IN THE CAPE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 1461/2006

In the matter between:

SHIRLEY ELOFF 1st Plaintiff

MAUREEN ELOFF 2nd Plaintiff

vs

DANIEL HENDRIK DEKKER **Defendant**

JUDGMENT: 28 NOVEMBER 2007

Meer, J:

Introduction.

[1] The Plaintiffs claim repayment of the sum of R300 000.00 (three hundred thousand rand), being a deposit paid to Defendant pursuant to an offer by Plaintiffs to purchase a property owned by Defendant in Gordon's Bay. Plaintiffs allege that a suspensive condition of the offer to purchase agreement concluded between the parties in October 2005 was not fulfilled, and the deposit is accordingly repayable.

[2] Defendant admits that the suspensive condition was not fulfilled

but pleads that Plaintiffs waived such condition and in addition repudiated the offer to purchase agreement, as a consequence whereof Defendant is entitled to retain the deposit paid.

Background Facts

[3] The First and Second Plaintiffs are mother and daughter respectively. In October 2005, shortly after the death of her husband, the First Plaintiff, a widow of 73, stayed for a short while with the Second Plaintiff in Gordon's Bay, whereafter she returned to her home in Louis Trichardt. Her intention was to eventually move from Louis Trichardt to live with her daughter in the Cape. With this in mind, whilst visiting the Second Plaintiff, the First Plaintiff signed an option to purchase Defendant's house situated at erf 4831, 67 Lancaster, in Gordon's Bay ("the subject property"). The option to purchase, dated 13 October 2005, stipulated the purchase price as R918 000.00, payable by way of a deposit of R300 000.00 and a bond of R618 000.00, to be approved by the end of February 2006. At the time the option to purchase was signed, Defendant had a competing and pre-existing offer to purchase the property which subsequently fell away due to the non-approval of a bond.

[4] Thereafter on 16 October 2005 Plaintiffs and Defendant concluded a written offer to purchase agreement ("the agreement"). The First Plaintiff at the time owned a property known as "Hunter's Rest" in Louis Tichardt, which she intended selling. Her deceased husband's estate had at that stage not been

finalized. The relevant sections of the offer to purchase agreement are contained in the following extracts from clauses of the agreement:

"1. Purchase Price: R900 000.00

(Nege Honderd Duisend Rand).

1.1 Deposit: R300 000.00

(Drie Honderd Duisend Rand).

in cash at the transferring attorneys, which deposit will be held in an interest bearing account in the said attorney's trust account until date of registration, interest to accrue to the Purchaser on or before the 21 October 2005.

1.2 R350 000.00 THE BALANCE OF THE PURCHASE PRICE in cash at date of registration. For which payment the purchaser must provide on demand a suitable bank guarantee, as requested by the Seller.

2. Agent's Commission: R60 000.00. (Sestig Duisend Rand)

……..

……..

7. Bond:

The parties agree that this Deed of Sale shall be subject to the suspensive condition that the Purchaser obtain written confirmation from a Bank or Building Society or Financial Institution, that a loan in the amount of not less than R250 000.00

(Two Hundred and Fifty Thousand Rand)

has been approved in principle upon the relevant institution's normal terms and conditions, including the security of a first mortgage bond over the said property, within a period of 15 days from the date hereof. In the event of the approval not being obtained within the stipulated period, the Seller may, however, unilaterally extend the aforesaid period for a further 15 days. In the event of this clause not being

fulfilled, this Deed of Sale shall lapse and that no duty to take transfer of the property shall rest upon the Purchaser. All other obligations will however remain until discharged by the Purchaser.

11. Breach. Should the purchaser fail to make any payments provided for herein, or otherwise commit a breach of any of the conditions hereof, the Seller shall be entitled to forthwith, and without prejudice to any other rights available at Law.

11.1 …

11.2 Cancel this Deed of Sale and retain all amounts paid by the Purchaser as rouwkoop or a genuine pre-estimate of damages suffered by the Seller, and furthermore the Purchaser shall not be entitled to compensation from the Seller for any improvements of whatsoever nature he may have caused on the property, whether with or without the Seller's consent.

