1]IN THE HIGH COURT OF SOUTH AFRICA

2](CAPE OF GOOD HOPE PROVINCIAL DIVISION)

3]Case No 758/05

4]In the matter between:

***5]*PROTEA PROPERTY HOLDINGS (PTY) LIMITED** Plaintiff

6]and

7]BOUNDARY FINANCING LIMITED
***8]*(formerly known as *International Bank of Southern Africa Ltd*)** First Defendant

SWANVEST 258 (PTY) LIMITED Second Defendant

KAROS (PTY) LIMITED Third Defendant

9]_____

10]JUDGMENT: DELIVERED 8 AUGUST 2007

11]_____

12]GRIESEL J:

13]During March 2001, the plaintiff in this matter, Protea Property Holdings (Pty) Limited (*PPH*), together with an associated company, Protea Hotel Group (Pty) Limited (*PHG*), concluded a suite of agreements with the first defendant, known at that time as International Bank of Southern Africa

(*IBSA*). (At a later stage, there was a change of corporate control at the first defendant and it is now known as Boundary Financing Limited (*Boundary*). In order to avoid confusion, however, I shall refer herein to *'the first defendant'*, irrespective of the entity that was in control at any given stage.)

14]Loosely speaking, the suite of agreements concerned the acquisition by the plaintiff of the Edward Hotel in Durban. It followed on a similar suite of agreements concluded between the same parties during October 2000 in relation to the Arthur's Seat Hotel in Sea Point. Both the aforementioned hotels were previously owned and managed by different companies in the Karos Group (*Karos*), which were placed in provisional liquidation during October 1999. The present action concerns only the set of agreements relating to the acquisition of the Edward Hotel.

15]The agreements comprising the suite were the following:[1]

PC1 A sale of shares agreement between the first defendant, the plaintiff and the second defendant (*Swanvest*), in terms of which the first defendant sold to the plaintiff 60% of the share capital of Swanvest for R1,00. In terms of the agreement, the purchase price was to be paid within thirty days of the effective date, stated to be 2 February 2001.

1 The numbering refers to annexures to the particulars of claim.

Share certificates were to be delivered within seven days of the payment of the purchase price. In terms of clause 1.24 of Appendix 2 to the agreement, the first defendant warranted and undertook, furthermore, that as at the effective date and the delivery date 'the sole assets of [Swanvest] shall be the immovable property known as Remainder of Erf 948 Sea Point West, in extent 4048 square metres, held by Deed of Transfer No T25566/1997, commonly described as The Arthur's Seat Hotel'.[2]

PC2 A shareholders' agreement between the same three parties, which recorded that the plaintiff had acquired 60% of the equity in Swanvest, and that Swanvest would be the registered owner of the bare *dominium* in the Edward Hotel property. The parties undertook to procure that the shares in Swanvest would be allotted as to 60% to the plaintiff and the remaining 40% to the first defendant.

PC3 An agreement of sale between Swanvest and the plaintiff, in terms of which the plaintiff acquired the furniture, fixtures and equipment (*FFE*) in the Edward Hotel for R2 million.

2 This misdescription of the property forms the subject of the plaintiff's claim for rectification, which is dealt with below.

PC4 An agreement of cession and pledge between the plaintiff, the first defendant and Swanvest, being a cession and pledge of equity *in securitatem debiti* by the plaintiff of the share certificates pertaining to its shareholding in Swanvest to the first defendant, securing the plaintiff's (future) indebtedness to the first defendant.

PC5 A lease agreement between the first defendant and PHG, in terms of which the former let to the latter the Edward Hotel for a period of ten years commencing on 1 February 2001 at a monthly rental of R87 500 during the first year, escalating to R94 500 during the second year and escalating at an annual rate of 8% thereafter.

PC6 An addendum to the aforesaid lease agreement, providing for additional rental if the gross annual turnover were to exceed R2 million.

PC7 A 'side-letter' between PHG, the plaintiff and the first defendant in terms of which the latter gave PHG and the plaintiff the right 'to restructure the series of transactions or any one of them' after a due diligence investigation had been

performed and with reference to the tax implications of the transactions.

PC8 Another ‘side-letter’ dealing with the payment of municipal charges under the lease agreement.

