THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 323/08

KOVACS INVESTMENTS 724 (PTY) LTD **APPELLANT**

and

FREDERICK CARTER MARAIS **RESPONDENT**

Neutral citation: *Kovacs Investments 724 (Pty) Ltd v Marais* (323/2008) [2009] ZASCA 84 (20 August 2009.)

Coram : MPATI P, BRAND, LEWIS, MAYA JJA and BOSIELO AJA

Heard : 4 MAY 2009

Delivered : 20 AUGUST 2009

Summary : Contract – sale of immovable property – written agreement – securing loan in amount less than that stipulated constitutes variation of term and not merely waiver of right – contrary to provisions of s 2(1) of Alienation of Land Act and to no variation clause.

ORDER

On appeal from: High Court of South Africa
(Cape of Good Hope Provincial Division)
(Thring J sitting as court of first instance)

1. The appeal is dismissed with costs, including those consequent upon the employment of two counsel.

JUDGMENT

MPATI P (BRAND, LEWIS, MAYA JJA and BOSIELO AJA concurring)

[1] There are two issues in this appeal. The first is whether an agreement of sale in respect of a portion of certain fixed property had lapsed due to non-fulfilment of suspensive conditions contained in the deed of sale (the written agreement). The second is whether an alleged joint venture to purchase the entire fixed property is valid and binding on the parties.

[2] On 29 July 2005 the parties to this appeal concluded a written agreement of sale in terms of which the respondent sold to the appellant 'the commercial section' of a building known as SANBEL, situated in Bellville, Cape Town, together with certain parking bays. (I shall refer to the entire fixed property as 'SANBEL' and to the commercial section as 'the property'.) The agreed purchase price of R18 454 041 would be payable as follows:

(a) a deposit of R8 304 319 was to be paid to the respondent's attorneys in two instalments, R7 627 444 on or before 15 August 2005, and R676 875 'on or before the possession date';

(b) the balance of R10 149 722 was to be secured by way of a loan from a bank or financial institution. The loan had to be granted by 15 August 2005.

In terms of the written agreement, the appellant, as purchaser, was entitled to occupation of

the property on the date 'of registration of transfer of the erf in favour of the seller'.[1]

[3] The written agreement contains two suspensive conditions. The first (clause 4.1) provides that -

'. . . this contract is subject to the suspensive condition that the Purchaser is granted a loan within the period specified in paragraph C(e) of the main contract from a bank or financial institution in the amount [of R10 149 722] . . . on the terms that the aforesaid bank or financial institution normally approves mortgage loans for the purchase for Commercial Sectional Title Units.'

The period specified in para C(e) of the main contract is the date 15 August 2005. Clause 4.7 reads:

'The suspensive condition in 4.1 above is imposed for the benefit of both the Purchaser and Seller and the benefit of this condition can only be waived or amended by mutual agreement between the Purchaser and Seller.'

The second suspensive condition is contained in clause 28 of the written agreement and is in the following terms:

'This contract is subject to the fulfilment of the suspensive condition that the Purchaser obtains written approval of the terms and conditions of this agreement from investors nominated by Interneuron Property (Pty) Ltd, which approval must be obtained on or before 15 August 2005.'

[4] It is common cause that the sum of R7 627 444 that was due by 15 August 2005 as part of the deposit was not paid timeously. On 17 August 2005 the respondent advised the appellant by e-mail that the uncertainty about 'the status of our agreement' was unacceptable. The communication ended with the words: '. . . your non performance leads me to regard our transaction as cancelled as of 15 August 2005'. Although the appellant's response of the same day was that '[i]n terms of the breach clause in the agreement you will need to give us written notice of breach and seven days to remedy the breach', one Marthie Horn, representing the appellant, corresponded by e-mail with the appellant on 19 August 2005 in the following terms:

'We have worked through the Agreement and would like to record the following:

1. that the suspensive condition in clause 4.1 has been fulfilled – a loan has been granted by Standard Bank as determined in that clause;

[1] At the time of the conclusion of the agreement SANBEL had not as yet been transferred to the respondent by the previous owner.