11.3 …

11.4 …

13. Special conditions:

This contract is subject to the sale of Hunter Rest Plot or the finalation of the deceased estate of M A Eloff."

[5] On 18 October 2005 the Plaintiffs paid an amount of R300 000.00 to Defendant's conveyancing attorneys, in lieu of the deposit as specified at paragraph 1.1 of the contract.

[6] Thereafter the Second Plaintiff applied for a bond of R250 000.00 to comply with the suspensive condition specified at paragraph 7 of the agreement. On 21 October 2005 a bond in the sum of R238 700.00 only was approved by ABSA Bank Limited. The suspensive condition at clause 7 remained unfulfilled by 31 October 2005, the date specified in the clause.

[7] On 14 November 2005, First Plaintiff's son notified estate agent Alice Joubert who negotiated the contract, that as the requisite bond as specified at clause 7 of the agreement had not been approved, the suspensive condition had not been fulfilled and accordingly the deed of sale had lapsed. He stated that under the circumstances the Plaintiffs would not be continuing with the transfer of the property and requested the return of the deposit of R300 000.00 with accrued interest. Defendant refused to return the deposit which continues to be held in trust by his attorney.

[8] Thereafter, a re-application for a bond of R250 000.00 was submitted on the instruction of Defendant's attorney and as a result approval of a bond in the sum of R250 000.00 was obtained on 5 December 2005. According to Dirk Joubert the credit manager at ABSA the first bond application had incorrectly recorded First Plaintiff's income, hence the earlier refusal.

[9] The sale of the subject property to Plaintiffs did not go through. Defendant continued residing on the property until December 2006 when he moved into a retirement village in Gordon's Bay and rented out the subject property. First Plaintiff sold her house in Louis Trichardt in July 2007

Pleadings

[10] Whilst the Defendant admitted that the suspensive condition at paragraph 7 of the agreement was not fulfilled, he pleaded that Plaintiffs waived such condition by accepting the lesser bond, approved in the sum of R238 700.00. In the alternative he pleaded

that Plaintiffs, with the intention to frustrate fulfillment of the suspensive condition, did not endeavor to obtain fulfillment thereof. Defendant pleaded moreover that in November 2005 Plaintiffs repudiated the agreement by informing Defendant in writing that they were no longer interested in proceeding with the sale. Defendant accepted the repudiation and pursuant to the penalty clause at paragraph 11.2 of the agreement, he is entitled to retain all amounts paid by Plaintiffs as rouwkoop or a genuine pre-estimate of damages. In a reply to a request of further particulars, Defendant detailed the extent to which he was prejudiced by the repudiation.

[11] By way of replication Plaintiffs pleaded that:

> 11.1 In the event that the suspensive condition at clause 7 is held to have been inserted solely for their benefit and waived by them, the agreement is void as it does not comply with the provisions of the Alienation of Land Act 68 of 1981, in that it does not contain a recordal of the time and manner in which the purchase price was paid. Pursuant to Section 28 of the aforementioned Act Plaintiffs are entitled to recover from Defendant the amount of R300 000.00;
>
> 11.2 Clause 11.2 of the offer to purchase agreement is a penalty stipulation in terms of Sections 3 and 4 of the Conventions Penalties Act No. 15 of 1962, the Defendant has remained in possession of the property valued not less

than R900 000.00, and the retention of the deposit of R300 000.00 is out of proportion to the prejudice suffered by Defendant by reason of the alleged conduct of the Plaintiffs. Defendant has accordingly suffered no prejudice and consequently the penalty should be reduced to zero. Alternatively, in the event of it being found there is prejudice to Defendant, the amount of R300 000.00 should be reduced to such extent as a court may consider equitable;

11.3 That on a proper construction of clause 13, the agreement, alternatively transfer of the property to the Plaintiffs and payment of any amount to the Defendant, was subject to the sale of the "Hunter's Rest" property and the finalization of the deceased estate of M A Eloff, both occurring. In the result, clause 13 of the agreement falls to be rectified to read;

> "This contract is subject to sale of Hunters Rest plot and the finalization of the deceased estate of M A Eloff; alternatively this contract is subject to the sale of Hunters Rest plot or the finalization of the deceased estate of M A Eloff, whichever occurs last".

