THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 25367/2010

In the matter between:

EMPIRE EARTH INVESTMENTS 17 (PTY) LTD **Applicant**
(Registration Number: 2005/011734/07

and

ADRIAAN KOTZÉ **First Respondent**

MARGARETHA CORNELIA KOTZÉ **Second Respondent**

JUDGMENT DELIVERED: THURSDAY 02 FEBRUARY 2012

SALDANHA, J

[1.] This is an application which had initially been brought by way of urgency wherein the applicant sought compliance by the respondents of their obligations in terms of the Deed of Sale which had been entered into between the parties on the 22nd February 2010, in respect of Erf 905, Croydon, Stellenbosch, commonly known as the Kelderhof Country Village. The respondents, a married couple and purchasers of the property, opposed the relief on two grounds namely; that two of the suspensive conditions to the Deed of Sale had not been met in that the property which they owned at the time of entering into the Deed of Sale had not been sold for a "minimum" of R1 050 000.00 and that the respondents had not

obtained a mortgage bond in the amount of R950 000.00 as provided for in the Deed of Sale. In effect, the principal contention between the parties on the first ground was the interpretation to be accorded by the court to clause 28 of the Agreement of Sale between them.

[2.] The urgent application was postponed on the 10th December 2010 for hearing on the semi urgent basis in the Fourth Division. During the course of the hearing of the application the respondents applied for a postponement in order to bring an application for the rectification of clause 28 of the Deed of Sale as an alternate defence.

[3.] The respondents however did not proceed with the application for rectification and sought leave to supplement their defence to the applicant's claim with the submission of further facts which they claimed was relevant for the purposes of the court exercising its discretion in respect of the relief for specific performance.

The Agreement of Sale.

[4.] The applicant entered into an agreement with the respondent in respect of the erf for the sum of R444 000.00 in a plot and plan scheme in the Kelderhof Country Village development. The development comprised a lifestyle centre with recreational facilities, roads and infrastructure services, security entrances, electrified and alarmed perimeter fences with alarm monitoring systems as well

as landscaped open spaces. The construction cost was for a separate amount of approximately R1075 900,00.

[5.] The purchase price of the erf was payable by way of a deposit of R10 000.00 and the balance in the amount of R434 000.00 on date of registration of transfer. The parties had further agreed that the respondents were to *"within five days of fulfillment of the conditions precedent contained in 4 (if applicable) or within 30 days of the effective date furnish the sellers attorneys with a bank guarantee acceptable to the sellers attorneys for the due payment of the full balance of the purchase price. Alternatively, the purchaser may pay such balance to the seller's attorneys to be held in their trust account as provided for in clause 3.2 pending registration of transfer."* Transfer of the Erf was to be passed *"as soon as reasonably possible after the subdivision or consolidation required to create it."*

[6.] The respondents undertook *"... to comply with any law, ordinance or regulation relating to the passing of transfer and to sign all documents or affidavits pertaining thereto when requested by the (applicants) attorneys to do so."*

[7.] It was further agreed between the parties that in the event of the respondents *"... failing to pay the deposit or to furnish a guarantee in lieu thereof timeously as provided for in 3.1, the seller shall be entitled to exercise its rights in*

terms of 19.1 without giving written notice calling for the purchaser to remedy such breach as provided for in 19.1." It was specifically *"....recorded that should any breach of either party occur at the time critical to the registration of transfer the other party shall be entitled to require the defaulting party to remedy such breach within a period of 48 hours and not within the 10 day period provided for in clause 19.1."* Further with regard to the notices in terms of the agreement it was agreed that *"Any notice given... by one party to the other...transmitted by telefax, electronic email shall be deemed (in the absence of proof to the contrary) to have been received within 1 hour of transmission where it is transmitted during normal business hours of the receiving instrument and within 2 hours of the commencement of the following business day where it is transmitted outside those business hours."*

[8.] On or about the 13th April 2010 an addendum to the agreement (the addendum) was concluded between the parties which provided that *"the agreement of sale is subject to the (respondents) selling their property situated at 4 Rosendal Crescent, Kuilsriver (the purchasers Property) and to the fulfillment of any suspensive conditions contained therein that sale agreement by no later than the 22nd May 2010."*

[9.] The respondents paid the deposit of R10 000.00 in terms of clause 3.1 of the Agreement and the applicant claimed that the respondents' loan finance approval was obtained from Absa Bank on 10th May 2010 in the amount of

R1011 985.00 (a copy of the approval by Absa Bank addressed to the applicant's attorneys and headed "INSTRUKSIES VIR INDIENING VAN VERBAND" was attached to the applicant's founding affidavit).