2. . . .

3. that the suspensive condition in clause 28 has been fulfilled – written approval of the agreement has been obtained from those investors nominated by Interneuron Property as determined in that clause;

4. that we are ready to pay the deposit as indicated in clause 3.1 of the agreement.

. . . .'

The full deposit was in fact paid on the same day. Both parties subsequently took certain steps to put the agreement into operation and on 20 September 2005 the appellant took possession of the property and has, since then, collected rentals in respect of it.

[5] It is not in dispute that, contrary to the contents of Marthie Horn's e-mail of 19 August 2005, the suspensive condition in clause 4.1, relating to the securing of a loan for the balance of the purchase price, was not fulfilled. By 15 August 2005 the respondent had been able to obtain a loan in the sum of R9 650 000, which was R499 722 less than the amount stipulated in the written agreement. According to the respondent, this fact came to his knowledge almost 21 months later, on 10 May 2007, after he had insisted on 'substantiated information confirming actual compliance with the suspensive condition'. Over that period of almost 21 months the respondent had, on two occasions, sought unsuccessfully to cancel the sale with the appellant's concurrence. The reasons for the attempted cancellation are not germane to this appeal.

[6] In their letter of 10 May 2007, in which the respondent's attorneys were advised of the actual amount of the loan[2] obtained by the appellant, the latter's attorneys claimed that whilst the amount of the approved loan 'is slightly less than the amount specified in the agreement of sale, the condition was substantially fulfilled'. The letter went further:

'In any event – and only to the extent that your client may now seek to contend that there was not substantial fulfilment of the condition – his conduct evidences a mutual acceptance (and hence agreement) with Kovacs that all suspensive conditions had been fulfilled and that the agreement came into operation.

He has thus waived any such non-fulfilment, alternatively and in any event is estopped from asserting, . . . that the suspensive conditions were not fulfilled and/or that the agreement did not

[2] The letter of approval of the loan from Standard Bank, which was annexed to the appellant's attorney's letter of 10 May 2007, is dated 2 August 2005.

come into operation. Clause 4.7 of the agreement did not require waiver of the condition to be in writing, and there is no contractual bar to an estoppel.'

[7] On 25 June 2007 the respondent commenced motion proceedings in the Cape High Court seeking an order declaring the written agreement to be of no force and effect, on the basis of non-fulfilment of the two suspensive conditions contained in it. On the same day the appellant, as plaintiff, issued summons against the respondent, as defendant, in which it sought an order declaring, inter alia, the written agreement between them to be of full force and effect. In the alternative, the appellant sought an order declaring SANBEL 'to be an asset of a joint venture between [the appellant and the respondent]'. The appellant asserts that the rights and benefits attaching to the property accrued to it, with the rest of SANBEL accruing to the respondent.

[8] On 3 September 2007 the appellant launched a counter-application in which it sought an order, pending the determination of the action, interdicting and restraining the respondent from alienating, encumbering or otherwise disposing of the property, and other ancilliary relief. In the affidavit in support of the counter-application, which also served as an answering affidavit to the respondent's founding affidavit, the appellant prayed for the dismissal of the respondent's application, with costs; alternatively, a stay of the application pending the outcome of its action proceedings against the respondent.

[9] The Cape High Court (Thring J) found that there was no suggestion that any waiver of the non-fulfilment of clause 4.1 of the written agreement had taken place on or before 15 August 2005. The court held that on that day the agreement of sale automatically lapsed. It accordingly granted the order sought by the respondent and dismissed the appellant's counter-application with costs. It also allowed, in part, the respondent's application to strike out certain paragraphs from the appellant's replying affidavit in the counter-application. This appeal is with its leave.