Evidence.

Testimony on the Value of the Subject Property

[12] Mr Ian Howcroft an appraiser and registered professional valuer of thirty years experience testified on behalf of Plaintiffs that,

based on comparable sales, the replacement value less depreciation of the subject property as at 16 October 2005, when the offer to purchase was signed, was R850 000.00. He placed the value thereof as of 8 March 2007, at R900 000.00 Howcroft described his valuations as conservative.

[13] Howcroft expressed surprise that the only offer Defendant had received for the subject property since December 2005 had been a verbal one of R800 000.00. He suggested the subject property may not have been properly marketed.

[14] In contrast, estate agent Andries Basson instructed by Defendant to sell the subject property in January 2006 on an open mandate, testified it had been advertised on the Internet, in Die Burger and the District Mail, a Helderburg weekly paper, from January to June 2006. There had also been a showhouse and Basson had taken 5 clients to the property and received an oral offer only for R800 000.00 in cash, which was rejected. The proximity of the property to low income groups as well as to developments could have adversely affected the sale of the property. Basson was of the view that the asking price was not high for the location.

Testimony of First Plaintiff

[15] First Plaintiff testified that in October 2005, soon after her husband's funeral, when she signed the option to purchase, dated

13 October 2005, she had informed Defendant, his wife and the estate agents present that the conditions precedent to her purchasing the property would be both the sale of her property, “Hunter’s Rest” in Louis Trichardt, and the receipt of funds from her husband’s estate. This was understood by all present including Defendant, estate agent Ms Knierin, who introduced her to the subject property, and her principal, Alice Joubert.

[16] Estate agent Alice Joubert had however incorrectly inserted these two preconditions into the offer to purchase agreement, by recording at clause 13, that either of the two conditions would suffice, and inserting the word ‘or’ as opposed to ‘and’ at the clause. First Plaintiff was adamant that she would not have been able to buy the property without both the finalization of the estate and the sale of the Hunter’s Rest property and that this had been made clear to all concerned.

[17] The large deposit of R300 000.00, had been at Defendant’s behest, a sum which First Plaintiff had borrowed from her son. It was First Plaintiff’s intention to pay the remaining R600 000.00 of the purchase price from the proceeds both of the sale of her property in Louis Trichardt and from the estate of her late husband.

[18] First Plaintiff explained with reference to the suspensive condition at clause 7 of the agreement, that the bond of R250 000.00 was to be obtained by her daughter, the Second Plaintiff, and used to fund transfer fees and further building on the property.

The Second Plaintiff and estate agent Delmarie Knierin had attended to the bond application and First Plaintiff had not been involved in that aspect. She had left the Cape shortly after concluding the agreement and had not spoken to Ms Knierin again after leaving.

[19] Whilst back in Louis Trichardt she had received a telephone call from Second Plaintiff who said she had not obtained a bond for R250 000, but a bond in the lesser amount of R238 700.00, as her salary did not qualify her for a R250 000 bond. First Plaintiff's response had been "Well if you can't you can't, that's it". They had not discussed the matter further, she said. Under cross examination First plaintiff denied that Ms Knierin had also phoned her with news of the bond. She moreover denied that she had telephonically told Ms Knierin that it was alright to go ahead with the sale with the lesser bond. Thereafter her son advised that the property was unsafe and he had notified the estate agent in an e-mail dated 14 November 2005, of the decision not to proceed with the sale.

[20] First Plaintiff had put her Louis Trichardt property on the market at the end of November 2005. She was however unable to sell it during 2005 and 2006 because a land claim had been registered against it. It was only in May 2007 that she was given the go ahead to sell, which she did in June 2007. In July 2007 she had moved to Cape Town. Her husband's estate was wound up in June 2006 and she was paid R45 000.00.

[21] First Plaintiff denied that she had an offer of R900 000.00 on the Louis Trichardt property at the time she signed the offer to purchase the subject property. She did not know of any dealings that estate agent Knierin had with the agent engaged to sell her Louis Trichardt property.