16]According to the plaintiff in its amended particulars of claim, the foregoing agreements 'each formed a necessary part of a series of transactions or scheme, designed and intended by the plaintiff and the defendants to enable the plaintiff to acquire ownership, as to a 60% share, in the immovable property on which the Edward Hotel stands'.

17]In addition to the foregoing suite of written agreements, the plaintiff also relies on a subsequent contract, partly written and partly oral, concluded between the plaintiff and the first defendant during the first half of 2002, in terms of which the plaintiff is alleged to have acquired the right to the remaining 40% of the shareholding in Swanvest against payment to the first defendant of R674 700.

18]Flowing from the aforementioned agreements, the plaintiff brings a threefold claim against the first defendant:

(a) a claim for delivery of all the shares in Swanvest against payment by the plaintiff of R674 701;

(b) a claim for rectification of *PC1* so as to reflect a warranty by the first defendant that the sole asset of Swanvest on the effective and delivery dates would be the Edward Hotel property, and *not* the Arthur's Seat property; and

(c)a claim that the first defendant be ordered to ‘make good’ the said warranty.

19]The evidence presented on behalf of the plaintiff in support of its claims consists, firstly, of a substantial body of documentary evidence, arranged chronologically and numbered consecutively. In addition, the plaintiff also presented *viva voce* evidence by its financial director, Mr Arnold Cloete, who was the only witness to testify at the trial.

20]It is clear from the evidence that, almost immediately after signature of the suite of agreements, attention shifted to the question of a possible restructuring of the Edward Hotel transaction. This was so because Karos, the owner of the Edward Hotel, had an assessed tax loss of some R40 million, which could potentially be utilised by the plaintiff to its own advantage. While this possibility of restructuring was being explored, the plaintiff and the first defendant did not proceed with the immediate implementation of the sale of shares agreement. Thus, the nominal purchase consideration of the shares was not paid over, and delivery of the shares was, in turn, delayed. Likewise, the Edward Hotel property remained the property of Karos.

21]A scheme of arrangement in terms of s 311 of the Companies Act was ultimately sanctioned on 31 December 2002. In January 2003 the plaintiff's attorney, Mr Traub, produced a set of fresh agreements which would implement a restructured deal. This gave rise to protracted negotiations between the parties, which had not come to fruition when new shareholders acquired the shares in the first defendant on 7 November 2003.

22] It is quite evident from the correspondence that the new shareholders of the first defendant were not *au fait* with the negotiations that had been ongoing until that stage, nor did they appear to recognise the need for restructuring of any of the transactions. Attempts were made to simplify the very convoluted contractual arrangements designed to effect the proposed restructuring. These attempts were unsuccessful and, by letter dated 12 July 2004, Mr Traub recorded that the first defendant did not appear to be prepared to go along with any restructuring process. He accordingly recorded that the plaintiff had no option but to proceed with implementation of the original 2001 suite of agreements. When he called for delivery of the share certificates in respect of the 60% shareholding in Swanvest, tendering payment of R1,00, however, the first defendant's attorneys responded, pointing out that the sale of shares agreement (*PC1*) was *'one of a suite of agreements'*. Their letter proceeded as follows:

> *23]'The structure contemplated in the suite of agreements has never been put in place by the parties, nor have the parties acted in accordance with their rights and obligations provided for in the suite of agreements. It is quite clear that the parties have not regarded themselves as bound by the suite of agreements for a period in excess of three years. In the circumstances, your client's sudden attempt to enforce the terms of the agreement of sale is inappropriate.'*

24]This gave rise to the present litigation, in which the plaintiff, seeks enforcement of the outstanding matters arising from the original suite of agreements.

Claim (a) – the sale of the shares in Swanvest

25]With regard to the first claim, the sole defence raised against the first leg of the claim (for transfer of 60% of the shareholding in Swanvest) is one of prescription. I find it convenient to deal first with the plaintiff's claim in respect of the remaining 40% of the shareholding in Swanvest, before considering the plea of prescription.