[10] In this court it was argued, on behalf of the appellant, that in dismissing the counter-application the court misconstrued the appellant's case and overlooked the common cause facts which were the fundamentals of that case in relation to clause 4.1 of the written

agreement. The common cause facts are, so it was contended, that both parties were aware, prior to 15 August 2005, of the 'slight' shortfall in the amount of finance approved, and that notwithstanding their shared knowledge of this fact, both parties went ahead in implementing the sale. In the action the appellant avers, in its particulars of claim,[3] that in proceeding to implement the sale before 15 August 2005 the respondent 'orally and/or tacitly accepted the sufficiency of the loan approval and that the condition had been fulfilled and thereby waived the benefit of any further compliance' with the terms of clause 4.1. It is further alleged that the appellant also waived the benefit of any further compliance with the provisions of the clause insofar as the amount of the loan was concerned and that in acting as they did the parties mutually agreed to waive the benefit of any further compliance with the provisions of clause 4.1

[11] It is indeed common cause that the respondent gained knowledge of the fact that Standard Bank had offered the appellant a loan in an amount less than that stipulated in the written agreement before 15 August 2005. I should mention, *en passant*, that I agree with Thring J that a shortfall of almost half a million rand cannot be dismissed as insignificant or insubstantial, or 'slight', even if it represents a small portion of the total purchase price. In a supporting affidavit in the counter-application one Grant Nicholas Kolbe, a former accounts manager at Standard Bank, testified that during a meeting he had with the respondent on 10 August 2005 he informed the respondent that Standard Bank 'had approved a loan in the sum of R9 650 000 to the [appellant]'. The respondent admits this fact – though not necessarily the date of the meeting – in his replying affidavit, but goes on to say that when Marthie Horn thereafter informed him that the condition relating to the loan had been fulfilled, he had no reason to believe that this impediment (of the approval of a loan in a lesser amount) had not been removed, either by way of a personal suretyship having been signed by Willem Daniel Jonker, the managing director of the appellant, or by Standard Bank having increased the loan amount so as to comply with the suspensive condition. He accordingly denies the existence of a mutual waiver as alleged.

[12] It is convenient at this stage to quote the terms of clause 22.3 of the written

[3] The combined summons and particulars of claim were annexed to the appellant's founding affidavit in the counter-application.

agreement. The clause reads:

'No variation of the terms and conditions of this contract or any purported consensual cancellation thereof shall be of any force or effect unless reduced to writing and signed by the parties or their duly authorized representatives.'

Counsel for the respondent submitted that even assuming in favour of the appellant that a waiver of the fulfilment of clause 4.1 was tacitly concluded, that would not be sufficient to save the sale agreement. This is so because a waiver of the suspensive condition in clause 4.1, ie an agreement to implement the sale notwithstanding the furnishing of a loan in a lesser amount than that stipulated in the written agreement, would constitute a variation of the contract. That, counsel contended, offends against the provisions of s 2(1) of the Alienation of Land Act,[4] which provide that no alienation of land 'shall … be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority'. Counsel submitted, further, that the amendment or variation is prohibited by clause 22.3 (the non-variation clause) of the written agreement, since it was not in writing. The effect of the waiver, counsel correctly contended, would be to substitute the sum of R10 149 722 specified as the loan amount that was required to be secured, with the amount of R9 650 000.

[13] It was argued on behalf of the appellant, on the other hand, that the 'informal consensus' which the parties had reached (the alleged mutual waiver) did not constitute a variation of the terms of the written agreement and thus did not offend against the non-variation clause, nor the provisions of the Alienation of Land Act. Counsel contended that an informal agreement between the parties to a sale of land to accept, as fulfilment of a term, a performance which is less than, or different to, that stipulated by the strict letter of the contract does not amount to a variation of the contract. Such agreement, so the submission continued, is effective and results in the fulfilment of the obligation concerned. In support of his argument counsel relied on the decisions in *Gouws NO v Montesse Township & Investment Corporation (Pty) Ltd; Montesse Township & Investment Corporation (Pty) Ltd v Standard Bank of South Africa Ltd* 1964 (3) SA 221 (T); *Van der Walt v Minnaar* 1954 (3) SA 932 (O) and *Profin v Ragghianti* 1983 (3) SA 371 (W).

