THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 494/2023

In the matter between:

MARIA LUISA PALMA CODEVILLA	**APPELLANT**
and	
PAULA JANE KENNEDY-SMITH NO	**FIRST RESPONDENT**
DINGLEY MARSHALL INCORPORATED	**SECOND RESPONDENT**
CARL FREDERICH WESSEL	**THIRD RESPONDENT**
SIMONE DANIELLE BORCHERDING	**FOURTH RESPONDENT**

Neutral citation: *Maria Luisa Palma Codevilla v Paula Jane Kennedy-Smith NO and Others* (494/2023) [2024] ZASCA 136 (10 October 2024)

Coram: SCHIPPERS, WEINER and KGOELE JJA and BAARTMAN and TOLMAY AJJA

Heard: 16 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email; publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 10 October at 11h00.

Summary: Agreement of sale of immovable property – lapsing of suspensive condition – whether revival of agreement thereafter is competent.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Allie, Wille and Lekhuleni JJ sitting as court of appeal):

1 The appeal is upheld with costs. Such costs shall include the costs of only one counsel.

2 The order of the full court of the Western Cape Division of the High Court, Cape Town, is set aside and replaced with the following order:

'1. The appeal succeeds with costs.

2. The order of the court a quo dated 4 March 2022, is set aside and replaced with the following order:

2.1 It is declared that:

(a) the Offer to Purchase Erf 150003, Kenilworth Upper, Cape Town, located at 8 Selwyn Road, Kenilworth, Western Cape (the property), concluded on 4 February 2020 between the first respondent as seller, and the third and fourth respondents as purchasers (the Offer to Purchase); and

(b) the Addendum to Agreement of Sale, concluded between the seller and the purchasers on 20 February 2020, purportedly to extend the suspensive condition in clause 7.2 of the Offer to Purchase, after the expiry date for the fulfilment of that condition, are invalid and unenforceable.

3. The first and second respondents shall pay to the applicant the sum of R1 950 000, which she paid to them on behalf of the third and fourth respondents in respect of the purchase price of the property, together with the interest on that amount to which the applicant is entitled.

4. The first and second respondents shall pay the costs of the application, jointly and severally, the one paying the other to be absolved.'

JUDGMENT

Weiner JA (Tolmay AJA concurring):

[1] The issue in this appeal is whether an agreement for the purchase and sale of an immovable property, can be revived, subsequent to the lapse of a suspensive condition contained therein. The issue arose under the following circumstances.

[2] On 4 February 2020, the third and fourth respondents (the purchasers), the son-in-law and daughter of the appellant, made an offer to purchase a residential property situated at Erf 150003, 8 Selwyn Road, Kenilworth Upper, in the City of Cape Town, Cape Division, Province of the Western Cape (the property) from the first respondent (the seller), the executrix of the estates of her late parents. The second respondent is a firm of attorneys who acted on behalf of the seller and were also appointed as the conveyancer for the transfer of the property (DM Inc).

[3] The Offer to Purchase (OTP)[1] was accepted by the seller on 4 February 2020. The purchase price of the property was R5 150 000 and a deposit of R200 000 was required by 10 February 2020. In terms of clause 7 of the OTP, the sale was subject to the approval, in writing, by a financial institution, on its usual terms and conditions, of a mortgage bond in an amount R4 950 000 against security of the property. Clause 7.2 provided that:

'Confirmation of approval in writing is to be given by no later than 14/02/2020 whereupon this suspensive condition shall be deemed to have been fulfilled, failing which the aforesaid date shall be extended for a further thirty (30) days with the written consent of the Seller….'

[1] The OTP was also referred to as the agreement by the parties.

[4] The deposit was timeously paid on 10 February 2020. On 11 February 2020, prior to the date set out in paragraph 7.2 of the OTP, the seller and the purchasers entered into an Addendum to the OTP in terms of which it was agreed that the date provided in clause 7.2, for the approval of the mortgage loan, would be extended until 19 February 2020 (the first addendum). This addendum also reflected the parties' agreement that all other terms and conditions of the OTP remained in full force and effect.

[5] As the purchasers were having problems in obtaining finance, the appellant agreed that she would provide them with the funds necessary to enable them to acquire the property. As the appellant needed time to obtain the funds, she requested the third respondent to address a letter to DM Inc stating that time was needed to have the funds released. DM Inc advised that the seller required a bank guarantee, alternatively, the funds had to be paid into DM Inc's trust account by 19 February 2020. Despite valiant attempts to get the guarantee and/or the funds provided on time, they were not provided by midnight on 19 February 2020. It is common cause that the OTP, as amended by the first addendum, accordingly lapsed.

[6] On 20 February 2020, the appellant requested a further extension to provide the funds. The seller agreed that a second addendum to the OTP could be concluded (the second addendum). DM Inc advised that the 'sale would have to be revived by means of a formal, written addendum'. That was the basis of the conclusion of the second addendum, which was signed on 20 February 2020. In terms thereof, inter alia, the provisions in respect of the bond approval was amended and the provision of the bank guarantee for the cash portion of the purchase price, had to be provided by 09h00 on 25 February 2020.

[7] The second addendum provided as follows:

'**WHEREAS** the Seller and the Purchaser entered into the OTP dated 4 February 2020, for the purchase of Erf 150003 Kenilworth. Transfer is Intended to take place on or about 30 April 2020.

AND WHEREAS in terms of clause 7 of the OTP, the purchaser must have bond approval in writing in the sum of R4 950 000.00 (Four Million Nine Hundred and Fifty Thousand Rand) by close of business on 14 February 2020, which date was extended in writing by the seller to close of business, 19 February 2020.

AND WHEREAS the Purchaser has requested the above to be amended to:

1. Bond approval in writing from a by a financial institution in the sum of R1 500 000.00 (One Million Five Hundred Thousand Rand) over the property being purchased, being erf 15003(*sic*);

2. Bond approval in writing from a financial institution in the sum of R1 500 000.00 (One Million Five Hundred Thousand Rand) over erf 95812, namely 112 Bultenkant Street, Gardens, being property that the purchasers currently own, to be registered simultaneously with this transfer and a bank guarantee to be issued on request by Dingley Marshall Inc for the full sum of the bond; and

3. A bank guarantee for the cash portion of the purchase price, being R1 950 000.00 (One Million Nine Hundred and Fifty Thousand Rand) to be issued and supplied to Dingley Marshall Inc by 9am on Tuesday, 25 February 2020.

NOW THEREFORE the Seller and the Purchasers have agreed to the above, failing which the OTP and the Addendum will expire and be of no further force or effect.