[10.] The respondents subsequently sold their property situated at No.4 Rosendal Crescent, Kuilsriver for an amount of R950 000.00. The applicant claimed that the suspensive conditions contained in the addendum of the Sale Agreement had been fulfilled prior to the 22nd May 2010. The applicant also referred and attached a copy of an email from the second respondent to the applicant's sales agent, Edna Durham (Durham), on the 28th April 2010 which stated as follows:

"*Hi daar!*

Net gou update:

Ons prokereur (sic) het al ons info gekry vir die oordrag van ons huis na die koper – wiel is aan rol. Ons leening (sic) is goed gekeur (sic) wag net vir die finale dokumentasie en prober nog onderhandel met die rente koers. Dit behoort op die laaste teen volgende week al uit gesorteer wees.

Sodra alles geteken is ens gaan ons die wiel by julle aan die rol sit. Wat is ons eerste stap?

Het jy daardie foto toe gebruik met jou trippie Sandton toe? Jy moet my wys waar jy dit gebruil het - hoop dit het jou gehelp met 'n paar sales

Ek hoor graag van jou,

Thanks!

Margriet."

[11.] The applicant claimed that the email clearly indicated that the respondents' property had been sold and that their attorneys had instructions to proceed with the transfer to the purchaser. The second respondent had furthermore confirmed that their loan had been approved and the applicant claimed that the conditions precedent referred to in clause 1.1 of the addendum had therefore been fulfilled.

[12.] The applicant claimed that notwithstanding the fulfillment of the relevant conditions precedent, the respondents nonetheless refused to sign the transfer documentation and to provide the guarantee in order to initiate the process of registration of the property into their names in terms of the agreement.

[13.] On the 24th May 2010 the first respondent addressed an email to Durham and Zunaid Rawoot (Rawoot), a conveyancer employed by the applicant's attorneys of record. The first respondent advised as follows:

"Dear Edna, Zunaid

We were unsuccessful in securing our bond for our house at Kelderhof in the time allowed. We did not extend the existing contract prior to the expiry date.

Due to unforeseen financial implications we would like to withdraw our application to build at Kelderhof Country Estate. Therefore with the laps (sic) of our contract, 17h00 22 May 2010 we would appreciate you to refund us our R10 000.00 deposit in to the following bank account....."

[14.] On the 27th May 2010 the first respondent addressed a further email to Rawoot which stated as:

"Good morning Zunaid

I just want to know when we can expect our refund of our deposit."

In response, Rawoot addressed an email to the first respondent stating inter alia as follows:

"Dear Mr. Kotze

My understanding is that you have sold you (sic) property within the specified timelines and did receive a timeous bond approval as well (but refused to accept it) and as a result my client has instructed us to transfer this matter to our litigation department for enforcement of the contract.

We will accordingly not be refunding you and will be putting you to terms."

[15.] On the 2nd June 2010 the respondents' attorneys Barry Nortje Attorneys, addressed a telefax to the applicant's attorneys in which they stated:

"It is our instructions that the suspensive condition in clause 28 of the relevant agreement of sale has not been fulfilled, as 4 Rozendal Crescent, Kuilsriver was sold for R950 000.00 and not for R1050 000.00 as stipulated. Accordingly the agreement of sale is of no force and/or effect."

[16.] On the 3rd June 2010 the applicant's attorneys addressed a further letter to the respondents requesting that they provide two separate guarantees for the balance of the purchase price of R434 000.00.

[17.] On the 9th of June 2010 the applicant's attorneys addressed a letter to the respondents advising them inter alia that the suspensive conditions relating to the bond as well as the sale of their property situated at 4 Rozendal Crescent, Kuilsriver had been fulfilled and should they not rectify their breach within 10 days of the date of the letter by furnishing the requested guarantees the applicant would not hesitate to invoke their rights in terms of clause 19 of the agreement to enforce the immediate compliance with the terms of the agreement.

[18.] In response the applicant's attorneys on the 11th June 2010 received a further telefax from Barry Nortje Attorneys referring to their telefax of the 2nd June 2010 and demanded repayment of the deposit. The applicant's attorneys responded on the 14th June 2010 in addressing a telefax to Barry Nortje Attorneys and enclosed a copy of the letter of demand dated the 9th June 2010

and advised them that as per the letter of demand the applicants had instructed them to enforce the agreement of sale.