[14] In one of two contracts the court had to deal with in *Gouws NO v Montesse*

Township the purchaser's obligation, in terms of a deed of sale in a property transaction, was to pass two mortgage bonds of £11 750 in favour of each of the two sellers. At the purchaser's request the sellers agreed that, instead of the two bonds, one of £23 500 should be passed in favour of one of the sellers. After the death of that seller the purchaser refused to pass a bond in favour of his estate and the remaining seller. The latter accepted the refusal as a repudiation of the contract and cancelled the agreement of sale. Counsel for the purchaser contended that the seller's refusal, on which reliance was placed for the cancellation, was not a refusal to comply with a contractual obligation, and that therefore no valid cancellation could be founded on it. He submitted that a material term of a contract for the sale of land could not be varied otherwise than by a written agreement signed by the parties, or by their agents, authorised thereto in writing in terms of the applicable legislation. The court agreed that the agreement to pass one mortgage bond instead of two was unenforceable. However, it made the following observation:

'But despite that, the substantial performance agreed upon by parol could have been carried into effect and, if it had been accepted by the sellers as a compliance with the purchaser's obligations, it would effectively have discharged those obligations (see *Van der Walt v Minnaar* 1954 (3) SA 932 (O), and the authorities referred to therein).'[5]

The court held that the sellers were thus entitled to cancel.

[15] In *Van der Walt v Minnaar* the plaintiff claimed from the defendant payment of the balance of the purchase price in respect of land which had, in terms of a written agreement, to be secured by way of a bank guarantee in favour of the plaintiff, as seller. The defendant pleaded that the amount (balance) claimed had been paid since, in lieu of performance in terms of the written agreement, the plaintiff's husband, acting as her authorised agent, requested him, and he agreed, to stand surety in respect of a loan that he (the plaintiff's husband) was to obtain from a bank. In terms of that agreement and to the knowledge of the plaintiff the defendant was required to, and did, pay the security, being the equivalent of the balance of the purchase price. In an exception taken against the plea on the ground that it did not disclose a defence, counsel contended that the defences raised amounted to an amendment of the manner of payment of the purchase price as stipulated in the written

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[4] 68 of 1981.
[5] At 227 B-C.

agreement; that the manner of payment of the purchase price was a material term of the contract and that such amendment could only be effected in writing in terms of the applicable legislation. The court, having reviewed a number of decisions, including English authorities,[6] said:

'Waar die betrokke partye in staat en gewillig is om die bepalings van die geskrewe kontrak stiptelik na te kom en waar enige van sodanige bepalings, op versoek van een van die partye daartoe en deur vergunning van die ander party, op 'n ander as die voorgeskrewe wyse ten volle nagekom is, dan kan die feit van nakoming deur ekstrinsieke getuienis bewys word.'[7] (My underlining.[8])

Similar sentiments were expressed in the *Profin* decision, where Gordon J said the following:

'Where one of the obligations under the sale is performed in a manner other than that provided in the sale, and if such performance is accepted by the other party as sufficient compliance, then the obligation is discharged. In such a case actual performance is substituted for that contracted for, "or because of waiver or election or estoppel".'[9]

The court was, at that point in the case, dealing with the question whether a waiver had been successfully established in regard to the obligations of a purchaser of certain fixed property. A guarantee for payment of the balance of the purchase price had been furnished by, or on behalf of, the purchaser, and accepted on behalf of the seller by the latter's attorneys almost four months after the date stipulated in the written agreement.

