IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

CASE NO: 29288/2005
DATE: 12/1/06

In the matter between

WILVON DEVELOPERS (PTY) LTD. Applicant

and

ERF 1095 ERINVALE (PTY) LTD First respondent
McPONY INVESTMENTS (PTY) LTD Second respondent
IAN DONALD McPHERSON Third Respondent
THE REGISTRAR OF DEEDS Fourth Respondent

JUDGEMENT

ISMAIL A J

[1] In this application the Applicant sought an Order

(a) Declaring that an agreement entered into between the applicant and the first respondent on the 18 October 2004, is valid and binding between them;

(b) In terms of which it is declared that the purported cancellation of the agreement by the first respondent is null and void;

(c) Compelling the first respondent, alternatively the second respondent, alternatively the third respondent to sign all necessary documents to give effect to the registration of the development bond in favour of Imperial Bank over portion 221 of farm Hartbeeshoek 303 within seven days after service of this order failing which the Sheriff be authorised to sign all necessary documents on behalf of the first respondent, alternatively the second respondent to effect the registration of the bond;

(d) An order compelling the first respondent, alternatively the Second alternatively the third respondent to sign all necessary documents to effect transfer of portion 221 of the farm Hartbeeshoek 303, from second respondent to first respondent within seven days after service of this order failing which the Sheriff be authorised to sign all necessary documents to effect transfer;

(e) That the registration of the development bond in favour of Imperial Bank and the transfer of portion 221 of the farm Hartbeeshoek 303, in the name of the first respondent be lodged with the Registrar of Deeds simultaneously as soon as practically feasible after documents are ready for lodgement;

(f) That the first, second and third respondents be ordered to pay the costs of this application jointly and severally;

(g) Alternatively to prayers (a) (b) (c) (d) and (e) above that pending the finalization of this application (including any appeal) alternatively an action to be instituted (including an appeal), that an

order be granted in terms of which the Respondents are prohibited from developing or promoting, and/or implementing a sectional title development on Portion 221 of the farm Hartbeeshoek 303, also known as Amandasig Extension 36 or to take any action in terms of which the existing development is deviated from;

(h) That the cost of this application be decided upon in the application, alternatively in the trial.

BACKGROUND

[2] Imperial Bank approved an application for a development bond over the property (portion 221 of the farm Hartbeeshoek) in terms of an agreement marked B2 to the papers.

[3] Pursuant to the obtaining of the development bond referred to above the Applicant, first and second respondents entered into an agreement during October 2004 whereby amongst other things the following was agreed upon:

(a) The second respondent undertook to transfer the property into the name of the first respondent;

(b) The Applicant was responsible to arrange a development bond to be registered over the property for the purposes of developing the property;

(c) The developer (applicant) would be responsible for the development of the property;

(d) The first respondent would be remunerated in respect of each stand;

(e) The remuneration was to be paid upon registration of each and every individual bond;

(f) The Applicant would be entitled on the profits made;

(g) The first respondent would be entitled to cancel the agreement in the event of the applicant having failed to comply with the terms and conditions of the agreement;

(h) Paragraph 32 of the agreement specifically deals with specific performance as an alternative to cancellation of the contract and requires a 10 days notice period before such specific performance may be claimed. Paragraph 3.2 the Respondent alleges is relevant insofar as it gives an indication of what the parties to the agreement viewed as a reasonable notice period in circumstances of an alleged non-compliance of contractual obligation.

[4] On the 22 February 2005 the first respondent called upon the Applicant to comply with the provisions of clause 2.4.3 within 10 days and to register

the development bond within 21 days, failing which the agreement would be cancelled.

[5] On 24 February 2005 Imperial Bank requested certain information from the Respondents which was partly furnished to the Bank by the Respondents on the 28 February 2005. The unfurnished information was waived by the Bank.

[6] On 9 March 2005 the Respondents cancelled the agreement. According to the Respondents a reasonable time for arranging and registering the development bond had elapsed on the 22 February 2005. The notice period of 10 days having been given.

[7] The initial agreement entered into between the second respondent and the applicant was contained in a document marked annexure B1. This agreement was entered into during February 2003. The development bond was granted by Imperial Bank during December 2003

[8] During October 2004 the Applicant, first respondent and second respondent entered into a written agreement whereby the second respondent undertook to transfer the property into the name of the first respondent. As a consequence of this agreement a new development bond had to be obtained through Imperial Bank in respect of the property.