26]The plaintiff claims that it acquired the right to claim transfer of the remaining 40% of the shareholding in Swanvest as a result of certain negotiations that took place between the parties during the period 4 January 2002 to

13 March 2002, culminating in an agreement that was partly written and partly oral. The salient events were the following:

•On 4 January 2002 the first defendant offered to sell the remaining 40% shareholding in both the Arthur's Seat and Edward hotels to the plaintiff for an aggregate amount of R3 356 285,34.

•On 18 January 2002 the plaintiff made a counter-offer to buy the remaining shareholding in the hotels at a 30% discount on the price offered by the first defendant.

•On 22 January 2002 the first defendant, in turn, offered to reduce the asking price by 30%, arriving at an aggregate figure of R2 349 399,74.

•On 29 January 2002 the plaintiff accepted the last-mentioned offer, 'subject to the condition that both purchase transactions, as agreed', are finalised by the end of 30 March 2002.

•On 4 February 2002, and after a meeting between the parties, the plaintiff extended the date for finalisation to 30 April 2002.

•On 6 February 2002 the first defendant thanked the plaintiff for accepting its

offer of R2 349 400 for the purchase of the remaining 40% shareholding in the Arthur's Seat and Edward hotels, but informed the plaintiff that the condition that both purchase transactions be finalised by the end of April 2002, could not be accepted. The first defendant, however, undertook to do everything possible to finalise the transactions by that date. The reason given for its unwillingness to accept the condition was the fact that some aspects of the transactions were not under its control. These 'aspects' refer to the sanctioning of the section 311 scheme of arrangement and the finalisation of the annual financial statements of Karos.

•Mr Cloete, the plaintiff's financial director, accepted the first defendant's rejection of the condition imposed by the plaintiff and 'waived' or 'stepped away from it' (so he testified). On 13 March 2002 he communicated his acceptance to the first defendant in the following terms:

> *27]'We hereby accept your offer of ZAR2 349 400 for the purchase of the remaining shareholding in the Arthur's Seat and Edward Hotel Property companies, subject to the following condition:*
>
> *28]1. That the complete transaction for both the Arthur's Seat and the Edward (this includes the successful completion of section 311 in respect of the Edward, the financial statements of the separate companies, etc.) is finalised as*

envisioned as urgently as possible.'

29]On 23 May 2002 the first defendant, as part of a separate transaction linked to the acquisition of the Kruger Gate Lodge, agreed to 'reduce the Karos (Pty) Ltd (Edward Hotel) transaction by ZAR 1 million'. The net result, so it is claimed, was that the plaintiff became entitled to acquire the remaining 40% of the shareholding in the Arthur's Seat as well as the Edward Hotel transactions at an aggregate purchase price of R1 349 400, in other words, R674 700 in respect of each hotel.

30]Against this background, the first defendant argued, firstly, that the correspondence which passed between the parties does not indicate a meeting of their minds, because there was always a dispute about the attachment of one or more conditions. Neither the written confirmation of an unconditional agreement nor the written acceptance of a conditional agreement exists, so it was argued.

31]The plaintiff countered this argument by referring to the difference between a term and a condition of a contract. It relied in this context, *inter alia*, on the following remarks of Hoexter JA in *Resisto Dairy v Auto Protection Insurance Co*:[3]

3 1963 (1) SA 632 (A) at 644F–H.

> *32]'The terms of the contract cannot be changed into suspensive conditions merely by calling them conditions precedent. A term of the contract may be so material that a breach of it will entitle the other party to repudiate the contract, and in the present case the parties have used the words "conditions precedent to any liability" to indicate that the so-called conditions are material terms of the contract.'*

33]In his evidence, Mr Cloete emphasised that he never intended to impose a condition by requiring the complete transaction to be 'finalised as envisioned as urgently as possible'; he merely wished to stress the importance of an urgent finalisation. According to him, this did not even form a term of the agreement. I accept this evidence and find that his requirement regarding urgent finalisation did not amount to a 'condition' properly so called.

34]In any event, nowhere in the correspondence or in the pleadings has it been suggested on behalf of the first defendant that the 40% agreement was conditional or that the agreement was unenforceable by reason of non-fulfilment of a suspensive condition or fulfilment of a resolutive condition. On the contrary, the parties gave effect to the '40% agreement' during May 2002 by agreeing to a reduction of the purchase price in respect of *both* hotels. Furthermore, the transaction in relation to the Arthur's Seat was subsequently consummated on the basis as agreed and the reduced purchase price was paid by

the plaintiff. In these circumstances, the first defendant's argument that there had been no final and binding agreement in respect of the 40% shareholding in relation to the Edward Hotel is not borne out by the uncontested evidence.

