

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO 07/141543

In the matter between :

HENTIESHELF 106 CC

Applicant

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE (YES/NO)	(YES)
(2) OF INTEREST TO OTHER JUDGES: YES/NO	(YES)
(3) REVISED	(YES)
1/10/07	SIGNATURE

and

M&I FAMILY INVESTMENTS (PTY) LIMITED

Defendant

JUDGMENT

1. The Applicant seeks an interim interdict restraining the Respondent from selling, alienating, disposing of or encumbering the immovable property situate at Stand 2, Harveston Agricultural Holdings in the district of Roodepoort and known as Holding 2, Zeiss Road, Harveston, Roodepoort, Gauteng ("the property") or from transferring the property to any third party, except the Applicant. In addition, the Applicant seeks an interim interdict restraining the Respondent from

removing, disposing of, selling, alienating any fixtures or permanent improvements to the property, except the riding school and horse equipment, if any, that may still be remaining in the property.

2. The interim interdicts referred to are sought pending the outcome of an action that the Applicant has issued against the Respondent under the above case number on 27 June 2007. The summons is annexed to the answering affidavit. In the action the relief sought is an order directing the Defendant to sign all necessary documentation and take all steps necessary to effect registration of transfer of the property into the name of the Plaintiff. The relief in the action is sought on the basis of an agreement of sale of the property ("the agreement") concluded between the Applicant and the Respondent on 8 August 2005 and in terms of which the Applicant purchased the property from the Respondent at an agreed purchase price. The Applicant alleges that the Respondent has breached the agreement in failing to sign the necessary transfer documentation and take the necessary steps to effect registration of transfer. In the result, the Applicant seeks specific performance in the

action tendering payment of the balance of the purchase price.

3. The Applicant purports to justify the interim interdictory relief on the basis that it has a *prima facie* right, if not a clear right, to claim transfer of the property in the action. It alleges that it will be prejudiced if the interim interdict is not granted because it has incurred expenses of R935 142,00 in relation to the process of establishing a township on the property.
4. It is common cause in this application that the agreement was subject to certain suspensive conditions which were not timeously fulfilled. In terms of the agreement the suspensive conditions were indeed capable of being waived. The fundamental issue for determination in the application is whether the Applicant waived the suspensive conditions to the agreement at all and if so whether it did so timeously and in the manner contemplated by the agreement and the law.
5. It is common cause that the agreement was concluded on 8 August

2005. The express terms of the agreement were *inter alia* :

- 5.1 The Respondent sold the property to the Applicant for a purchase price of R3,5 million payable as to R150 000,00 within 3 days of the receipt of confirmation in writing of the availability of bulk services for the Harveston area;
- 5.2 the balance of the purchase price of R3 350 000,00 would be paid by the Applicant upon registration of the transfer of the property into its name and shall be secured by means of a banker's or other guarantee to be made available to the Respondent within 18 months or sooner if proclamation took place;
- 5.3 occupation of the property would be given to the Applicant on proclamation or the date of registration of transfer into the name of the Applicant, whichever was the sooner;

5.4 the Applicant undertook to take transfer within 20 months of the acceptance of the agreement or on proclamation if this was sooner;

5.5 the Applicant would render guarantees to the Respondent 2 months prior to the said transfer or proclamation;

5.6 the Applicant would give the Respondent at least 60 days' notice if the proclamation took place before 20 months and such notice would be in writing;

5.7 the parties agreed to the terms and conditions of annexure "A" to the agreement (addendum);

5.8 in terms of the addendum :

5.8.1 the agreement was subject to the following suspensive conditions being fulfilled within 20

months from date of the sale of the property,
being the following :

- 5.8.1.1 that the Applicant applies for rezoning and formation of a township as to be performed on the property by March 2007, the density to allow 20 units to be built per hectare;
- 5.8.1.2 the Applicant applies for an environment impact assessment exemption by July 2006 at the Respondent/Applicant's cost;
- 5.8.1.3 the Applicant acquiring *Biz* two or three or other zoning rights in principle from the local authority

or municipality in respect of the whole property before or on March 2007;