[9] Mr Coetzee SC appearing for the Applicant submitted that the respondents rely upon two grounds for the cancellation of the agreement. The first being annexure K a letter written by the Respondents attorneys to the Applicant *dated* 22 February 2005, wherein they stated:

> " *Ingevolge gemelde ooreenkoms en met verwysing na klousule* 2.4.3 *is dit die ontwikkelear ten laste gelê om 'n ontwikkeling verband te reël en te registreer op* sy *koste. Ons instruksie is dat nieteenstaande vele navrae en versoeke tot datum,* geen *ontwikkelings verband gereël* of *geregistreer is nie. Ons bevestig dat die redelike tyd vir die registrasie van die ontwikkelings verband reeds verstryk het aangesien na 'n periode van* 4 *maande nog* geen *registrasie van die verband plaasgevind het nie'*

The second reason for the cancellation is based upon the acceptance of an alleged repudiation by the Applicant. The respondents allege that the development bond, granted by Imperial Bank in terms of annexure J amounts to a repudiation as it does not accord with the agreement which the parties entered into in terms of annexure B3.

[10] Mr Coetzee submitted that the negotiations in terms of annexure J was an on going process in order to obtain the development bond and that it was never represented that annexure J was the final performance in terms of B3.

[11] To this end the Applicant submitted that up to the 28 February 2005 the first respondent tried to satisfy Imperial Bank's requirements, notwithstanding it having given notice in terms of annexure K. Applicant submits that the Respondents knew that the obtaining of a development bond was an ongoing process of negotiations with the bank and that Respondents notice in view of it supplying the Bank with the information it sought was a waiver on its part by supplying the information which the Bank sought, that is some 6 days after it delivered the notice.

[12] It was also submitted on behalf of the applicant that the cancellation of the agreement by the First respondent is legally invalid by virtue of the provisions in the contract, Annexure B3, which provides for the remedies in the event of breach of contract in terms of clauses 3.1 and 3.2 thereof.
Clause 3.1 of the contract stipulates;

> *"Should the Developer (the Applicant) fail to comply with all or any of the terms and conditions of this agreement, the owner* (*the First respondent) shall be entitled to cancel this agreement and retake possession and occupation of the property and claim damages from the Developer in respect of the damages which he may have*

suffered as a *result* of *the breach* of *contract on the part* of *the Developer.*

Alternatively

3.2 *the Owner may claim specific performance* of *the terms* of *the agreement and damages, in either event, however, on condition that the Owner beforehand requested the Developer to rectify the breach* of *the agreement* as *set out in the notice sent to the Developer at his domicile referred to above and the Developer having failed to rectify the breach within* 10 *(Ten) days after such notice was sent to the Developer by prepaid registered mail"*

[13] Annexure 83 does not stipulate when the development bond had to be obtained by the applicant. Time for performance *was not* stipulated,nor was time for obtaining the development bond of the essence in the proposed development scheme. The Applicant submitted that it should only be in place when it could proceed with the installation of the services. The Applicant submitted that it had to be placed *in mora* before there can be a breach of the agreement. First respondent had to give the applicant 10 days notice to rectify the breach in terms of B3. Mr Coetzee submitted that the applicant was given 10 days notice to rectify without being placed *in mora* and for that reason the notice to rectify is defective as there was no existing breach of the agreement. Furthermore, the period of 10 days given to the Applicant to arrange the development bond was unreasonable in view of the purpose of the development bond.

[14] Where the parties to a contract have agreed to a certain procedure to be followed for cancellation of a contract that procedure is binding. See *Nel v Cloete* 1972 (2) SA 150 (A) where Jansen JA refers to *Micautsicos and Another v Swart* 1949(3) SA 715 (AD) where Fagan AJA said the following:

> *"For* my *present purpose it is sufficient to say that, where time for the performance* of a *vital term in* a *contract has been stipulated for and one party is in mora by reason* of *his failure to perform it within that time, but 'time is not* of *the essence* of *the contract', the other party can make it* so *by giving notice that if the obligation is not complied with by* a *certain date, allowing* a *reasonable time, he will regard the contract* as *at an end"*

[15] R H Christie - The Law of Contract 4th edition at page 584 deals with the question of Mora in persona states:

> "The general rule must be read together with the rule for deciding when contractual obligations are enforceable if no time for performance is fixed in the contract, thus stated by Mason J in *Mackay v Naylor* 1917 TPD 533 537-538:
>
> *"The general rule* of *law is that obligations for the performance* of *which no definite time is specified are enforceable forthwith (Inst* 3.15.2; *Dig 50.17.4 and* 45.1.41.1; *van Leeuwen RD Law* 2.2.3; *Voet* 45.1.19), *but the rule is subject to the qualification that performance cannot be demanded unreasonably* so as *to defeat the objects* of *the contract or to allow an insufficient time for compliance. (Inst* 3.19.27; *Dig 45.1.60,73,137.3)*

The onus is on the party demanding performance to show that his demand allowed the other party a *reasonable time within which* to *perform.-Van Elst vSabena Belgian World Airlines* 1983(3) *SA* 637 *(A)* "

[10] .At page 585 Christie deals with the question of whether a reasonable time was allowed by a creditor to a debtor to perform.

" Whether the creditor's demand allows a debtor a reasonable time to perform depend very much on the circumstances of each case, but in *St Martin's Trust v Willowdene Landowners (Pty) Ltd* 1970 (3) SA 132 (W) 135-136 Colman J laid down some guidelines which, with certain amendments having been approved by the full bench on appeal *(Willowdene Landowners (Pty) Ltd v St Martin'sTrust 1971* (1) SA 302 (T)). The words that the full bench thought should be added or substituted are placed between square brackets:

"(a) As the problem, namely whether or not a *reasonable time for performance has been allowed, arises out* of *contract, it is to be resolved in the light* of *the intention* of *the parties,* as *expressed by them, or* as *properly inferred by the Court from the language* of *the contract and the surrounding circumstances.*

(b) In deciding what would have been reasonable time the Court must have regard to the nature of *the performance which was due by the party who is alleged to have been in default, and to the difficulties, obstacles and delays attendant upon such performance.*

(c) *The difficulties, obstacles and delays to be taken into account are, however, only such* as *were within the contemplation of the parties [or would have been within the reasonable contemplation of* a *reasonable man] at the time of the contract. That was laid down by Tindall* J, as *he then was, in Young v Land values Ltd* 1924 *WLD* 216 *at pp* 224-225. *(Compare Victoria Laundry v Newman Industries* [1949] 1 *All ER* 997 *at pp 1002-1003 and Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 (1) SA 816 *(W) at p 819H]*

(d) *In taking account of the nature of the required performance, with the relevant difficulties, obstacles and delays attendant thereon, the Court, should postulate reasonable prompt and appropriate action and due diligence on the part of the party obliged to perform.*

(e) *In deciding upon the promptitude and diligence which was to be expected the party obliged to perform, the Court must have regard to the commercial and other interest of [both parties] to the contract. Although in* a *particular case it may prove impossible for one of the parties to complete performance until after the lapse of* a *very long time indeed, it does not necessarily follow that very long period constitutes* a *reasonable time which must elapse before cancellation is justified. The period necessary for performance may be* so *unreasonably long in the light of the other party's interest that cancellation may be justified before that period has expired.*

(f) *In deciding whether or not the purported cancellation was valid the Court must have regard not only to the further period specified in the* mora *notice, but also to the elapsed period, namely the period between the conclusion of the contract and the giving* of *the notice. The party obliged is not entitled to remain inactive, after the conclusion* of *the contract, on the assumption that if and when he received the notice putting him* in mora *he will thereafter still have the benefit* of *the full period which was reasonable for performance, whatever period that may be. Authority for that proposition may be found in Pretorius v Greyling* 1947 (1)SA 171 (W) at pp 174-175 *read with* PP 177-8. *It is* of *interest to notice also that in Stickney v Kebble* [1915] All ER Rep 73 *the House* of *Lords in England has taken* a *similar view. I refer to the observations of Lord Loreburn at p* 77 of *the report and those* of *Lord Atkinson at p.* 79. *The further period fixed in the notice must be reasonable. But what is reasonable depends on what has gone before.* "

[11] In *Nel v Cloete* 1972 (2) SA 150 (A) 166 the principles embodied in paragraphs (c) (as amended to incorporate the objective approach) and (f) of the above extract were applied by the Appellate Division, which also (at 164) apparently favoured the proposition that the onus is on the debtor to prove that the time allowed him was unreasonable, but the point was expressly left open. A party who contends that a reasonable time has elapsed should plead the facts on which his contention is based.