Aside from the above amendments to the OTP, the Seller and Purchaser confirm and agree that all other terms and conditions of the Agreement are to remain the same.'

[8] The requisite bond approvals were obtained. The appellant, instead of providing a bank guarantee, made payment of the sum of R1 950 000 into DM Inc's trust account on 21 February 2020. The seller was requested to 'desist from marketing the property as all the suspensive conditions of sale have been fulfilled'. Problems arose in May 2020, when the purchasers, facing financial problems as a result of the COVID-19 pandemic, found themselves unable to meet their financial obligations and thus sought to cancel the agreement. They

requested Standard Bank, which had approved the mortgage loan, to withdraw such approval.

[9] The appellant, having taken cession of the purchasers' claim, sought to recover the amount she had paid to the seller. She sought legal advice. The advice was that there was no valid agreement, as it had lapsed on failure of the suspensive condition, contained in the first addendum on 19 February 2020; and that it was not revived by the second addendum. She thus demanded repayment of the amount of R1 950 000. The seller did not accept that the OTP had lapsed and elected to uphold the contract and demand specific performance of its terms. DM Inc, acting on behalf of the seller, was of the view that the second addendum 'records their joint intention in crystal clear terms; the sale of the property was to proceed, save that amended financing arrangements were stipulated with express reference to paragraph 7 of the OTP'. It was contended by the seller that the suspensive conditions in the second addendum had been fulfilled, as instead of providing a bank guarantee for the balance, the purchasers had timeously provided even better security for the balance: R1 950 000 by way of cash transfer, and the bond approvals had been received on 24 February 2020.

[10] On 24 June 2020, DM Inc demanded that the purchasers remedy their breach of the agreement. The breach relied upon was the purchasers' conduct in procuring the withdrawal of the Standard Bank bond and their intention not to proceed with the sale. On 8 July 2020, DM Inc, acting on behalf of the seller, purported to cancel the OTP as amended, on the basis that the purchasers had failed and/or refused to remedy the breach of the agreement as demanded.

[11] On 31 July 2020, the appellant applied to the high court for the following relief:

1. 'Declaring that:

1.1 The Offer to Purchase which was concluded on or about 4 February 2020 between the First Respondent as seller, and the Third and Fourth Respondents as purchasers, in respect of Erf 150003 Kenilworth Upper, Cape Town ("the Offer to Purchase") was subject to a suspensive condition, namely the written approval of a mortgage loan ("the Suspensive Condition") – which had to be fulfilled by 14 February 2020;

1.2 The time for the fulfilment of the Suspensive Condition was validly extended to 19 February 2020 by the Addendum to the Offer to Purchase dated 11 February 2020;

1.3 The mortgage loan contemplated by the Suspensive Condition was not provided by 19 February 2020 with the result that the Offer to Purchase failed;

1.4 The Addendum to Agreement of Sale which was concluded on 20 February 2020 did not revive the Offer to Purchase and the purported extension of the period of time for the fulfilment of the Offer to Purchase was invalid;

1.5 The Offer to Purchase is null and void *ab initio* and the Applicant is entitled to the repayment of the monies which she paid to the First and Second Respondents in furtherance of the transaction contemplated by the Offer to Purchase.

2. Directing the First and/or Second Respondents to:

2.1 Repay to the Applicant the amount of R1,950,000.00 which she had paid to them on behalf of the Third and Fourth Respondents in respect of the purchase price of the Property;

2.2 Pay to the Applicant any and all interest which has accrued on the said R1,950,000.00.

3. Directing the First Respondent and any other person who opposes this application to pay costs jointly and severally, the one paying the others to be absolved, on a scale as between attorney and client. . .'

[12] The issue before the high court was whether the further agreement revived or reinstated the OTP which had lapsed on 19 February 2020 as a result of the suspensive condition not being fulfilled. This involved a decision on:

(a) whether the parties had intended to conclude a fresh agreement when they signed the second addendum;

(b) whether the second addendum complied with the Alienation of the Land Act 68 of 1981 (the Act);
(c) whether the second addendum could be read as incorporating all the terms of the OTP, including the purchase price; and
(d) whether a valid contract could arise if all the terms of the OTP were incorporated.

[13] The high court found that the parties had intended to revive the agreement and that the second addendum had that effect. It held that the second addendum amounted to a 'fresh agreement' incorporating the terms of the OTP, as amended by the first addendum. Leave to appeal was granted to a full court of the high court (the full court), which dismissed the appeal on 24 January 2023.

[14] The full court's dismissal of the appeal was based on different grounds to those relied upon by the high court, in upholding the agreement. The full court found that a new agreement was not concluded, but that in terms of clause 7.2, the offer was validly extended for the 30-day period contained in the clause. The first extension was in terms of the first addendum. The second addendum was concluded within the 30-day period and amounted to a further extension of the date for the fulfilment of the suspensive condition. The agreement was thus valid. This point was not part of the seller's case neither in the high court, nor the full court. It appears that the full court raised the issue of the 30-day extension *mero motu* (of its own accord) and the seller now relies upon it for the first time in this Court.[2] This course of action is not permitted.[3] Special leave to appeal was granted by this Court.

[2] The first and second respondents did not pursue this aspect with enthusiasm, accepting that such course of action would be contrary to legal principles established in the cases referred to hereunder.
[3] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 para 13, in which it was held:
'Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their

[15] The seller contends that it is clear from the correspondence exchanged on 19 February 2020, that the parties knew that the suspensive condition would lapse that day. This is why the appellant desperately tried to procure the funds or a guarantee before midnight. Although the appellant stated in her affidavits that she was unaware that the sale had lapsed, it seems clear that she was aware of that fact. She was perhaps not fully aware of the consequences thereof. It is trite that, upon the failure of a suspensive condition, the contract lapses and is of no force or effect.[4] What happens thereafter is the issue with which this Court is concerned.

[16] It is common cause that the appellant requested an extension for the payment of the outstanding amount on 20 February 2020. This led to the signing of the second addendum, which the seller contends demonstrated both parties' intention to revive the OTP. Although the document refers to an amendment to clause 7.2, the seller submits that the second addendum had the effect of either reviving the OTP; alternatively, it amounted to a new agreement which complied with the formalities of the Act, by incorporating and 'reviving' the terms of the OTP. The submission was that the second addendum clearly shows that the parties intended to continue with the sale; it contains an amended date for the suspensive condition to be fulfilled; and with the incorporation of the OTP, and by reference thereto, it complies with the formalities of the Act.[5]

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dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded".' This *dictum* was confirmed by the Constitutional Court on several occasions. See *South African Police Service v Solidarity Obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) paras 210, 220 and 233. See also *Molusi and Others v Voges NO and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) para 28.