Testimony of Defendant

[22] Defendant is a retired teacher from Gauteng, living in Gordon's Bay, who is currently employed at Acutts Estate Agency. Since his retirement to the Cape Defendant has attempted to supplement his income by teaching and engaging in property investments on a small scale. Defendant testified about those property investments which he thought had a bearing on this claim, as well as the damages he alleged he suffered as a result of Plaintiffs' failure to purchase the subject property.

[23] Defendant bought the subject property in 2001 for R330 000.00 on a 'plot and plan' basis after his retirement. A bond on the purchase price was paid off when he received his pension.

[24] In 2004 Defendant bought another property on a plot and plan basis in Kraaifontein for R250 000.00, raising a bond of that amount. The property later sold for R420 000.00 and some of the profit was used towards the purchase of another "plot and plan" property in a retirement village in Gordon's Bay, for R591 000.00.

A deposit of R20 000.00 was paid towards this, the balance to be paid when building commenced. A second bond was taken in the amount of R474 993.64 on the subject property to pay the balance. The monthly repayments on the bond were R4 400.00 payable from August 2005.

[25] Thereafter in August 2005 Defendant put the subject property on the market for R920 000.00 because, he explained, he needed to raise R472 000.00 for the retirement property. He planned also to partly finance another property he had purchased for R595 000.00 in Kraaifontein from the proceeds of the sale of the subject property. He had bought the latter property before the subject property was put on the market, with the intention that it would give him a monthly rental income.

[26] In September 2005 Defendant received a conditional offer for R900 000.00. Thereafter the option to purchase for R918 000.00 was signed by First Plaintiff whom he said had informed him that she herself had an offer to purchase on her Louis Trichardt property. He gained the impression her property would be sold quite quickly and he expected to have his money by the end of February 2006. He conceded she did not know when her husband's estate would be wound up.

[27] When the prior offer of R900 000.00 lapsed, Defendant entered into the offer to purchase agreement with Plaintiffs for the sum of R900 000.00. Defendant explained he had insisted on

the large deposit of R300 000.00 as a guarantee that Plaintiff would buy the property.

[28] Defendant denied that the special condition at paragraph 13 of the agreement was subject both to the sale of the Hunter's Rest property owned by First Plaintiff and the finalization of her husband's estate. The sale, he said was subject to the sale of the Hunter's Rest property or the finalization of the estate, whichever event occurred first.

[29] After signing the offer to purchase Defendant had been informed by Ms Knierin that the bond had been approved. He also received a letter from his attorney, Mr Nortjie stating that the deposit of R300 000.00 had been paid. He showed the letter to the developers of the retirement village property he had bought and instructed them to proceed with the building of his house there, and the bond raised for that purpose commenced being drawn against.

[30] Thereafter Defendant received a telephone call from First Plaintiff's son, informing him that she no longer wished to proceed with the sale, and requesting that the contract be cancelled. Defendant refused, indicating that a breach of contract on his part would result in his being liable for agent's commission. An e-mail from First Plaintiff's son dated 14 November 2005, cancelling the sale, was thereafter shown to Defendant by the estate agent.

[31] Defendant put the subject property on the market again in December 2005 but to date he has received an oral offer only, of R800 000.00 in mid 2006. Defendant denied that he did not actively attempt to sell the subject property because he knew that a sale would affect his ability to retain the deposit of R300 000.00 paid by Plaintiffs. He denied that his intransigence in reducing the purchase price of R900 000.00 indicated a reluctance to sell.

[32] Defendant moved out of the subject property on 15 December 2006 whereafter it was rented for a monthly rental of R4 500.00. Had the subject property been purchased by Plaintiffs for R900 000.00 he said he would have used 472 000.00 to pay off its bond, R290 000.00 to pay towards the Kraaifontein property and R60 000.00 for agent's commission on the sale. He believed that he was entitled to the deposit of R300 000.00 irrespective of the damage he had sustained, as soon as Plaintiffs had breached the contract.