35]In the circumstances, I am satisfied that the 2002 agreement in respect of acquisition of the remaining 40% shareholding in Swanvest is valid and enforceable. The plaintiff has consequently proved on a balance of probability that it acquired the right to 100% of the shareholding in Swanvest against payment of the amount of R674 701. The question is whether this right has become prescribed, as alleged by the first defendant.

Prescription

36]With regard to the plea of prescription in relation to the first leg of the claim (i.e. transfer of 60% of the shareholding in terms of PC1), the first defendant contended that the debt in question was extinguished by prescription in terms of Chapter III of the Prescription Act 68 of 1969 (*the Act*). In this regard, it alleged that the obligations in question fell due for performance by not later than 11 March 2001, regard being had to the provisions of PC1.

37]It is common cause that the nominal purchase price – in the sum of R1,00 –

in relation to the 60% shareholding was not paid within 30 days of the effective date (i.e. 2 February 2001). In fact, it was only tendered by means of a cheque under cover of the plaintiff's attorneys' letter of 11 November 2004, which tender was rejected by the first defendant's attorneys. It was accordingly argued on behalf of the plaintiff that the first defendant's obligation to deliver the share certificates only arose within seven days of the receipt of the cheque in November 2004.

38]There was some debate as to whether one party could unilaterally postpone the commencement of the running of prescription, as the plaintiff appears to have done in this instance. In the view that I take of the matter, it is not necessary to decide this issue or to decide exactly when the debt became due. I shall assume in favour of the first defendant (without so deciding) that the debt in fact became due by not later than 11 March 2001.

39]In its replication, the plaintiff answered the plea of prescription by relying on various alleged express or tacit acknowledgements by the first defendant of its liability to give effect to the agreements contained in *PC1*, *PC2* and *PC7*. One of the instances relied on by the plaintiff as an express or a tacit acknowledgment of liability was the conclusion of the above-mentioned agreement regarding the acquisition of the remaining 40% shareholding in Swanvest. The

plaintiff submitted that such agreement presupposed and recognised that the plaintiff had already, in terms of *PC1*, acquired the right to 60% of the shareholding in Swanvest. In agreeing to sell the *remaining* 40% shareholding (so the argument went), the first defendant must necessarily be understood to have acknowledged that the obligation to transfer the *first* 60% was binding.

40]Having regard to the objective test in respect of a tacit acknowledgement of liability,[4] I am persuaded by the plaintiff's argument in this respect. In my view, the first defendant's conduct constituted at least a tacit acknowledgment of liability in relation to its obligations under the sale of shares agreement (*PC1*) to transfer to the plaintiff 60% of the shareholding in Swanvest. It follows that the first defendant's plea of prescription in relation to the 60% agreement cannot succeed. (For the same reason, the plea of prescription in relation to the plaintiff's claim to make good the warranty, which arises from the same sale of shares agreement, likewise cannot succeed.)

41]Given my earlier conclusion with regard to the agreement to acquire the remaining 40% of the shareholding, it follows that the first defendant is liable – in terms of PC1, as amplified – to transfer 100% of the shares in Swanvest to the plaintiff against payment of the agreed purchase price of R674 701.

4 *Cape Town Municipality v Allie* 1981 (2) SA 1 (C) at 7D–G.

Claim (b) – rectification

42]It is clear from the evidence as a whole that the reference in clause 1.24 of Appendix 2 to Annexure *PC1* to the Arthur's Seat property – rather than to the Edward Hotel property – was an obvious error. This occurred because the first suite of agreements, which related to the acquisition of the Arthur's Seat Hotel, was used as the precedent or template for the second suite relating to the Edward Hotel.