[16] The principle that emerges from these decisions, and others not mentioned here, including decisions of this court,[10] is that provided the obligations under a written agreement are to be complied with in full, performance of one of the obligations in a manner different from that stipulated in the written agreement, and accepted by the other party, would be considered as sufficient, or substantial, compliance and the obligation as having been discharged. And where the different manner of performance was at the request of one

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[6] Eg *Morris v Baron and Co* 1918 AC 1 at 30; *British and Benningtons Ltd v N W Cachar Tea Co Ltd* 1923 AC 48 at 62, and *Besseler; Waechter Glover and Co v South Derwent Coal Co Ltd* 1938 (1) KB 408 at 416.

[7] At 937 A-B.

[8] The English translation of this passage, sourced from the headnote, reads: ' . . . where the parties concerned are in a position, and are willing, to perform their obligations under the written contract strictly, and where one of such obligations, at the request of one party and as a favour by the other party, is fully performed in a manner other than that provided in the agreement, then the fact of such performance can be proved by extrinsic evidence.'

[9] At 380 A-B.

party, and orally (or tacitly) agreed to by the other, the fact of such performance, ie that the obligation has been discharged, may be proved by extrinsic evidence. The agreement for a different manner of performance does not have to be in writing.

[17] A question that could be asked, legitimately so, I think, is whether a deviation from the performance of an obligation as required by a written agreement does not amount to a variation of the contract. In *Neethling v Klopper*[11] Steyn CJ reasoned that clauses (in written agreements) relating to the manner and time within which payment of the purchase price is to be made, generally fall under the category of material (wesenlike) provisions. As such, they cannot be varied or amended by oral (or tacit) agreement. But that does not mean, said the learned Chief Justice, that on a restrictive interpretation of the provision (that requires an agreement of sale of land to be in writing) no variation or amendment by consensus or oral agreement of the provisions of such clauses may be permissible.[12] In *Venter v Birchholtz*[13] Jansen JA added that '…lê daar in die geval van 'n latere wysiging van 'n kontrak die gedagte opgesluit van 'n afstanddoening van bestaande regte wat uit die kontrak voortvloei . . . .'[14]

[18] It is not my intention, in this judgment, to attempt to draw a distinction between a variation and a waiver since I conclude later that the appellant was in fact contending for a variation – a change in the quantum of the loan to be obtained. But as pointed out by Nestadt J in *Van As v Du Preez*[15] a waiver 'does not *per se* result in the contract being altered'.[16] In her article *The Effect of Non-variation Clauses in Contracts*[17] Louise Tager states that 'that a waiver does is to suspend, temporarily, the enforcement of the obligation.'[18]

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[10] See *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A), and *Neethling v Klopper* 1967 (4) SA 459 (A).
[11] Ibid.
[12] At 465 B-C.
[13] 1972 (1) SA 276 (A).
[14] At 286 F-G. A loose translation would be: 'Moreover, in a case of a subsequent amendment of the agreement (ie after the written agreement had been concluded) there is, by implication, a waiver of existing rights which flow from the contract.'
[15] 1981 (3) SA 762 (T).
[16] Ibid, at 764 G-H.
[17] 1976 SALJ 423.
[18] P 436.

[19] In the present matter counsel for the appellant contended that it was not the latter's case that the parties agreed to amend the clause containing the suspensive condition ('subject to loan' clause) by replacing the amount in it with a lesser amount. He conceded, however, referring to *Borstlap v Spangenberg*[19] and *Fairoaks Investment Holdings (Pty) Ltd v Oliver,*[20] that such an agreement would 'probably' amount to an impermissible amendment of the terms of the written deed of sale. Realising this impediment, counsel submitted that the appellant's case was that when the parties learned, by no later than 10 August 2005, of the shortfall in the loan granted or offered to the appellant, they both nonetheless proceeded to implement the sale, thereby waiving the 'subject to loan' clause, or any further compliance with it, by their conduct.