[19.] It appeared that on the 16th June 2010 the first respondent addressed an email to Sophia Vorster (Vorster) of Devpro Nationwide Bond Consultants advising her that they had never accepted the Absa loan. Vorster in reply stated as follows:

"Hi Adriaan

Ek het in julle file gekyk en kan die volgende bevestig:

1. *Julle koopkontrak was geteken onderwerpe aan 'n verband van R950 000.*

   Goedkeuring van Standardbank R1 000 000.

   Goedkeuring van Absa R1 011 985.

   Gedkeuring (sic) in Prinsiep van Nedbank R1 116900 op record (sic)...

2. *Die verkoop van julle huis. (Dit het gebeur)*

   So in terme van die getekende kontrak vir die Kelderhof eiendom is al die opskortende voorwaardes nagekom."

[20.] On the 13th July 2010 the respondents attorney in response to the letter of demand of the 9th June 2010 sought confirmation from the applicants that *"the parties are ad idem that the agreement of sale had a suspensive condition that our clients had to sell their property namely 4 Rozendal Crescent, Kuilsrivier, on or before the 22nd April 2010 for R1 050 000.00 and that according to your client*

the suspensive conditions was amended in that our clients only had to sell their property on or before the 22nd May 2010." In response thereto the applicant's attorneys on the 19th July 2010 addressed a further telefax to the respondents' attorneys in which they placed the following on record.

"*1. your statement regarding the parties being ad item (sic) in respect of the suspensive condition is incorrect. As stated in our letter of demand addressed to your clients on the 9th June 2010 the Suspensive Condition does not stipulate that the agreement is subject to your client selling their property at 4 Rozendale Crescent, Kuils River for the sum of R1 050 000.00.....*"

[21.] The applicant's attorneys further stated their client's threat to bring an application against the respondents to enforce compliance with their obligations in terms of the Agreement. The applicants claim that it was therefore apparent that they had attempted to procure compliance by the respondents with the agreement and had therefore had no option but to bring the urgent application against the respondents.

[22.] In opposing the application the second respondent deposed to an affidavit which was supported by the first respondent in which they claimed that the Deed of Sale had not come into force because the suspensive conditions were not met. In this regard they relied on a contention that the hand written clause inserted after clause 28 of the Deed of Sale stated as follows:

"This offer is subject to selling of, 4 Rozendal Crescent, Kuilsriver not later than 22nd April 2010, on the market for R1 050 000.00."

[23.] The respondents contend that the Rozendal property was to be sold for a *"minimum"* of R1 050 000.00 and that because the property had only been sold for R950 000.00 they were unable to obtain further loan finance for the balance and therefore the suspensive condition had not been fulfilled. The second respondent further claimed that the email from her to Durham (referred to above) was written at a time when the respondents as lay people were not aware that the contract had already lapsed for non-fulfillment of clause 28.

[24.] The respondents further contended that the mortgage bond had not been approved in terms of clause 4 of the Deed of Sale and that the applicant had not put them to terms in terms of clause 4 of the agreement and therefore no binding agreement had come into being.

[25.] In reply, the applicant denied that the handwritten addition to clause 28 of the Agreement imposed a *"minimum"* sale price as part of the suspensive condition and claimed that the clause only recorded that the property was *"on the market"* at that price. The applicant further contended that respondents' contention was fallacious that they were unable to afford to build a house on the erf because they had only sold their Rosendal property for R950 000.00. They claimed that the amount realized from the Rozendal property could easily have

covered the purchase price of the erf in the sum of R444 000.00 and, together with the respondents' approved loan from Absa Bank, would have provided sufficient equity to construct a house to the value of R1 075 900.00.

Clause 28

[26.] Mr. Kantor, who appeared on behalf of the applicant, submitted that the respondents' attempt to construe the handwritten part of clause 28 (referred to above) as stipulating a condition precedent that the Rozendal property was to be sold for a *"minimum"* of R1 050 000.00 was contrived. He also relied on the decision of Harms DP in **KPMG Chartered Accountants SA v Securifin Ltd & Another 2009 (4) SA 399 SCA at para. 39**

"[39]....the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses...."

[27.] Mr. Maree who acted on behalf of the respondents argued to the contrary and for his part relied on the decision of Joubert JA in **Coopers & Lybrandt & Others v Bryant 1995 (3) SA 761 (A) at page 768;**

"The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ supra;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. Delmas Milling Co Ltd v Du Plessis1955 (3) SA 447 (A) {dicta at 454G-H & 455A-C appl} at 454G-H; Van Rensburg en Andere v Taute en Andere1975 (1) SA 279 (A) {dicta at 303A-C & 305C-E appl} at 305C-E; Swart's case supra at 200E-201A & 202C; Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others1994 (2) SA 172 (C) {dictum at 180I-J appl} at 180I-J;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intention.".

