneys. I find him to have been unbiased and reliable as a witness in this matter.

- 32) I have studied the various annexures contained in Exhibit "A". I do not agree that A37 and Mr. Rotherforth's responses to A40, A43, A45 and A47 in any much helpful manner supports Mr. Esterhuizen's testimony regarding the waiver of the suspensive condition. It is indeed the law that the conduct of the contracting parties also has relevance in the determination of the question of whether or not waiver had taken place. In the instant matter I have been unable to deduce anything even from the conduct of the parties supporting the contention that there was waiver. On the contrary, the fact that Mr. Esterhuizen allegedly waived the suspensive condition on 2 August 2004 (or during August 2004) and during September 2004 the same Mr. Esterhuizen instructed the land surveyors to proceed with such rezoning application as evidenced by Exhibit A56-57, is clearly indicative of the truth, namely, that there was no such waiver at all. In my view the Plaintiff's claim stands to be dismissed.

### **COSTS**

- 33) The general rule that a successful party is entitled to its costs must clearly apply in the instant matter. There is and can be no justification in the circumstances of this matter to depart from the general rule.

### **ORDER**

34) In the result I make the following order:

- a) The Plaintiff's claims are hereby dismissed with costs.
- b) The First Defendant shall pay the wasted costs (as tendered) of 1 June 2006 occasioned by the non-availability of its witness.

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**DLODLO, J**