[4] *Fairoaks Investment Holdings (Pty) Ltd and Another v Oliver and Others* [2008] ZASCA 41; [2008] 3 All SA 365 (SCA); 2008 (4) SA 302 (SCA) (*Fairoaks*); *Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd* [2011] ZASCA 20 (*Pangbourne*); see also *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v SA Post Office Ltd* [2012] ZASCA 160; [2013] 1 All SA 266 (SCA); 2013 (2) SA 133 (SCA) (*Command Protection Services*) para 21.

[5] Section 2(1) of the Alienation of Land Act 68 of 1981 requires the whole contract of sale – its material terms – to be reduced to writing signed by or on behalf of the parties. The material terms include the description of the parties to the sale agreement, the purchase price, and the description of the property being transferred. See *Tamryn*

[17] The appellant contends that the second addendum did not revive the OTP, nor was it a fresh agreement. After the OTP lapsed on 19 February 2020, there was no longer any agreement to revive. She points to the wording of the second addendum that 'all other terms and conditions of the Agreement are to remain the same' and submits that that the word 'Agreement' refers to the second addendum itself, as opposed to the OTP. The seller, on the other hand, submits that the intention of the parties to continue with the sale is clear from the wording of the second addendum.

[18] The interpretation contended for by the appellant on the meaning of the 'Agreement', would, in my view lead to an absurd result, and it would not reflect the actual intention of the parties.[6] In interpreting the second addendum, it is apposite to have regard to the oft-cited case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*), where Wallis JA stated the following:

'The trial judge said that the general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. He referred to authorities that stress the importance of context in the process of interpretation and concluded that:

"A court must interpret the words in issue according to their ordinary meaning in the context of the regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the rules."

. . .

. . .where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent

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Manor v Stand 1192 Johannesburg (785/2015) [2016] ZASCA 147 (30 September 2016); see also *Cooper N O and Another v Curro Heights Properties (Pty) Ltd* [2023] ZASCA 66; 2023 (5) SA 402 (SCA).

[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*); see also *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.

meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.'[7] (Footnotes omitted.)

[19] Relying on *Endumeni*, the interpretation suggested by the appellant would clearly lead to an absurdity. The Court is thus obliged to ascribe a meaning to the language that avoids the absurdity. It becomes clear, in such circumstance that the word 'Agreement' in the addendum can only be a reference to the OTP. This interpretation would also be in line with establishing the true intention of the parties.

[20] The appellant relies upon various authorities where the failure of a suspensive condition led to the contract lapsing and not being revived by a subsequent agreement or addendum. In *Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd*,[8] the suspensive condition provided for the approval by *Pangbourne's* board of directors by a certain date. The condition was not fulfilled and the contract lapsed. Thereafter, the parties concluded an addendum, which dealt with an ancillary, non-material term of the contract – that the management of the project would be conducted by a different entity to that contained in the original contract. The high court found that although the agreement had lapsed, it had been 'revived' in the addendum. It held that this was the implication of a written addendum to the agreement concluded after the date for fulfilment of a suspensive condition had occurred. This Court, however, found that:

'…Accordingly, the factual matrix indicates that the addendum was just that: an alteration in one minor respect of what was assumed to be a valid contract. And that is confirmed by the words at the end that state that the agreement remained of full force and effect.

The high court was thus wrong in finding that the addendum "revived" the agreement for the sale of the property by Basinview to Pangbourne, with tacit terms read in as to the dates of

[7] *Endumeni* para 17 and 25.
[8] *Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd* (381/10) [2011] ZASCA 20 (17 March 2011).

signature, and dates for the fulfilment of the conditions. And Basinview's argument that it actually constituted a new agreement on the same terms (more or less) likewise is untenable.'[9]

[21] The appellant also relied upon *Abrinah 7804 (Pty) Ltd v Kapa Koni Investments CC* (*Abrinah*).[10] The issue in *Abrinah* was whether, after an agreement had lapsed due to the failure of a suspensive condition, the party for whose benefit the condition had been inserted, could waive compliance therewith after the contract had lapsed. In other words, could such *ex post facto* waiver revive the agreement?

[22] The court in *Abrinah* found that the issue had been subject to some conflicting judgments.[11] It went on to state:

'In *Mekwa Nominees v Roberts* it was however held, with reference to *Phillips v Townsend* and *Meyer v Barnardo*, that a contract that had lapsed due to the non-fulfilment of a suspensive condition could not be revived by waiving the suspensive condition at that stage.

This controversy was effectively settled in *Trans-Natal Steenkoolkorporasie Beperk v Lombaard en 'n Ander*, where the *Phillips* and *Mekwa* judgments, as well as the judgment to the same effect in *Meyer v Barnardo*, were approved.

. . .

Thereafter the appellant, just like the respondent, and for the same reasons, would not have been able to waive any right that it may earlier have had in respect of the contract.

"*The condition…was clearly a condition inserted for the benefit of the purchaser. When it was not fulfilled the agreement lapsed. The lapsing of the agreement could not possibly have given rise to a right on the part of the seller which could unilaterally be waived by the seller, thereby resurrecting the agreement, …"*

"*An agreement subject to a suspensive condition automatically falls away if the condition is not fulfilled by the date fixed by the parties for its fulfilment (Meyer v Barnardo and Another). It follows, therefore, that nothing which is done after the date fixed for the fulfilment of the*

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[9] Ibid para 23 and 24.

[10] *Abrinah 7804 (Pty) Ltd v Kapa Koni Investments CC* [2017] ZANCHC 63; 2018 (3) SA 108 (NCK) para 66 (*Abrinah*).

[11] *Wacks v Goldman* 1965 (4) SA 386 W; *Mekwa Nominees v Roberts* 1985 (2) SA 498 (W); *Phillips v Townsend* 1983 (3) SA 403 (C) and *Meyer v Barnardo and Another* 1984 (2) SA 580 (N).

condition can affect the position. If the condition is held to have been fulfilled by the relevant date, the contract is good and enforceable; if not, there is no binding contract between the parties thereto. No question of fictional fulfilment can therefore arise by reason of the conduct of one of the parties to a contract after the date fixed for the fulfilment of the condition.".'[12] (Footnotes omitted.) (Original emphasis.)