43]The only issue for determination in relation to the claim for rectification is the first defendant's plea of prescription. In this regard, the first defendant contended that the plaintiff's claim for rectification is a 'debt' for purposes of chapter III of the Act, which debt became due by not later than 1 March 2001, this being the date since when the plaintiff must have had knowledge of the facts giving rise to the claim. It contended further that its obligation to comply with the warranty fell due for performance by not later than 11 March 2001 and that, accordingly, this debt was also extinguished by prescription by not later than 11 March 2004, whereas summons herein was only served on 1 February 2005.

44] The term 'debt' is not defined in the Prescription Act. As pointed out by Loubser,[5] the term has been used primarily in our case law to describe the correlative of a right or claim to some performance, in other words, as the duty side of an obligation produced by contract, delict, unjust enrichment, statute or other source. Counsel on both sides also drew attention to the 'wide and general meaning' attached to the term 'debt' in our case law.[6]

45]Counsel for the first defendant sought to extend this wide interpretation of 'debt' to include a claim for rectification. In support of their argument, counsel relied on *Primavera Construction SA v Government, North West Province*[7] and an article by Prof Loubser under the title '*Is a right of rescission subject to extinctive prescription?*'[8] However, neither authority deals pertinently with the issue at hand and, in my respectful opinion, neither provides support for the argument advanced on behalf of the first defendant. In the *Primavera* case, *supra*, the court was not required to decide whether a claim for rectification had prescribed. Whether or not a claim for rectification is subject to the Prescription Act was not argued. Friedman JP, in what was clearly an obiter observation, merely assumed for the purpose of that observation (without any

5 *Extinctive Prescription* (1996).

6 Cf eg *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F–H; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909A–B; *The Master v IL Back and Co Ltd* 1981 (4) SA 763 (C) at 777-778; *Escom v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344E–F.

7 2003 (3) SA 579 (B) at 599H.

8 (1990) 53 *THRHR* 43.

apparent further consideration) that a claim for rectification could become prescribed.[9]

46]As for Prof Loubser's article, his analysis deals with the exercise of the contractual remedies of rescission and cancellation. I do not find it necessary, for purposes hereof, to consider the correctness or otherwise of the learned author's conclusion, namely that on a wide interpretation of the term 'debt', 'the liability correlative to a right of rescission would be subject to extinctive prescription'.[10] The fact of the matter is that very different considerations prevail in relation to rectification as a contractual remedy.[11] Rescission or cancellation serves to create rights and correlative obligations not hitherto in existence. Hence the fact that, in various ways, these remedies were subject to various prescriptive periods in the legal regime existing before the introduction of the Prescription Act of 1969.[12] Rectification is a procedural remedy which, in certain circumstances, is necessarily antecedent to the enforcement of existing contractual rights and their correlative obligations. Rectification is not in itself a contractual right, and a claim for rectification is not in itself a claim for enforcement of a contractual right with a corresponding contractual performance required by the debtor. Rectification does

9 At 599 of the judgment para 19.

10 *Op cit* at 60.

11 As more fully appears from R H Christie *The Law of Contract* 5ed (2006) at 483–484.

12 Christie *op cit* at 483-484.

not create rights or obligations. It does not involve the variation of a contract. It merely results in the document being made into an accurate reflection of the agreement.[13] It is the procedural device resorted to when enforcing the relevant contractual right and the correlative obligation. The policy of legal certainty and finality underlying the principle of prescription is met in that the underlying *obligation* is subject to prescription. Extending the concept of 'debt' to a claim for rectification introduces legal uncertainty and anomaly. In my view, neither linguistic nor policy considerations support the extension of the word 'debt' (Afrikaans: '*skuld'*) to include a claim for rectification.

47]Christie[14] draws an apt analogy where he states that a party claiming rectification is in much the same position as a party seeking to imply a term in a contract. In each case an attempt is being made to establish contractual terms sufficient to ground a basis for the contractual obligation or debt sought to be enforced. I agree with this argument. If the first defendant's argument were to be accepted, namely that a claim for rectification is a separate and self-standing 'debt' for the purposes of the running of prescription, the anomalous situation could arise that a claim for performance due under a contract which has not become prescribed may be defeated on the basis that the right to claim rectification of the contract necessary to support such claim has been

13 *Spiller and Others v Lawrence* 1976 (1) SA 307 (N) at 310H-311A; *Gralio (Pty) Ltd v DE Claasen (Pty) Ltd* 1980 (1) SA 816 (A) at 824A–B.