[20] It is true, as counsel for the appellant submitted, that a 'subject to loan' clause in a sale of land may be informally waived. That was indeed the position in *Van Jaarsveld v Coetzee*,[21] where a clause in the written agreement stipulated that the sale of a farm was subject to the purchase price of R40 000 being paid by way of a loan of R20 000 to be secured from the Land Bank and paid upon registration of transfer; that R10 000 was payable by way of a bank guarantee or cash deposited in the trust account of an attorney and paid on registration of transfer, and the balance of R10 000 to be paid five years after the registration of transfer. The purchaser failed to obtain a loan from the Land Bank as required, but secured a bank guarantee for R30 000. The clause provided that the procurement of a loan from the Land Bank was a condition precedent to the continued existence or survival of the agreement of sale. In rejecting an argument that the agreement had lapsed upon failure by the purchaser to obtain a loan from the Land Bank, this court reasoned that the clause had to be interpreted so as not to lead to an absurdity, such as to give the meaning that the seller had the right to refuse a cash payment by the purchaser on registration of transfer and to declare the agreement null and void merely because a first mortgage had not been secured from the Land Bank.[22] It was held that an agreement must be interpreted such that it is, preferably, kept extant.

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[19] 1974 (3) SA 695 (A) at 704A-D.
[20] 2008 (4) 302 (SCA) para 21.
[21] Above footnote 10.
[22] At 244E-G.

[21] Clearly, the decision in *Van Jaarsveld v Coetzee* demonstrates what has sometimes been referred to as 'substantial', or 'substituted' performance. Upon registration of transfer, the seller would have received his R30 000 which the purchaser had to pay in terms of the agreement even though no loan could be obtained from the Land Bank. The position in the present matter is different. Here, the appellant seeks to claim that it has substantially performed when it could raise a loan only in an amount less than that stipulated in the written agreement. Jonker makes no averment whatsoever, in any one of his affidavits, of an agreement as to how and when the deficit of almost R500 000 would be payable. He suggested that he would have obtained the full amount through his giving the bank additional security, but nowhere was it alleged that the respondent was aware of this possibility, or that the bank would in fact have approved a loan for the full amount. Thus, in my view, the change to the quantum of the loan approved by the bank is not a waiver but an amendment to the condition which does result in the contract being altered.[23] It is not a temporary suspension of the enforcement of an obligation. What would in fact have occurred is that the appellant's obligation to secure a loan for the balance of the purchase price of R10 149 722 would have been altered or amended to one where the appellant had now to procure a loan for a lesser amount, with no agreement on when and how the deficit was to be secured or paid.

[22] The contention, on behalf of the appellant, that it was not the appellant's case that the parties agreed to amend the 'subject to loan' clause by replacing the amount in it with a lesser amount does not hold water. As was said in *Van As v Du Preez* 'oral variation masquerading as or in the guise of a waiver remains . . . what it truly is'.[24] It remains a variation. To hold otherwise, the court concluded, 'would be to render nugatory the principle of the effectiveness of contractual entrenchment as laid down in *Shifren's* case'.[25] And in *Van der Walt v Minnaar*[26] Horwitz J held that where the provisions of a written agreement are altered in the sense that a provision therein is deleted and an oral (or tacit) obligation

[23] *Van As v Du Preez*, above footnote 16.
[24] Ibid at 765F.
[25] Ibid at 765F-G. It was held in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) that a contract which contained a clause providing that any variation of its terms should be in writing, otherwise it would be of no force and effect, could not be altered orally. The decision has been affirmed recently by this court in *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[26] 1954 (3) SA 932 (O).

substituted in its place, then no contract exists which covers both the original agreement and the amendment. The amended agreement, therefore, would not comply with the provisions of the legislation which required an agreement for the sale of land to be in writing.[27] The same would apply in this case were the argument on the existence of a tacit agreement to waive the 'subject to loan' clause to be upheld. The alleged tacit agreement would be contrary to the provisions of s 2(1) of the Alienation of Land Act.[28]

[23] In my view, the so-called waiver of the benefit of any further compliance with the provisions of clause 4.1 of the written agreement, allegedly mutually agreed to between the parties, in fact amounts to an amendment or alteration of that clause. The amendment or alteration is contrary to the provisions of s 2(1) of the Alienation of Land Act and to the non-variation clause in the written agreement, as it is not in writing. It follows that the written agreement lapsed at the end of the day on 15 August 2005.