[23] Similarly, in *Cronje v Tuckers Land and Development Cooperation (Pty) Limited* (*Cronje*),[13] the question was whether a subsequent agreement to revive an agreement that was subject to a suspensive condition after the suspensive condition had failed, could have any validity. The court held that:

'Here, however, the defendant is confronted by this difficulty: A revival of the whole of the written agreement, including the reference to 24 months (from the date of signature of the original contract), would again bring the condition in clause 4 into effect and cause the termination (or self-destruction) of the agreement immediately on revival. This could obviously not have been, or ever be, intended by the parties seeking to "revive" the written agreement. Thus, the parties to a written agreement containing a clause such as clause 4 of the agreement in this case, who seek to revive the lapsed agreement, will, in addition to agreeing to revive the agreement, also have to eliminate the operation of such clause in the "revived" agreement . . .[T]he parties would agree to revive their agreement without the condition in clause 4 in its original form. If a new date for the coming into operation of the condition were to be orally agreed upon at the time of the "revival" this could presumably amount to an attempted revival and simultaneous variation of a material term of the old written agreement – which attempt would be ineffective because of the provisions of s 1 (1) of Act 71 of 1969. Even if the parties agreed to "revive" the old written agreement with exception of the whole of clause 4, the simplicity of the situation in Neethling v Klopper (supra) no longer pertains: it is no longer a question simply whether the original agreement (at least as to its material terms) has again become effective or not; it becomes necessary to look at the consensus of the reviving agreement to determine which clause or clauses of the original agreement would not be revived.'

[12] *Abrinah* paras 35-37 and 47; see also *Trans- Natal Steenkoolkorporasie Bpk v Lombaard en 'n Ander* 1988 (3) SA 625 (A).
[13] *Cronje v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (1) SA 256 (W) at 259G-260.

[24] In *McPherson v Khanyise Capital (Pty) Ltd*,[14] the court analysed the various authorities and concluded as follows:

'In this respect the respondents' case falls foul of the doctrine enunciated by the Coetzee J in *Mekwa Nominees v Roberts*. In that case Coetzee J enunciated the proposition that, after a contract has lapsed by reason of the failure of a suspensive condition, it is too late for the parties to revive their agreement by waiving the suspensive condition, even if they have the power to waive the suspensive condition under their agreement. . .

Mekwa Nominees, insofar as it followed the reasoning of *Phillips v Townsend,* departed from a line of previous Transvaal cases, starting with *Wacks v Goldman,* 1965 (4) SA 386 (W) which held to the contrary.

Fortunately for us the controversy has since been laid to rest by the judgment of Van Heerden JA in the Appellate Division in *Trans-Natal Steenkoolkorperasie Beperk v Lombaard en 'n Ander,* 1988 (3) SA 625 (A) 640, in which the learned Judge held;

"'n Analogiese posisie geld indien 'n kontrak onderhewig gestel word aan 'n opskortende voorwaarde dat iets voor of op 'n bepaalde datum moet plaasvind; soos bv dat die koper 'n lening moet bekom. In 'n aantal Transvaalse gewysdes is die houding ingeneem dat indien so 'n bepaling ten gunste van slegs een party verlei is, hy ook na die sperdatum van die voordeel daarvan afstand kan doen. In die tagtiger jare is egter in drie uitsprake bevind dat 'n latere afstand doening nie tot herlewing van die kontrak kan lei nie; *Phillips v Townsend*, 1983 (3) SA 403 (K); *Meyer v Barnardo and Another,* 1984 (2) SA 518 (N); *Mekwa Nominees v Roberts*, 1985 (2) SA 498 (W). Ek hoef slegs te sê dat ek ten volle saamstem met die gevolgtrekkings wat in hierdie drie sake bereik is.".'[15]

[25] The court, in *McPherson*, summarised the position as follows:

'A suspensive condition cannot be waived or extended after the time for fulfilment of the condition has passed.

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[14] *McPherson v Khanyise Capital (Pty) Ltd* [2009] ZAGPHC 57 (*McPherson*) paras 21-23.

[15] Translation:

'An analogous position applies if a contract is made subject to a suspensive condition that something must take place on or before a specified date, e.g. that the purchaser must obtain a loan. In a number of Transvaal cases, the attitude was taken that if such a provision was included in favour of only one party, he could also waive its benefit after the deadline. In the eighties, however, it was found in three judgments that a later waiver could not lead to revival of the contract…I fully agree with the conclusion arrived at in these cases.'

An agreement that has "*lapsed*" by virtue of the non-fulfilment of a suspensive condition or the failure of a resolutive condition cannot be "*revived*". It is necessary for the parties to enter into an entirely new agreement. The new agreement can of course be on the same terms and conditions as the old.

If the new agreement is concluded on the same terms and conditions as the old, but the suspensive conditions are not excised, or extended, the new agreement "*self-destructs*". This is because the agreement is by its terms subject to a suspensive condition that has failed.'[16] (Emphasis added.)

[26] In *McPherson*, as opposed to this case, the attempted revival of the contract was not in writing signed by both of the parties. It thus failed to comply with the formalities of the Act. Secondly, the language in the correspondence relied upon, for the revival, did not denote an intention to 'revive' the old agreement by the conclusion of a new agreement on the same terms and conditions. Thirdly, even if the agreement were somehow revived, it would immediately self-destruct because there the date for the fulfilment of the condition was not extended.[17]

[27] The intention of the parties in similar situations to the present case, was considered in *Neethling v Klopper en Andere* (*Neethling*).[18] The facts and conclusions in *Neethling*, were analysed by Streicher JA in *Fairoaks* where he stated:

'Steyn CJ concluded [in Neethling] that for these reasons the revival of a cancelled contract in respect of land by waiver of the rights arising from the cancellation of the contract need not comply with the formalities prescribed in respect of agreements for the sale of land. Referring to this passage in the judgment counsel for the appellant submitted that this court decided that whenever parties agree to the revival of a contract of sale of land by way of a withdrawal of a cancellation of the contract, compliance with the formalities is not required.

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[16] *McPherson* para 28.
[17] *McPherson* para 28.
[18] *Neethling v Klopper en Andere* 1967 (4) SA 459 (A).

I do not think that Steyn CJ's concluding words were intended to be read in isolation. It is in my view clear from his reasoning that in order to determine whether an agreement should comply with the prescribed formalities one has to determine what the intention of the parties was. In that case there was a valid cancellation (so he assumed). But, the validity of the cancellation was disputed by Klopper. There was, therefore, a dispute as to whether the contract had been validly cancelled and that dispute was settled on the basis that Neethling would waive his claim to have validly cancelled the contract. In those circumstances he found that there was no intention to enter into a new contract of purchase and sale. It does not follow that an agreed waiver of a cancellation of an agreement of sale would not constitute a new agreement of sale where the parties were agreed that the contract had been validly cancelled. In each case the true nature of the transaction will have to be investigated in order to determine whether it constitutes an agreement of purchase and sale. If the intention was to buy and sell ie to enter into a new contract on the same terms as the cancelled contract, the agreement will have to comply with the prescribed formalities even though the mechanism employed to give effect to that intention was the withdrawal of the cancellation.