[28.] Mr. Maree contended that the reference to the amount R1 050 000.00 in clause 28 was for a specific purpose and not merely as a recordal and it must be

read within the context of the entire sub-clause to give it proper meaning as an essential condition of the contract.

[29.] As already indicated, the respondents had during the course of argument sought a postponement in order to bring an application for the rectification of the contract, in particular the sub clause of clause 28 so as to rectify the content thereof to reflect the meaning they sought to accord to it. In an affidavit by the second respondent in which she sought to explain their failure to bring the application they indicated that they had contacted the estate agent Durham who had represented the applicant during the course of the negotiations but that it was apparent that they were not able to obtain any support from her for their contention in a proposed application for rectification. Inasmuch as the onus would have rested on the respondents for rectification they appeared to have wisely abandoned such an endeavor for the lack of any evidence other than their own say so.

[30.] The respondents also relied on a claim made by them in their opposing papers that they had sent an email to Durham shortly after the email of the 28th April 2010 or at the same time in which they claimed that because the house had been sold for less than R1 050 000.00 they would therefore need to obtain a larger amount of financing in order to proceed with the Kelderhof purchase. The second respondent claimed that the reason for sending such an email was because they had not achieved a purchase price of R1 050 000.00 as

contemplated in sub clause 28. The applicant for their part claimed not to have any knowledge of such an email but they claimed that in any event it was irrelevant as they specifically relied on the literal interpretation of the sub clause to clause 28. However, despite the respondents reliance on such an email and despite it allegedly having emanated from them it was not tendered into evidence. Moreover they did not explain their failure to have attached the email.

[31.] The content of the handwritten portion of clause 28 is clear and unambiguous. Despite its inelegant phrasing (as counsel for the respondents pointed out, the word *"the"* had been left out), the clause has to be given its clear, grammatical and literal interpretation. The clause makes specific reference to the property being placed on the market for an amount of R1 050 000.00 and the sale is not qualified by a minimum amount having to be obtained in respect of the sale of the Rozendal property. Clearly, had the parties intended for such a minimum amount it would have simply been stated as such in the construction of the clause. In the result the interpretation that the respondents seek to accord to the handwritten portion of clause 28 cannot be sustained and their defence as to non-fulfillment of a suspensive condition which they unilaterally construed is without merit. This view is supported by the very email sent by the second respondent to the agent Durham on the 28th April 2010 in which she reported on their progress with the sale. Quite clearly second respondent had been in contact with her own attorney and if there was any non-compliance with a suspensive condition in a Deed of Sale it would no doubt have been pointed out

by her attorney. It was therefore quite clear that the respondents themselves were of the view that there had been compliance with the suspensive conditions of the Deed of Sale and in fact asked the applicant's agent what was the next step to be taken; *"Wat is ons eerste stap."*

[32.] It appears that thereafter the first respondent for the first time claimed that they had been "*unsuccessful in securing our bond*" for the purchase of the Kelderhof erf. That appears to have been the reason why they at that stage sought the return of their deposit for what he referred to as being *the "laps (sic) of our contract" and due to "unforeseen financial implications would like to withdraw our application to build at Kelderhof estate."* Counsel for the applicant was correct in construing the conduct of the respondents as "buyer's remorse" and it appeared to be a patent opportunistic attempt at resiling from their obligations under the Deed of Sale. The respondents also claimed that the email of the 28th April 2010 by the second respondent to Durham was sent while they were still optimistic that they would be able to secure further finance to enable them to purchase the Kelderhof erf. The email of the second respondent is not merely an expression of optimism but in fact the confirmation that the suspensive conditions had been met that they had received information from their attorneys with regard to the transfer of their property into the name of the seller. On two occasions in the email the second respondent states; *"die wiel is aan die rol."*

[33.] With regard to the second defence raised by the respondents that the bond had not been approved in terms of the provision of the Deed of Sale I am satisfied that such defence has no merit. Besides the second respondent herself confirming that the bond had been approved, the letter dated the 10th May 2010 from Absa clearly indicated that the bond had been approved in the amount of R1 011 985.00. Moreover, in response to an email sent by the first respondent to Vorster on the 26th June 2010 at Devpro Nationwide Bond Consultants and in which they had been informed that bonds had been approved for them by Standard Bank in the amount of R1 000 000.00 and Nedbank, in principle, in the amount of R1 0116 900.00 and Absa in the amount of R1 0011 985.00. I am satisfied that the respondents' defence on this issue is likewise opportunistic and without any merit at all.