14 *Op cit* at 332.

extinguished by prescription. Clearly, if a claim for the payment of a money debt has not itself become extinguished by prescription, it would be most incongruous if it were nonetheless effectively to be extinguished by prescription where it is necessary for one of the parties to rely upon rectification of the agreement.

48]Take the following example: A borrows an amount of R200 000 from B. Interest on the loan at an agreed rate is payable monthly, with the capital being repayable on demand. After making regular payments in respect of interest for five years, A stops paying. B now demands repayment of the capital of the loan, but discovers that the written agreement erroneously records the capital of the loan as R20 000 instead of R200 000, as agreed. He accordingly claims rectification of the agreement, together with payment of the full amount of the capital, as rectified. Can A now raise prescription as a defence to B's right to claim rectification, even though the main debt, namely repayment of the capital of R200 000, has not become prescribed as a result of the tacit acknowledgments of liability by A by way of the monthly interest payments? If the first defendant's argument were to be accepted, the answer would have to be yes. I would find this to be a startling result.

49]Conversely, say the same agreement erroneously recorded the capital

amount of the loan to be R2 000 000, instead of R200 000. B in his summons, however, claims payment of R2 000 000. Could A's plea of rectification conceivably be defeated by a special plea of prescription raised by B? An affirmative answer to this question would produce an equally startling result.

50]These examples illustrate why, in my view, the first defendant's argument, namely that a claim for rectification of a contract should be regarded as a separate 'debt', cannot be accepted. It follows that the defence of prescription cannot succeed, with the result that the plaintiff is entitled to an order rectifying the warranty contained in clause 1.24 of Appendix 2 to Annexure PC1 by the deletion of the reference to the Arthur's Seat Hotel property and the substitution therefor of a reference to the Edward Hotel property. As rectified, the clause thus reads as follows:

> *51]'The Seller hereby warrants and undertakes in favour of the Purchaser both as at the effective date and as at the delivery date (unless the context otherwise indicates) that:*
>
> *52]1.1–1.23 …*
>
> *53]1.24 the sole assets of the Company* [Swanvest] *shall be the immovable property known as Remainder of Sub 1 of Lot 11258 Durban, situate in the city of Durban, administrative district of Natal, Province of Kwazulu-Natal, commonly described as the Edward Hotel, Beach Front, Durban.'*

Claim (c) – making good the warranty

54]The final question is whether the plaintiff is entitled to claim specific performance of the obligation undertaken in terms of the aforementioned clause as rectified. This aspect forms the true nub of the plaintiff's claim.

55]In opposing this part of the claim, counsel for the first defendant referred to two types of warranties found in the law of insurance, namely affirmative and promissory: A warranty is affirmative if the party concerned warrants the truth of a representation regarding an existing fact, and promissory when the party concerned warrants the performance of a certain act or that a given state of affairs will exist in the future.[15] Counsel sought to apply this distinction to contracts in general. Having done so, they argued that if the clause in question were to be interpreted as being an affirmative warranty of fact, it could never serve as the basis for a claim for specific performance because, to the knowledge of the plaintiff, the warranty was incorrect at the time when it was given inasmuch as the Edward Hotel was *not* the sole asset of Swanvest at that stage. If, on the other hand, the clause were to be interpreted as a 'promissory' warranty, certain other problems would arise, with which I shall deal below.

56]Leaving aside the question whether the distinction contended for is

15 Reinecke *et al* in 12 *Lawsa* 1st reissue (2002, *sv Insurance*) at para 361 and authorities referred to therein.

permissible, there are various difficulties with the first defendant's argument. First, as Reinecke *et al* themselves point out,[16] 'the term "promissory" as a special term is a misnomer, in that all warranties are promissory, that is, all involve an obligation or promise to perform'. The learned authors accordingly prefer to call such warranties 'continuing' warranties.