. . .

Not only is it alleged that the parties by way of the letters B1 and C1 "agreed in writing . . . to revive the lapsed agreement of sale" it is alleged that it was an express term of the revived agreement that clause 13.2 thereof be amended to the effect that compliance therewith was to occur upon or before transfer of the property. The amendment is material as the time allowed in clause 13.2 for the fulfilment of the condition was inserted in order to create certainty as to the fate of the contract and affected both parties. The contract which had lapsed because of the non-fulfilment of the condition had become, as a result of the amendment, subject to a new material condition, the time for fulfilment of which had not been stipulated. It follows that the parties by agreeing to revive the lapsed agreement with amendments, entered into an agreement to buy and sell on terms different from the terms previously agreed to. Such an agreement has to comply with the provisions of s 2(1) of the Act.'[19]

[28] The appellant's reliance on *Pangbourne*, *Abrinah*, *McPherson*, *Cronje* and *Fairoaks* is flawed because those authorities are distinguishable. Firstly, they dealt with different issues, namely: in *Abrinah*, whether a condition could be

[19] *Fairoaks* para 18-19 and 21.

waived after the contract had lapsed; secondly, in *McPherson* and *Cronje*, whether a contract which the parties sought to revive, would self-destruct as the date for fulfilment of the suspensive condition was not amended, and had already passed; and thirdly, in *Fairoaks*, whether the 'revived' agreement required compliance with the formalities of the Act. All three of these issues are adequately dealt with in the present case.

[29] In contrast to the position in *Fairoaks*, the second addendum, by incorporating the terms of the OTP, complied with the formalities required by the Act. And, contrary to the other authorities relied upon by the appellant, the imputed clause (which would self-destruct, without an amendment), was expressly amended to provide for a later date for fulfilment. The second addendum and the revival of the sale do not fall foul of the Act. The purpose of the Act is to avoid uncertainty and disputes. The essential terms and conditions on which the parties agreed to sell the property (including the purchase price) are clearly ascertainable from the second addendum read together with the OTP, to which it expressly refers. The seller contends further that the parties' subsequent conduct affirms the fact that it was at all times their intention to revive the sale and to procure the transfer of the property.

[30] The facts in present case are similar to those in *Benkenstein v Neisius and Others*,[20] where the court dealt with a situation where, as in the present case, the addendum clearly provided for a new date for the fulfilment of a suspensive condition. Thus, in contrast to *Abrinah* and *Pangbourne,* there was no question of the addendum self-destructing due to the date of the suspensive condition not being extended.[21] The court thus found that 'the consensus of the parties was complete'.[22]

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[20] *Benkenstein v Neisius and others* 1997 (4) SA 835 C.
[21] Ibid at 842I-J.
[22] Ibid at 847F-G.

[31] The position was also explained by Nicholas J in *DS Enterprises (Pty) Ltd v Northcliff Townships (Pty) Ltd*,[23] where, in referring to *Neethling*, it was held that the conduct of the parties 'makes it clear that all the parties intended to do was continue with their written contract of sale'.[24] In *Fairoaks,* Streicher JA stated that:

'…In each case the true nature of the transaction will have to be investigated in order to determine whether it constitutes an agreement of purchase and sale. If the intention was to buy and sell ie to enter into a new contract on the same terms as the cancelled contract, the agreement will have to comply with the prescribed formalities even though the mechanism employed to give effect to that intention was the withdrawal of the cancellation.'[25]

[32] In this matter, at the time that the second addendum was concluded, there was no dispute between the parties as to their intention. The second addendum expresses clearly the parties' intention to continue with the sale of the property. The preamble of the second addendum expressly records the parties' shared intention that 'transfer [of the property] is intended to take place on or about 30 April 2020'.

[33] This intention is borne out by various instances. The Standard Bank bond was already in place from 14 February 2020, days before the second addendum was concluded. The appellant's reasoning that the approval of the Standard Bank bond 'fell away' because it was provided prior to conclusion of the second addendum, is ill-conceived. Standard Bank, in fact, issued a guarantee of payment on or about 5 March 2020 pursuant to the bond approval. They would obviously not have done so if the bond had 'fallen away'.

[23] *DS Enterprises (Pty) Ltd v Northcliff Townships (Pty) Ltd* 1972 (4) SA 22 (W).
[24] Ibid at 28E-F.
[25] *Fairoaks* para 19.

[34] The FNB bond was a further advance under an already existing bond over the purchasers' Buitenkant Street property. That bond approval was timeously provided and the guarantee was also issued on the strength thereof. In addition, the appellant timeously deposited the balance of the purchase price into the DM Inc's trust account. Thus, both parties were aware and accepted that the suspensive conditions had been fulfilled and their intention was that the second addendum revived and incorporated the terms of the lapsed OTP.

[35] Subsequent to the signing of the second addendum, the appellant made payment of R1 950 000; she indicated to the seller that she should 'desist from marketing the property' as all the suspensive conditions had been fulfilled; bond attorneys were appointed to attend to the registration of the purchasers' two bonds; Standard Bank issued their guarantee under their approved bond, to secure payment of R1 500 000 of the purchase price; First National Bank issued their guarantee under their approved bond, to secure payment of R1 500 000 of the purchase price; the parties signed the transfer documents, which included the purchasers' signing powers of attorney to authorise the conveyancer to effect transfer; rates clearance and other certificates were applied for in respect of the property; the parties concluded a separate agreement in terms of which the purchasers purchased furniture and other items situated in the home on the property from the seller; on multiple occasions the purchasers requested early occupation of the property; even after the declaration of the state of disaster, as a result of the COVID-19 pandemic, the transfer process continued with regular updates and correspondence between the parties and the conveyancer; and, on 12 May 2020, the parties agreed that the purchasers could take occupation of the property during the first week of June. On 21 May 2020, when the purchasers sought to cancel the sale, the appellant did not contend that the sale had 'failed', as she did in her founding papers. The reason she gave then was the purchasers' changed financial circumstances.

[36] Although the subsequent conduct of the parties would not assist if the second addendum did not revive the sale, and/or if the formalities in terms of the Act were not complied with, the purchasers' conduct goes towards demonstrating the intention at the time of signing the addendum. Such intention is manifest from the state of mind of the parties, before and after the signing of the second addendum.