[33] Whilst Defendant listed in a reply to Plaintiff's request for further particulars to trial, details pertaining to his prejudice as a result of Plaintiffs' alleged repudiation, and lead evidence thereon, he did not provide all the requisite documentation against which his testimony on this aspect could be tested. He conceded he had not made discovery of all the documents relevant to his financial position over the period in question. At the time of making discovery his view seemed to be that his financial affairs were not relevant as he was entitled to the full amount of R300 000.00

irrespective thereof.

[34] A schedule prepared by Mr Grobbelaar specifying Defendant's prejudice totalled his damages as R220 785 13. Included in the items specified were estate agents commission, occupational rental, bond repayments on the subject property, insurance thereon, a savings plan for his granchild, and losses in repect of two insurance policies. A causal link between many of these items and the non fulfillment of the sale agreement did not clearly emerge from Defendant's testimony. Defendant appeared to suggest that by way of a ripple effect Plaintiffs were to blame for his costs and expenses right up until September 2007.

[35] Defendant conceded that he had not given the First Plaintiff a further 15 days at the end of October to obtain a bond of R250 000.00 in accordance with the suspensive condition at clause 7. Instead, on the advice of his attorney a bond for R250 000.00 was reapplied for and approved on 5 December 2005. Defendant thought the Plaintiffs were bound to the agreement once that approval had occurred.

Testimony of Delmarie Knierin.

[36] Delmarie Knierin an estate agent employed by Action Estates in 2005, and a close personal friend of the Plaintiffs, had introduced them to the subject property in October 2005. Ms Knierin was present when both the option to purchase as well as

the offer to purchase agreement were signed.

[37] She explained that both documents provided for a high deposit of R300 000.00 because the Defendant was prepared to wait for the sale of First Plaintiff's Louis Trichardt property or the finalization of the estate, for the contract to go through.

[38] The offer to purchase agreement had been filled in by Ms Knierin's principle, Alice Joubert, as, at the time Ms Knierin had been an estate agent for only 2 months and the contract involved the winding up of the estate. When cross examined about the special conditions at clause 13 of the offer to purchase and probed about the reasons for the inclusion of such conditions, Ms Knierin conceded that clause 13 meant that the contract was subject to the sale of Hunter's Rest plot or the finalization of the deceased estate whichever happened last, or whichever gave the money for the purchase price.

[39] After the offer to purchase agreement was signed Ms Knierin arranged for a company, Bond Choice, to assist the Second Plaintiff with obtaining the R250 000.00 bond in compliance with the suspensive condition at clause 7. On 24 October 2005 she telephoned Second Plaintiff and informed her that a bond only in the sum of R238 700.00 had been approved. They had a discussion during which Ms Knierin advised Second Plaintiff about the amount she would need for transfer and building costs, whereafter they had decided that a bond as approved would be

enough. Consequently Second Plaintiff had accepted the R238 700.00 bond. Ms Knierin had recorded her telephone discussion with Second Plaintiff on a notepad on which she kept notes of important matters.

[40] Ms Knierin said that she had phoned the First Plaintiff on her cell phone directly after phoning Second Plaintiff and also informed her that a bond of R238 700.00 had been approved. First Plaintiff had accepted this amount. When probed about this phone call during cross examination Ms Knierin initially said First Plaintiff told her she was at Second Plaintiff's flat when she was phoned. However when confronted with First Plaintiff's evidence that she was back in Louis Trichardt when her daughter phoned to tell her about the bond, Ms Knierin said she could have been, but then later reverted to her earlier suggestion that First Plaintiff was at her daughter's flat at the time. She referred to a fax that she had arranged to send to First Plaintiff at her daughter's flat. When asked to read out the fax, it emerged that Knierin had recorded First Plaintiff's cell number as being that of Second Plaintiff's.

[41] Ms Knierin attempted to explain this discrepancy by saying that First Plaintiff had been using her daughter's cell phone as she did not have a cell phone with her in October 2005. This contradiction with her evidence in chief that she had phoned First Plaintiff on her cell phone after speaking to Second Defendant, was pointed out. Ms Knierin had not recorded on her notepad that she had phoned First Plaintiff to inform her about the bond, and

she conceded as much.