57]Secondly, counsel's argument seeks to attach to the word 'warranty' a certain limited meaning, namely the meaning ordinarily attached to it in the context of insurance law. However, Christie[17] rightly observed that –

> *58]'…the word "warranty" is one of the more unfortunate importations into our law from English legal terminology, because it has so many different meanings. It may mean, generically, a term of the contract as opposed to a mere puff or representation; or it may mean, specifically, a term not going to the root of the contract as opposed to a condition in the sense of the term going to the root of the contract; or it may mean, in an insurance contract, a term the breach of which entitles the insurer to elect to avoid the policy and repudiate liability; or it may, especially when described as a collateral warranty, mean a term of a contract prior to and inducing the main contract'.*

59]In the final analysis, there is no unanimity among the authorities as to what

16 *Loc cit.*

17 See Christie *op cit* 156.

the expression 'warranty' connotes, save that it is a contractual term. It accordingly becomes necessary, as pointed out by Farlam JA in *Masterspice (Pty) Ltd v Broszeit Investments CC*,[18] 'in every case where the expression is used, to examine the terms of the contract in question closely in order to endeavour to ascertain in what sense the parties have used it'.

60]Examining the terms of the contract in issue in the context of the suite of agreements as a whole, it is clear to my mind that clause 1.24 amounts to an undertaking or promise by the first defendant to take all necessary steps to effect transfer of the Edward Hotel property to Swanvest by the time the shares in Swanvest are transferred to the plaintiff. This is evidenced, *inter alia*, by the introductory words of the appendix where the 'standard warranties' are recorded, namely 'the seller warrants *and undertakes*' (emphasis added). The obligation contained in clause 1.24 is therefore simply a contractual term, in terms of which the first defendant undertook to perform certain acts by certain specified dates so as to bring about the factual position as warranted.

61]The next line of defence raised on behalf of the first defendant was the argument that the court should not grant an order for specific performance of clause 1.24, because where the term 'make good the warranty' is used in

18 2006 (6) SA 1 (SCA) at para 35.

South African case law, what is 'ordinarily' intended, is payment of damages.[19] Counsel also referred to various academic authorities who focus their discussions of remedies for breach of warranty entirely on the remedies of cancellation and damages.[20]

62]The short answer to this argument is that none of the authorities referred to – or any other authority of which I am aware – say that specific performance is *not* a competent remedy for breach of warranty; on the contrary, as pointed out by Lubbe & Murray,[21] breach of what is described as a warranty 'results in the remedies for breach of contract becoming available'. Foremost among such remedies is, of course, specific performance.

63]As an alternative argument, it was submitted that even if specific performance were to be held to be a competent remedy for breach of warranty, such relief would not be appropriate in this case as it would amount to a form of specific performance which would be 'legally inappropriate, and indeed even legally impossible', according to counsel. This argument was based on

19 Cf *Evans and Plows v Willis & Co* 1923 CPD 496 at 498–502; *Whitfield v Phillips and Another* 1957 (3) SA 318 (A) at 325A; *Prima Toy Holdings (Pty) Ltd v Rosenberg* 1974 (2) SA 477 (C) at 483C; *Mainline Carriers (Pty) Ltd v Jaad Investments CC and Another* 1998 (2) SA 468 (C) at 473G–474B.

20 Van der Merwe *et al Contract: General Principles* 2ed (2003) at 272; De Wet en Van Wyk *Kontraktereg en Handelsreg,* 5ed (1992) Vol I at 339–340; Lotz 'Purchase and sale' in Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) at 378; Zulman and Kairinos *Norman's Law of Purchase and Sale in South Africa* 5ed at para 19.1.

21 G F Lubbe and C M Murray *Farlam and Hathaway Contract* 3ed (1988) at 427 note 1.

the proposition that the 'delivery date' must be interpreted as being, at the latest, 11 March 2001. It follows, according to the first defendant, that the performance which the plaintiff is asking the court to order is impossible: the first defendant cannot be ordered now to turn back the clock, as it were, and to 'make good' the warranty by housing the Edward Hotel property in the second defendant on 11 March 2001. In the result, so it was argued, the only remedies potentially available to the plaintiff are cancellation of the contract and damages.