Relief for specific performance.

[34.] The court enjoys a discretion with regard to the refusal of an order of specific performance despite the applicant having successfully proved the breach of the contract by the respondents. Mr. Kantor correctly referred to instances where a court may refuse such an order such as impossibility, undue hardship, imprecise obligations and specific performance in the context of contracts for personal service. In this regard see Christie Law of Contract in South Africa 5th Edition pages 524 – 530. Mr. Maree submitted that the court must exercise its discretion in the granting of specific performance mindful of the *dicta* of Hefer **JA** in **Benson v SA Mutual Life Assurance Society 1986 (1) 776 (A) page 783A.**

".....theoretically, I suppose, there may be a rule which regulates the exercise of the discretion without actually curtailing it but, apart from the rule that the discretion is to be exercised judicially upon a consideration of all relevant facts, it is difficult to conceive of one. Practically speaking it follows that, apart from the rule just referred to, no rules can be prescribed to regulate the exercise of the Court's discretion."

[35.] Mr. Maree also referred to **Christie** where at **page 609** the following is stated:

"The courts in their discretion will naturally not subject a defendant to the danger of contempt of court in cases where compliance with the order would be impossible, unduly onerous, difficult to enforce and insufficiently clear-cut, so that opinions might legitimately differ on whether there had been performance. It is premature of the court to exercise its discretion until all the evidence has been heard."

[36.] In the light thereof, Mr. Maree submitted that based on the supplementary affidavit dated the 23 May 2011 and the affidavit of the 30th September 2011 in which the respondents state that Absa Bank had since withdrawn their approval for the bond as the approval was valid for no more than three months after the date of approval the court should exercise its discretion in not granting specific performance. The respondents further claimed that on the 21st July 2010 they

entered into a Deed of Sale for the purchase of an alternate property at 65 Gordon Road Somerset West for an amount of R1 450 000.00. They paid a deposit of R480 000.00 and obtained a bond for the balance thereof. They claimed that their financial position was such that they would not be able to afford two bonds in the event of the court granting an order of specific performance against them in respect of the Kelderhof erf. The second respondent appears also to have given birth to a second child and their monthly expenses indicated a surplus of no more than R1590.07 and a further amount of R1975.00 is received by the second respondent from a trust fund. They also claim that in the event of them having to sell the Somerset West property they may incur a nett loss and it would also require their relocation to Stellenbosch. The Kelderhof erf is also as yet not developed and they will therefore have to secure rental accommodation in the meantime. In effect, they claimed that an order of specific performance against them would be unduly onerous and could possibly lead to them being in contempt of court. I am particularly mindful of the present financial predicament that the respondents find themselves in and although they have been the authors thereof, I am of the view that in the circumstances it would not be appropriate to make an order of specific performance against them.

[37.] Mr. Kantor did in the light of the respondents' supplementary affidavit suggest in argument three possible orders the court may consider making against the respondents. The first is as per the notice of motion and the second would require of them to pay the purchase price against transfer of the property

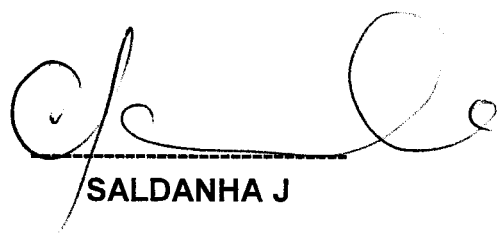
the funds for which should be made available by means of payment to the applicant's conveyancers or to be covered by means of a bank guarantee within ten days of the anticipated date of transfer and of which notice would be given to the respondents by the applicants or its conveyancer. As a third option, and which I propose making and what I consider to be the most appropriate, is a declaration that the respondents are in breach of the Agreement.

[38.] Given that the applicant has been successful in its claim against the respondents and in the light of the rather opportunistic defences raised I have no hesitation in imposing an appropriate order of costs against the respondents.

I accordingly declare:

(i) That the respondents are in breach of the Deed of Sale and that they are jointly and severally liable for any damages which the applicant may prove in subsequent proceedings (whether in this application set down in due course, with the papers duly supplemented or in separate proceedings).

(ii) I further order that the respondents are to pay the cost of this application.



SALDANHA J