[42] Ms Knierin had tried unsuccessfully on 24 October to phone Defendant and eventually sent him an SMS message that the bond had been approved. She had recorded this on her notepad. Ms Knierin had thereafter telephoned the person at Bond Choice who had facilitated the bond application, and informed her that Second Plaintiff had accepted the bond of R238 700.00.

[43] Ms Knierin said she had also been involved with an estate agent in Louis Trichardt who was negotiating the sale of the Hunter's Rest property owned by First Plaintiff. She had faxed documents to the estate agent for First Plaintiff in this regard. She had seen an offer on the Hunter's Rest property around 28 October 2005.

[44] Ms Knierin had been shocked at the e-mail from First Plaintiff's son dated 14 November 2005 instructing the cancellation of the sale. She had notified the Second Plaintiff about this and the latter, she said, was very upset. On 16 November 2005 Ms Knierin had written a letter on the instruction of Defendant to the First Plaintiff and her son in connection with the cancellation.

[45] Thereafter, according to her, the First Plaintiff had telephoned her to enquire if the Defendant would be willing to rent the house to the Plaintiffs and deduct the rental from the R300 000.00 deposit. Ms Knierin had not forwarded that request to the

Defendant. The commission for the sale has not been received, nor has the estate agency pursued the commission, due to the current litigation.

[46] Ms Knierin conceded that a bond for less than R250 000.00 would have reduced the purchase price on the contract.

Testimony of Alice Joubert.

[47] Alice Joubert, the principle estate agent at Action Estates, who filled in the offer to purchase agreement, testified that in terms of the special conditions at clause 13, the contract was subject either to the sale of Hunter's Rest or the finalization of the estate, and that the purchase price would be paid whichever event occurred first. This was in contrast to the testimony of her employee, Ms Knierin who conceded the clause was to be understood in the context of whichever event occurred last.

[48] Also, in contrast with the testimony of Knierin to the effect that she had notified Defendant by SMS of the approval of a bond of R238 700.00, Joubert testified that this was conveyed telephonically to Defendant whom Knierin had telephoned in her presence. She also said that Knierin had telephoned First and Second Plaintiffs in her presence, a detail which Knierin herself had not alluded to, and informed them about the bond approval of R238 700.

[49] Furthermore, in contrast with the testimony of Defendant that the subject property was first put on the market in August 2005, 2 months before Plaintiffs' offer, Ms Joubert said she had the house on her books for about 10 months before Plaintiffs made the offer. When faced with these discrepancies, Ms Joubert stated that these events had occurred a long time ago, she has a lot of stock and could not remember everything.

[50] Ms Joubert stated it had not been explained to her that the First Plaintiff needed to sell her house in order to purchase the subject property. She however accepted that Ms Knierin was closest to the transaction, and knew why clause 13 had been inserted. Joubert could not say if either of the conditions specified at clause 13 had occurred.

[51] According to Ms Joubert, First Plaintiff's son had informed her telephonically on 9 November 2005 that he wished the sale to be cancelled because the house was in a Coloured neighbourhood and not suitable for his mother. He said he had found a loophole, as the contract at clause 7 stipulated for a bond of R250 000 and this had not been granted. The e-mail to her dated 11 November 2005, stating the sale had lapsed, due to the non fulfillment of the suspensive condition, had followed.

Argument.

[52] Both Mr Turner for Plaintiffs and Mr Grobbelaar for

Defendant agreed that if the Defendant did not discharge the onus to prove the alleged waiver of the suspensive condition at Clause 7 of the agreement, the Plaintiffs must succeed in recovering the full deposit of R300 000.00 plus interest and costs.

[53] In the event of a waiver being found, Defendant would be required to prove a repudiation on the part of Plaintiffs, which he accepted, as well as his entitlement to withhold the deposit as a genuine pre-estimate of damages pursuant to the provisions of the penalty sub clause at 11.2 of the agreement. The provisions of the Conventional Penalties Act would apply to clause 11.2 and the onus would be on Plaintiff to show *prima facie* that the Defendant did not suffer prejudice or that the amount claimed, should be reduced. If they did, the Defendant would have to lead evidence to show the prejudice he alleged he suffered.