[12] Mr Arnoldi SC on behalf of the First respondent submitted that the applicant took two months to obtain the initial development bond and there was no reason that the obtaining of the second development bond should

taken any longer then two months in view of the only change being a substitution from the second respondent's name as owner of the property to that of the first respondent. He also submitted that the court should draw an adverse inference against the Applicant in that the Applicant failed to permit Imperial Bank to disclose to the respondents when the application for the development bond was applied for.

[13] The first respondent also submitted that the 'second development had to be applied on the same terms and conditions as the original agreement B2. First respondent avers that B3 stands to be rectified by adding the words *"On the same terms and conditions contained in the bond dated* 8 *December 2003".* Mr Arnoldi conceded during argument before me that he could not apply for rectification of the agreement on the papers before the Court, however, he submitted that rectification was not necessary in view of the repudiation contained in paragraph 8.5 of annexure J, page 85 of the papers namely; page 85 namely:

> *"IBC will not receive the full proceeds for the stands being sold Owner* of *land will get his proceeds after IBC have been settled in full'*

First respondent submits that this clause is at variance with the contract and therefore rectification is not needed.

[14] It was submitted by Mr Coetzee on behalf of the Applicant that the argument relating to repudiation raised by the first respondent is an after thought as there was no repudiation by the Applicant. The first respondent would be paid in terms of the contract or a bank guarantee.

[15] The Question which needs to be answered is whether the period of 4 months which the first respondent alleges it took the Applicant to obtain the development bond was a reasonable period considering that the initial period it took for the first bond took two months only. The respondent alleges that it was entitled to give the Applicant the notice it did to comply with the agreement failing which it would consider the agreement as cancelled. As any reasonable person would have expected it to take two months to obtain the development bond.

[16] The second bond was applied for during November 2004 and by February 2005 a period of 4 months had already elapsed. The delay in obtaining the development bond was not in contemplation of the parties at the time the contract was entered into. The thrust of the First respondent's argument is based on the fact the first development bond was obtained within two months and the second development bond. was not granted within 4
months it was therefore entitled to give notice as it did.

[17] Had there not been a change in the ownership of the property from the second respondent to the first respondent the Applicant had complied with its performance. The delay was caused by virtue of a change in ownership from the second to first respondent and it was never agreed between the parties that the development bond would be obtained within two months of
the new contract being entered into. One would expect the obtaining of the development bond to take a similar time span as the obtaining of the first bond took, however, it would not be unreasonable for any bank to request additional information pertaining to costs factors bearing in mind that there had been a delay in the project.

[18] In my view there may have been a delay on the part of the applicant to obtain the development bond, however, the period of 10 days given in term of the notice in the circumstances was not a reasonable period within

which the Applicant could have performed. In the circumstances on this ground alone the application should succeed.

[19] In the light of *Willowdene's* case supra the Court must look at the commercial interest of both parties to the contract. The Applicant who was obliged to perform was not in my view *'inactive'* after the conclusion of the contract. The development bond was applied for in November bearing in mind that the contract was entered to in October. The delay if it could be so called was as a result of the bank requiring certain information which had to be furnished by the Applicant and First respondent. There had been ongoing negotiations between the Bank and the Applicant regarding the project.

[20] Accordingly I make the following order:

(a) That the purported cancellation of the agreement by the First Respondent, which the parties entered into on the 18 October 2004, is declared null and void;

(b) The agreement entered into between the Applicant and First Respondent on the 18 October 2004 is valid and binding;

(c) The First Respondent alternatively the Second Respondent alternatively the Third Respondent sign all necessary documents to give effect to the registration of the development bond in favour of Imperial Bank over portion 221 of the farm Hartbeesshoek 303, within seven days of service of this order failing which the Sheriff be authorised to sign all necessary documents on behalf of the First, alternatively the Second alternatively the Third Respondents to effect the registration of the bond;

(d) That registration of the development bond in favour of Imperial Bank

and the transfer of portion 221 of the farm Hartbeeshoek 303, in the name of First Respondent be lodged with the Fourth Respondent simultaneously as soon as the documents. are ready for lodgment;

(e) That the First Second and Third Respondents be ordered to pay the costs of this application jointly and severally. Such costs to include the costs of two counsel.

Judgment delivered on 30 December 2005

For the Applicant: . Adv J A Coetzee SC assisted by Adv M A Bardenhorst SC instructed by Botha Willemse and Wilkinson -Pretoria
For the First to Third Respondent: Adv A F Arnoldi SC assisted by adv P S De Waal
instructed by Couzyn Hertzog and Horak Attorneys -Pretoria
For the Fourth Respondent: The fourth Respondent did not defend the application.