[37] The seller submits, correctly, in my view that 'the Court, with respect, need not be "too astute" to label the conduct of the parties as being to "revive" or "reinstate" the sale agreement, or even whether the parties concluded an entirely fresh agreement of sale. What is abundantly clear from the second addendum is the parties' intention to procure the sale and transfer of the property.' Such intention is borne out by the signing of the second addendum, which passes muster in relation to each element required to render the addendum, incorporating the OTP, as valid and compliant with the Act.

[38] Accordingly, I am of the view that the agreement of sale, embodied in the OTP, was validly revived by the second addendum and the appeal must therefore fail, but on different grounds to that of the full court.

[39] Accordingly, I would make the following order:
The appeal is dismissed with costs.

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S E WEINER

JUDGE OF APPEAL

Schippers JA (Kgoele JA and Baartman AJA concurring)

[40] I have had the advantage of reading the judgment of my colleague, Weiner JA (the first judgment). I gratefully adopt her setting out of the factual background to the appeal, the litigation history, and the abbreviations used.

[41] I agree that the issue raised by the full court of its own accord, namely that the OTP does not contain an express nor implied term that the seller can extend the date for compliance with clause 7.2 of the OTP only once, is impermissible, for the reasons stated in the first judgment. I would merely add that there is no evidence that the parties, when concluding the second addendum, considered that the right to extend the expiry date in clause 7.2, was being exercised for a second time. On the contrary, the first respondent states that she thought that the OTP had lapsed.

[42] The first judgment states that the appellant's contention that the second addendum did not revive the OTP and that it was not a fresh agreement would lead to an absurd result, and would not reflect the actual intention of the parties. The first judgment concludes that 'the agreement of sale, embodied in the OTP, was validly revived by the second addendum and the appeal must therefore fail'. With respect, I am unable to agree with the first judgment in the result or in principle.

[43] There is a long line of authority which establishes the principle that a suspensive condition in a contract suspends in whole or in part, the operation of the obligations flowing from the contract, pending the occurrence or non-occurrence of a specific uncertain future event. If the condition is fulfilled, the

obligations under the contract become enforceable. If the condition is not fulfilled, the contract becomes unenforceable.[26]

[44] It is common ground that the contract for the sale of the property lapsed due to the non-fulfilment of a suspensive condition in clause 7.2 of the OTP, namely that the purchasers were required by 19 February 2020, to provide written approval of a mortgage bond in the sum of R4 950 000, by a financial institution (the suspensive condition). Consequently, the sole issue in this appeal is whether the second addendum could revive or reinstate the OTP, which had lapsed on 19 February 2020.

[45] The second addendum, entitled, 'ADDENDUM TO AGREEMENT OF SALE', and concluded on 20 February 2020 after the non-fulfilment of the suspensive condition, is quoted in paragraph 7 above. It records the following. The seller and the purchasers concluded the OTP on 4 February 2020. Transfer should take place on 30 April 2020. Clause 7 of the OTP required the purchasers to have bond approval in the sum of R4 950 000 by 14 February 2020, which was extended by the seller to 19 February 2020. The addendum further records that the purchasers requested an amendment (to the OTP) that written approval be obtained from a financial institution, for the registration of two mortgage bonds in the sum of R1 500 000 each, over (a) the property, and (b) the property currently owned by the purchasers; and that they should provide a bank guarantee in the sum of R1 950 000 to DM Inc, by 25 February 2020, for the cash portion of the purchase price.

[46] The second addendum then states that the seller and purchasers have agreed to the above amendments, 'failing which the OTP and Addendum will expire and

[26] *Command Protection Services* fn 4 para 10; *Swart v Starbuck and Others* [2017] ZACC 23; 2017 (10) BCLR 1325; 2017 (5) SA 370 (CC) (*Swart*) para 6; G B Bradfield *R H Christie's Law of Contract* 8 ed (2022) at 183.

be of no further force or effect'; and that '[a]side from the above amendments to the OTP, the Seller and Purchaser confirm and agree that all other terms and conditions of the Agreement are to remain the same'.

[47] The appellant submits that the second addendum makes it clear that the parties were oblivious to the fact that a whole new contract was required. They were under the erroneous impression that they could simply extend the time period within which the suspensive condition had to be fulfilled. This, the appellant says, could not be done.

[48] The appellant contends that even if it were possible to read the Agreement as a reference to the OTP, this would cause both agreements to self-destruct on account of clause 19 of the OTP, which, in relevant part, provides:

'19. **EXPIRY**

The first signature to this Agreement shall constitute an irrevocable offer, which may not be withdrawn prior to presentation to the Seller of the Purchaser, whichever the case may be, and which thereafter shall remain available for acceptance until 15h00 on 04/02/2020 whereafter it shall lapse and be of no further force or effect.

[49] The respondents submit that the purpose of the second addendum was simply to record the different funding arrangements preferred by the purchasers; to provide a deadline of 9 am on 25 February 2024 for the provision of a bank guarantee, and 'to revive the sale'. They contend that the parties' intention to revive the sale is apparent from the wording of the second addendum. It states, inter alia, that transfer was to take place on 30 April 2020; that the sale will remain in force and effect but would expire if the bank guarantee is not timeously provided; and that 'all other terms and conditions of the Agreement are to remain the same'. This, so it is submitted, shows that the parties intended the second addendum to have the effect of implementing the sale of the property, which is 'nothing more than the revival or reinstatement of the sale'.

[50] That the parties intended to 'revive' the OTP is clear from the evidence. The wording of that document makes it clear that the parties intended to 'amend' the OTP. Indeed, the second addendum records that it is an 'addendum' to a sale agreement. It purports to amend clause 7 of the OTP by replacing the suspensive condition and extending the period for payment of the purchase price to 25 February 2020, 'failing which the OTP and the Addendum will expire and be of no further force or effect'. And the second addendum states that the parties agree that all other terms and conditions of the 'Agreement' (apparently an error, the parties intended to refer to the OTP) would remain the same.

[51] The appellant is thus correct that the respondents laboured under the erroneous impression that they could simply extend the time fixed for the fulfilment of the suspensive condition, and did not appreciate that a new contract had to be concluded. This is reinforced by the context in which the addendum was concluded and its purpose. The seller, in her affidavit, states that the second addendum is not 'intended to be read on its own'; that 'it incorporates the sale agreement [the OTP]'; that '[her] intention in signing the second addendum was to revive and keep the property sale transaction "alive", by providing additional time for the purchasers to furnish the guarantee for the balance of the purchase price'; and that the intention of the parties was to proceed with the sale 'on the terms set out in the sale agreement as amended by the second addendum'.