[54] Mr Turner submitted in addition, that in the event that the Defendant was successful in either of the defences raised and it was found that the suspensive condition was waived, there are two further suspensive conditions at Clause 13 that suspend the agreement, neither of which had been fulfilled by the time the Defendant purported to cancel.

Waiver

[55] In order to prove a waiver the Defendant must show that the Plaintiffs had a right under the contract, conferred solely for their

benefit, which they both waived. See *Barnard v Barnard* 2000(3) SA 741C at paragraph 18 and 19.

[56] There was some debate as to whether the suspensive condition at clause 7 constituted a right conferred solely for the benefit of Plaintiffs. Mr Turner submitted that the clause viewed in the context of the agreement was for the benefit of both parties, did not bestow a right on Plaintiffs only, but merely created a suspensive condition for the implementation of their agreement, and accordingly could not be waived. The exclusion of the sum of R250 000.00 which made up the purchase price, he argued, would render the contract inchoate. Mr Grobbelaar in contrast, argued that clause 7 was capable of being waived, the effect whereof would not render the contract inchoate but would require it to be looked at as it stood.

[57] It is settled law that a bond clause akin to the suspensive condition at clause 7 of the agreement, is for the exclusive benefit of the purchaser and is capable of unilateral waiver provided that such waiver takes place before the date for fulfillment of the condition. See *Manna v Lotter and Another* 2007(4) SA 315 (C) at 324I-325E; *Mia v D J L Properties (Waltloo) (Pty) Ltd and Another* 2000 (4) SA 220 (T) at 228 H-I; *Westmore v Crestanello and Others* 1995 (2) SA 733(W) at 739 B-C; *Alessandrello v Hewitt* 1981 (4) S A 97 (W). I do not accept that clause 7 is for the benefit of both parties, or that the clause viewed in the context of the agreement provides a basis for deviation from settled law.

[58] Defendant, in order to succeed in his waiver defence must also discharge the further onus of proving that both Plaintiffs waived their right to accept a bond of R250 000.00, conferred at clause 7, by accepting a bond in the lesser amount of R237 800,00. As co-creditors / co-debtors to the agreement the right must have been waived by both of them. See *Barnett v Glantz* (1908) 25 SC 967; *Prinsloo v Roets* 1962 (3) SA 91 (O); *Segal v Segal* 1977(3) SA 247 (C) at 252-254. A waiver by one of them only, would not suffice to discharge the onus.

[59] There exists in our law a strong presumption against waiver and the onus of proving a waiver is not easily discharged[1]. Innes CJ in *Laws V Rutherford* 1924 AD 261 at 263 stated:

> "… The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."

See also *Hepner v Roodepoort-Maraisburg Town Council* 1962(4) SA 772 (A).

Clear proof is required especially of a tacit as opposed to an express waiver[2] See *Borstlap v Spangenberg* 1974(3) SA 695 A at 704, *Road Accident Fund v Mathopi* 2000 (4) SA 38 A paras 16-17. The conduct from which waiver is inferred, it has frequently been stated, must be unequivocal. See *Road Accident Fund v Mothupi* 2000(4) SA 38 (SCA) at para 19 or the conduct must evince an unequivocal intention to waive a particular right. This determination has been said to be one of fact and a statement of

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1 See Christie, The law of Contract in South Africa 5th edition, Butterworths at 441
2 Christie ibid

attitude or understanding is not sufficient. (See *Barclays Bank of Zimbabwe Limited v Binga Products Pty Limited* 1983(3) SA 1041 (ZS).

[60] Against the backdrop of the evidential standard pertaining to waiver, I set out to consider in the light of the relevant evidence whether both Plaintiffs waived the right conferred at clause 7. An evaluation of the testimony of Ms Knierin to whom on Defendant's version both Plaintiff's conveyed their acceptance of the lesser bond, and who in turn accepted their waiver on Defendant's behalf, as well as that of First Plaintiff, is relevant to this enquiry.