[24] This conclusion disposes of the further arguments advanced on behalf of the appellant, viz that there was substantial fulfilment of the suspensive condition in clause 4.1 of the written agreement, and that the respondent is estopped, by his conduct in proceeding to implement the sale, from denying that he had accepted the amount of the bond granted to the appellant as substantial and sufficient compliance with the suspensive condition, and from denying that he waived the benefit of compliance with the condition. It also renders unnecessary a consideration of the question whether the second suspensive condition was fulfilled. I may mention, however, that in all the decisions I have referred to above, where performance had been held to have constituted substantial or sufficient compliance, there had been a different manner of, but *full*, performance of an obligation. In the present matter, for example, the acceptance by the respondent of payment of the deposit on 19 August 2005, instead of 15 August 2005, or before, as stipulated in the written agreement, constituted a waiver of the right to demand payment on the earlier date. As to estoppel, I am of the view that the appellant's case is defeated by the contents of the letter of 19 August 2005, by which the respondent was informed that the suspensive conditions had been fulfilled. It was only after receipt of this letter, which misled him into

[27] Ibid at 937B-C.
[28] Compare also *Borstlap v Spangenberg* footnote 19 at 704A-D.

believing that the suspensive conditions had been fulfilled, that the respondent took steps to implement the sale agreement. The appellant has not shown any action on the part of the respondent, other than an alleged 'acceptance' of information from Kolbe that a loan in a lesser amount had been offered to it, to support the allegation that the respondent took steps to implement the agreement before 15 August 2005.

[25] This brings me to the second issue in the appeal, viz whether an alleged joint venture to purchase SANBEL is valid and binding on the parties. In his founding affidavit, in the appellant's counter-application, Jonker avers that even if the main application were to be determined in favour of the respondent, this will not be dispositive of the question whether the latter is obliged to give transfer of the property to the appellant. Jonker alleges further that prior to the conclusion of the sale agreement an arrangement existed between the parties which involved 'the combining of [their] respective resources to acquire the Sanbel building as an investment for the benefit of both'. In terms of this arrangement the respondent's share would comprise the 'office section' and the appellant's the 'commercial section' (which is the subject of the sale agreement). The appellant accordingly claims transfer of the property also on the basis of the alleged joint venture agreement, hence the orders sought in the counter-application.

[26] The further details of the alleged joint venture agreement and the combining of resources are pleaded in paras 4, 5 and 6 of the particulars of claim in the action. In the counter-application Jonker confirmed those allegations, as pleaded, as correct. It is necessary to quote only sub-paragraph 5.4, which reads:

'5.4 Plaintiff's entitlement to the commercial section in terms of the joint venture would be structured (in accordance with a proposal made by Defendant and his legal representatives) in the form of an agreement of sale in terms of which Plaintiff would acquire the commercial section in return for amounts commensurate with its required contribution to the joint venture and the acquisition of the building.'

It is then pleaded, in para 6, that subsequent to the conclusion of the joint venture 'and in pursuance thereof' the parties concluded the sale agreement. Counsel for the appellant conceded in this court that the written agreement discussed above is indeed the sale agreement referred to in the particulars of claim, and that the respondent was required to

do nothing more under the alleged joint venture agreement.

[27] I find it difficult to understand how, when the appellant has itself allowed the sale agreement to lapse, it can still rely on the alleged joint venture for a claim for transfer of the property to it. And like the court a quo, I am unable to see why, if the appellant's claim based solely on the alleged joint venture agreement were to survive an order granting the relief sought in the main application, that in itself should be a reason to dismiss the application, or postpone it *sine die*, as prayed for by the appellant.

[28] The appeal is dismissed with costs, including those consequent upon the employment of two counsel.

MPATI P

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