[52] However, the purported revival of the OTP and extension of the time fixed for the fulfilment of the suspensive condition, after the expiry date for its fulfilment, is legally incompetent. The OTP lapsed on 19 February 2020 by the operation of law, and with it, the suspensive condition. Indeed, this is conceded in the respondents' written submissions, which state that 'in terms of the first addendum, the 'sale lapsed . . . because the deadline had come and gone'.

[53] Consequently, there was nothing to revive, and the OTP and all its terms became unenforceable.[27] In *Fairoaks*,[28] Streicher JA summarised the position as follows:

'The condition . . . was clearly a condition inserted for the benefit of the purchaser. When it was not fulfilled the agreement lapsed. The lapsing of the agreement could not possibly have given rise to a right on the part of the seller which could unilaterally be waived by the seller, thereby resurrecting the agreement . . .'

[54] This principle was applied in *Pangbourne*.[29] It has consistently been followed by this Court, and affirmed by the Constitutional Court.[30] That a contract which has lapsed due to non-fulfilment of a suspensive condition cannot be revived, because there is no right that can be waived, was settled in *Trans-Natal Steenkoolkorporasie*.[31] Van Heerden JA said:

'An analogous position applies if a contract is rendered subject to a suspensive condition that something must occur on or before a specific date; as for example, that the buyer must obtain a loan. In a number of Transvaal cases the approach has been adopted that if such a provision is introduced in favour of only one party, he can also after the expiry date, waive the benefit. In the 80s, however, it was held in three cases that a subsequent waiver cannot result in the revival of the contract: *Phillips v Townsend* 1983 (3) SA 403 (K); *Meyer v Barnardo and Another* 1984 (2) SA 580 (N); and *Mekwa Nominees v Roberts* 1985 (2) SA 498 (W). I need to say only that I fully agree with the conclusions reached in these three cases.'[32] (own translation.)

[55] The full court erred in disregarding this principle, despite referring to *Fairoaks*. It held that the appellant, by signing the second addendum, gave expression to the intention of the parties, substantially on the same terms and

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[27] *Trans-Natal Steenkoolkorporasie Bpk* fn 12; *Fairoaks* fn 4 para 22; *Pangbourne* fn 4 para 6; *Command Protection Services* fn 4 para 10; *Swart* fn 26 para 6.
[28] *Fairoaks* fn 4 para 22.
[29] *Pangbourne* fn 4 paras 6 and 24.
[30] See the authorities cited in fn 4.
[31] 1988 (3) SA 625 (A) at 640B-C.
[32] The original text is quoted in para 24 of the first judgment.

conditions in the OTP, save that clauses 7.1 and 7.2 were varied. But clause 7.2 could not be varied after the expiry date for the fulfilment of the suspensive condition.

[56] Neither could the parties to the OTP extend its validity in accordance with the terms of the second addendum – the OTP was invalid and unenforceable on 20 February 2020. For this reason, the respondents' argument that the purchasers sought 'to provide additional time for fulfilment of the suspensive condition', is unsustainable.

[57] The above passage in *Trans-Natal Steenkoolkorporasie*[33] is also quoted in the first judgment,[34] with reference to *McPherson*.[35] The first judgment states that *McPherson* can be distinguished from this case, because the attempted revival of the contract in *McPherson* was not in writing and signed by both parties';[36] and that the issue in *McPherson*, was 'whether a contract would self-destruct as the date for fulfilment of the suspensive condition was not amended, and had already passed'.[37]

[58] But that is not so. The court in *McPherson* held that a suspensive condition cannot be waived or extended after the time for the fulfilment of the condition has passed; that an agreement which has lapsed because of the non-fulfilment of the condition cannot be 'revived'; and that the parties are required to enter into an entirely new agreement, which can be on the same terms and conditions as the

[33] 1988 (3) SA 625 (A) at 640B-C.
[34] See para 24 above.
[35] *McPherson* fn 14.
[36] See para 26 above.
[37] See para 28 above.

old.[38] This is consistent with the holding in *Fairoaks*,[39] *Pangbourne*,[40] and *Abrinah*.[41]

[59] In support of their contention that by signing the second addendum, the seller and the purchasers intended to revive or reinstate the OTP, which rendered it enforceable, the respondents rely on *Benkenstein.*[42] In that case the parties concluded an agreement for the sale of a farm on 28 June 1996. The offer to purchase was subject to a suspensive condition in clause 19 thereof, namely the sale of the purchaser's property by 6 August 1996 or such extended period as the sellers may allow in their sole discretion. On 16 July 1996 the sellers signed an addendum to the offer to purchase, in which they amended the offer to purchase and agreed that the sale of the purchaser's property had to take place by 6 September 1996 or such extended period as the sellers would allow. The purchaser's property was not sold by 6 September 1996. On 13 September 1996 the parties signed a further addendum to the offer to purchase, in terms of which they agreed to 'waive' the suspensive condition.

[60] Despite its attention having been drawn to both *Phillips*[43] and *Mekwa*,[44] the court in *Benkenstein* held that the offer to purchase was enforceable. It stated that by signing the addendum on 13 September 1996, the parties,

'effectively reaffirmed their intention to sell the property on the terms set out in the offer to purchase with the deletion of clause 19 thereof. Notwithstanding that they referred to clause 19 as having been "waived", the parties clearly evinced an intention to give effect to the original decision to sell the property to applicant.'[45]

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[38] *McPherson* fn 14 para 28.
[39] *Fairoaks* fn 4 para 22.
[40] *Pangbourne* fn 4 para 24.
[41] *Abrinah* fn 10 para 47.
[42] *Benkenstein* fn 19.
[43] *Phillips* fn 11.
[44] *Mekwa* fn 11.
[45] *Benkenstein* fn 19 at 841D-E.

[61] This conclusion is at odds with the decision in *Phillips*, in which Schock J held that even where a suspensive condition is inserted solely for the benefit of one party that he might waive it, he may not do so after the expiry of the time limit for the fulfilment of the condition. The reasoning of Schock J is compelling:

'Subject to what follows I am prepared to assume for the purposes of this judgment that the condition in question was exclusively for the benefit of the plaintiff. However, in my judgment this cannot avail plaintiff because of the time limitation in the condition which admittedly was inserted at the instance of defendant. *If the contract remained valid despite the lapse of the time there provided, without a bond having been obtained and without the plaintiff having waived it during that time, it would render the time limitation entirely without content or purpose. Defendant would then be in no different position than she would have been had there been no time limitation.* Clearly, defendant had a purpose in requiring the time limitation. The manifest object of the time limitation was to ensure certainty so that the defendant would know at an early date whether she had a firm buyer or not . . . If during this period [when the plaintiff was seeking to obtain a bond] defendant tried to hold him to the contract he clearly would have pleaded the condition, namely that he had not succeeded in getting the money and defendant could in those circumstances certainly not have held him to the contract. *It would have been most unreasonable and contrary to the manifest intentions of the parties in this case that, after the 10-day period, defendant should be bound by the contract and plaintiff not, and yet that would be the position if in fact there could be a waiver by plaintiff at some stage after the lapse of the 10-day period*….'[46] (Emphasis added.)