64]I find this a strained and artificial construction of the clause in question. The fact that it was impossible to give literal effect to the warranty on a particular date (eg the 'effective date', as here), does not mean that performance of the substance of the obligation is therefore objectively and absolutely impossible. It is still possible to give effect to the substance of the warranty, albeit not on the 'effective date', as defined. On the plaintiff's construction, the warranty was required to be made good *at the date the shares are delivered*. I am inclined to agree with the plaintiff's interpretation. To hold otherwise, would enable the first defendant to avoid liability for specific performance merely by tendering the shares one day late. This could never have been the intention of the parties, as rightly submitted on behalf of the plaintiff.

65]Relying, finally, on the fact that specific performance is a discretionary remedy, counsel for the first defendant urged the court to take into account that the order sought would mean that the first defendant must in some way procure the transfer of ownership of the Edward Hotel property from the third to the second defendant. Whilst it is common cause on the pleadings that the first defendant is the sole shareholder of the third defendant, it is a different question whether the directors of the third defendant and the second defendant – about whose identity there has been no evidence – will in the exercise of their fiduciary duties think it advisable either to sell or to buy the property. Counsel also drew attention to s 2(1) of the Alienation of Land Act 68 of 1981, which requires the conclusion of a written contract of sale between the second and third defendants. There is currently no such contract. They accordingly posed the rhetorical question as to how the first defendant is supposed to comply with such an order.

66]I am unimpressed with this argument. There is nothing vague or uncertain about the solemn undertaking contained in clause 1.24 of the appendix in question. Exactly how the first defendant was to give effect to its obligations was not spelt out in the agreement, nor was it of any concern to the plaintiff. What is clear is that it was entirely within the power of the first defendant at the time to give effect to this undertaking, as both Swanvest and Karos were

its wholly-owned subsidiaries. No evidence has been placed before me to indicate that this factual situation has changed in the interim, or that it has become impossible for the first defendant to give effect to its contractual undertaking. In this context, the plaintiff rightly drew my attention to the judgment of Miller JA in *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*,[22] where it was held that it is not for the plaintiff to allege or prove that there are no impediments to specific performance, as in the absence of evidence it can be assumed that the defendant can perform the obligations he has undertaken.

67]Moreover, both Swanvest and Karos are before the court as parties and neither have advanced any reason or raised any impediment as to why it might not be feasible for the first defendant to give effect to its undertaking.

68]In this regard, the general principle in our law of contract, unlike the position in the English common law, is that specific performance is the primary and not a supplementary remedy for contractual breach. This cardinal principle of our law was recently reaffirmed and applied by a Full Court of this Division in *Santos Professional Football Club (Pty) Ltd v Igesund*.[23]

22 1982 (1) SA 398 (A) at 441D–443G. See also Christie *op cit* at 525.

23 2003 (5) SA 73 (C) at 82A *et seq.*

69]In the present matter, the warranty was fundamental to the suite of agreements. The plaintiff (together with its associated company, PHG) was paying some R12 million (in the form of rental payments) to acquire the property; the entire structure of the suite of agreements was predicated upon Swanvest (being the property holding company) being or becoming the owner of the property. No sound reason has been advanced as to why the plaintiff should be denied its contractual bargain, particularly where more than half of the purchase price has already been paid.

70]In all the circumstances, I am satisfied that this is pre-eminently a case where the plaintiff is entitled to its primary remedy of specific performance.

Conclusion

71]For the reasons set out above, the following order is issued:

(*a*) The first defendant is ordered forthwith and against payment to it of the amount of R674 701,00 to deliver the share certificates in respect of its 100% shareholding in the second defendant, together with duly completed transfer forms, to the plaintiff.

(*b*) **The sale of shares agreement (Annexure *PC1*) is rectified by the deletion in clause 1.24 of Appendix 2 of the description of the property contained in the said clause and the substitution therefor of the following:**

> *72]'Remainder of Sub 1 of Lot 11258 Durban, situate in the city of Durban, administrative district of Natal, Province of Kwazulu-Natal, commonly described as the Edward Hotel, Beach Front, Durban.'*

(*c*) **The first defendant is ordered forthwith to take all steps necessary to make good the warranty referred to in clause 1.24 of Appendix 2 to Annexure *PC1*.**

(*d*) **The first defendant is ordered to pay the costs of this action, including the costs of two counsel.**

73]_____

74]**B M GRIESEL**
Judge