[61] It was apparent from Ms Knierin's testimony in chief that during her telephone call to the Second Plaintiff on 24 October, informing her about the approval of the bond of R238 700.00, that prior to the Second Plaintiff's acceptance thereof, Ms Knierin had advised her that this amount would be sufficient to cover transfer fees and building costs. It would appear that having been convinced by Ms Knierin that the greater sum of R250 000.00 was not really required, the Second Plaintiff accepted the bond in the lesser amount. I note that Ms Knierin recorded her conversation with Second Plaintiff on a notepad used to jot down important matters, and recorded there also the SMS she sent to Defendant notifying him of the bond approval.

[62] Knierin's evidence in chief that she had phoned First Plaintiff on her cell phone in a separate call immediately after phoning Second Plaintiff contrasts sharply with her testimony under cross

examination that First Plaintiff did not have a cell phone in October, and was using the cell phone of Second Plaintiff. It leads one to speculate whether Knierin offered the latter testimony conveniently to cover her tracks, when it emerged during cross examination that the cell number Knierin had for First Plaintiff was that of Second Plaintiff. This, and the fact that she did not record the phone call to First Plaintiff as she did in respect of that to Second Plaintiff and the message to Defendant that day, poses the question as to whether the call to Plaintiff was in fact made, and in my view, impugns her credibility.

[63] Her prevarication during cross examination as to where First Plaintiff was when she phoned her, also does not assist her. The only corroboration of Knierin's testimony that she phoned First Plaintiff, is provided by Alice Joubert, but given the latter's contradictory evidence as juxtaposed against that of Knierin's, and Defendant's as alluded to above, great store cannot in my view be placed on the testimony of Joubert.

[64] The First Plaintiff in contrast was consistent in her testimony both in chief and under cross examination, that Ms Knierin had not phoned her and in her denial that she had communicated acceptance of the lesser bond to Knierin. In the circumstances I come to the view that the probabilities favor the acceptance of First Plaintiff's evidence over that of Ms Knierin. The probabilities moreover, are that if a communication with first Plaintiff about the bond had occurred telephonically or at all as attested to by Ms

Knierin, she would have recorded such a communication on her note pad as she had done in respect of her communication with the Second Plaintiff and the Defendant.

[65] I accept also as was contended by Mr Turner that the conduct of Defendant and indeed his agents after 14 November 2005 is inconsistent with that of a party who has accepted a waiver or at least received communication thereof. The waiver was not raised in Ms Knierin's letter of 16 November written on Defendant's instructions or in the Defendant's attorney's letter of 8 December. Further the attempt to get a bond for R250 000.00 approved on 5 December 2005 indicates that they were trying to revive the agreement, and is an act inconsistent with a belief that the condition had been waived.

[66] I am accordingly unable to find there to have been proof of an unequivocal intention on the part of First Plaintiff to waive the right conferred at clause 7. Defendant has accordingly not discharged the requisite onus of proof, namely that both Plaintiffs waived the right conferred at clause 7. I note in passing that from the evidence there is possibly also scope for debate as to whether an unequivocal intention to waive was evinced on the part of Second Plaintiff. I however make no finding in this regard, as indeed I am not required to, in the light of my finding in respect of First Plaintiff.

[67] I note moreover that there was no evidence of a waiver being

communicated or accepted on 19 October 2005 as stated in Defendant's amended further particulars. I however accept the incorrect date reference, in all likelihood, to have been a mistake in the light of the evidence.

[68] In the light of my finding it is not necessary for me to make any determination in respect of the damages alleged to have been suffered by Defendant nor indeed in respect of the special conditions at clause 13 of the agreement. I mention in passing however, that had Defendant succeeded with the waiver defence, he may well have had difficulty in proving, in light of the evidence presented, some of the damages he alleged he suffered. He would also have faced the challenge of proving his stance in respect of the two further special conditions at Clause 13, neither of which had been fulfilled by the time Defendant purported to cancel the agreement.

[69] In the light of all of the above I find that the Defendant has not succeeded in proving the waiver he relies on. Plaintiffs' claim must accordingly succeed in its entirety.

[70] I order as follows:

The Plaintiffs are granted judgment against the Defendant for:

1. Payment of the sum of R300 000.00;

2. Interest thereon at the rate of 15.5% per annum from 24 November 2005 to date of payment.

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MEER, J