[62] Similarly, in *Mekwa*[47] Coetzee J said:

'It seems to me that, even if the instant condition is exclusively for the benefit of the purchaser, it necessarily follows from the stipulation of the time limit for obtaining the bond that that is also the time limit for the exercise of the purchaser's right of waiver of the condition and communication of his decision. The reasoning of Schock J [*Phillips*] and Kumleben JA [*Nel v Barnado*], with respect, is impeccable. If they are not correct, what is the point of stipulating a time limit at all?'

[46] *Phillips* fn 11 at 408E-H.
[47] *Mekwa* fn 11 at 501J-502B.

[63] Little wonder then, that Van Heerden JA in *Trans-Natal Steenkoolkorporasie*, confirmed these decisions as being correct.[48] It goes without saying that *Benkenstein* runs counter to *Phillips* and *Mekwa*, as well as *Fairoaks* and *Pangbourne*. It was wrongly decided and should not be followed.

[64] The full court, however, held that *Pangbourne* differs materially from the facts in this case. Although the suspensive condition in the two cases is different, *Pangbourne* is on all fours with this case. The relevant facts in *Pangbourne* are briefly the following. The appellant purchased the respondents' business of letting immovable property. The agreement was subject to three suspensive conditions, one of which was that the boards of directors of the purchaser and the seller, were required to approve the purchase and sale by written resolution. The suspensive conditions were for the benefit of all parties and could not be waived. Clause 4.4.2 of the relevant agreement provided that the condition relating to board approval had to be fulfilled within 14 days of the signature date; and clause 4.5, that the parties could in writing extend the dates of fulfilment, prior to those dates, by mutual agreement. Clause 4.6 stated that in the absence of such extension, if the conditions were not fulfilled, the agreement would become unenforceable, and that 'the parties shall be restored to the status quo ante'.

[65] *Pangbourne's* board of directors did not pass the resolution within the 14-day period stipulated. *Pangbourne* argued that the contract had lapsed because the suspensive condition was not fulfilled. The court of first instance, however, found that the agreement had been 'revived' by a written addendum concluded after the expiry date of the suspensive condition. That finding, this Court held, was wrong: the parties could not waive the fulfilment of the condition. Lewis JA stated that 'the alleged waiver was not only precluded by the express terms of the

[48] *Trans-Natal Steenkoolkorporasie* fn 12 at 640B-C.

agreement but also occurred after the date by which the condition should have been fulfilled'; and that 'there was no basis on which to find that the agreement was enforceable'.[49]

[66] Further, contrary to the finding by the full court that *Pangbourne* is distinguishable because clause 4.6 provided that the entire agreement would become of no force and effect upon the non-fulfilment of the relevant suspensive condition, clause 4.6 does no more than confirm the common-law principle: it is a belt-and-braces approach. In addition, the court's finding that in the present case, 'the suspensive condition provided expressly for the grant of a 30-day extension of time in writing', which was granted by the seller, is apparently based on its erroneous conclusion that the seller had exercised the right to extend the date for the fulfilment of the suspensive condition, on two occasions. As stated, the OTP lapsed on 19 February 2020.

[67] It follows that the full court's reliance on *Endumeni* for its conclusion that the second addendum should be interpreted in a manner that makes commercial sense and does not lead to absurd results, is misplaced. The unitary exercise of interpretation enunciated in *Endumeni* applies to a valid contract:[50] not to an unenforceable contract that is purportedly 'revived' or 'extended' in terms of a right that does not exist.

[68] For the above reasons, it is unnecessary to consider whether the second addendum constitutes a new agreement, or the appellant's argument that the addendum brings about the self-destruction of the OTP. On the evidence, the second addendum is not a new agreement. The respondents' case is that the

[49] *Pangbourne* fn 4 paras 24 and 25.
[50] *Endumeni* fn 6 para 18; *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

purpose of the second addendum was to 'revive' the transaction, and that the purchasers signed it on that basis. What is more, DM Inc's conveyancer was of the view that the OTP did not lapse, but even if it did, the second addendum had 'revived and amended' the OTP.

[69] In the draft order contained in the appellant's heads of argument, an order is sought that the first and second respondents should pay the appellant all amounts paid to them to give effect to the transfer of the property. However, this was not part of the relief sought in the notice of motion, and no case for such relief was made out in the founding papers. Consequently, the order sought cannot be granted.

[70] What remains is the question of costs. The parties were throughout represented by junior counsel, save that the appellant was represented in this appeal by senior and junior counsel. Given the narrow issue in the appeal, the costs of senior counsel are not justified.

[71] It follows that the appeal must succeed. I make the following order:

1 The appeal is upheld with costs. Such costs shall include the costs of only one counsel.

2 The order of the full court of the Western Cape Division of the High Court, Cape Town, is set aside and replaced with the following order:

'1. The appeal succeeds with costs.

2. The order of the court a quo dated 4 March 2022, is set aside and replaced with the following order:

2.1 It is declared that:

(a) the Offer to Purchase Erf 150003, Kenilworth Upper, Cape Town, located at 8 Selwyn Road, Kenilworth, Western Cape (the property), concluded on 4 February 2020 between the first

respondent as seller, and the third and fourth respondents as purchasers (the Offer to Purchase); and

(b) the Addendum to Agreement of Sale, concluded between the seller and the purchasers on 20 February 2020, purportedly to extend the suspensive condition in clause 7.2 of the Offer to Purchase, after the expiry date for the fulfilment of that condition, are invalid and unenforceable.

3. The first and second respondents shall pay to the applicant the sum of R1 950 000, which she paid to them on behalf of the third and fourth respondents in respect of the purchase price of the property, together with the interest on that amount to which the applicant is entitled.
4. The first and second respondents shall pay the costs of the application, jointly and severally, the one paying the other to be absolved.'

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A SCHIPPERS

JUDGE OF APPEAL

Appearances

For the appellant:	R S Van Riet SC with P Tredoux
Instructed by:	De Waal Grobbelaar Fisher Inc, Cape Town JL Jordaan Attorneys, Bloemfontein
For the first and second respondents:	N C De Jager
Instructed by:	DML Inc, Cape Town Phatshoane Henny Inc, Bloemfontein.