5.8.1.4 the Applicant acquiring the pre-proclamation conditions of establishment of the township on which the property is situated on or before March 2007;

5.8.1.5 it would be the responsibility of the Applicant to comply with the pre-proclamation conditions of establishment within 20 months (reasonable time) after signature of the agreement at the Applicant's cost;

5.8.1.6 the Applicant obtaining within 20 months after signature of the agreement written confirmation and proof from the local authority or municipality having jurisdiction confirming that all the conditions of sub-division, rezoning and establishment of a township had been duly complied with by the Applicant and that all the provisions of municipal services such as the provisions of essential engineering services such as water, electricity and sewerage can be constructed on the property;

5.8.1.7 non-fulfilment of the suspensive

conditions would render the agreement null and void and the agreement would have no further force and effect;

5.8.1.8 the purchaser also retains the exclusive right to waive any of the suspensive conditions contained therein at any time or unilaterally extend the period of fulfilment thereof if the purchaser contains his/her intentions in writing;

5.9 the agreement constituted the whole of the agreement between the parties relating to the matters dealt with in the agreement and save to the extent otherwise provided therein, no undertaking, representation, term or condition relating to the subject matter of this agreement not

incorporated in the agreement, shall be binding on any of the parties;

5.10 no variation, addition, deletion or agreed cancellation will be of any force or effect unless in writing and signed by or on behalf of the parties hereto;

5.11 no waiver of any of the terms and conditions of this agreement will be binding or effectual for any purpose unless in writing and signed by or behalf of the party giving the same. Any such waiver will be effective only in the specific instance and for the purpose of given. No failure or delay on the part of any party in exercising any right, power or privilege thereunder will constitute or be deemed to be a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any right, power or privilege.

6. The suspensive conditions were required to be fulfilled within 20 months from the date of the sale of the property. These 20 months would expire on 7 April 2007. Accordingly, in the event that the suspensive conditions were not fulfilled by then, the agreement would lapse and be null and void. Similarly, the Applicant was to take transfer within 20 months, that is then on 7 April 2007 and the guarantees were to be rendered on 7 February 2007.
7. It is quite evident from the nature of the conditions that they were inserted for the primary benefit of the Applicant as purchaser and that it was tasked with ensuring (in the event of an absence of waiver) that the suspensive conditions were timeously met. Save for providing the Applicant with a written mandate to apply for and sign all documents pertaining to the zoning and township establishment and proclamation, the Respondent was not to be active in any manner in the process of fulfilling the conditions.
8. It is plain that the Applicant intended to purchase a property for

township development purposes and that the Applicant's interest was in ensuring that the agreement self-destructed in the event that the necessary consents on regulatory prerequisites could not be put in place within the specified time. If the property was unsuitable, the agreement would lapse in its own terms if the necessary approvals were not timeously obtained. The manner in which the suspensive conditions could be waived is prescribed in the addendum. The clause reads as follows :

"The purchaser also retains the exclusive right to waive any of the suspensive conditions contained herein at any time or unilaterally extend the period of fulfilment thereof if the purchaser contains his/her intentions in writing."

9. It is clear to me that not much thought had gone into this particular clause. The purchaser had 20 months for the suspensive conditions to be fulfilled. It was a term of the agreement that he had to take transfer within 20 months. This could not be extended. It would be nonsensical

for him to extend the suspensive conditions beyond the 20 month period when he has to take transfer within 20 months.

10. The Applicant alleges that it exercised the right to waive fulfilment of the conditions in terms of clause 10. The waiver must be established by it in the context of two further provisions in the agreement. Clause 13.3 of the agreement provides that no waiver of any of the terms and conditions of the agreement would be binding or effectual for any purpose unless in writing and signed by or on behalf of the party giving the same. Any such waiver would be effective only in the specific instance and for the purpose of given. The agreement was also subject to a non-variation clause.
11. The Applicant submitted that on a proper interpretation of clause 10, only the unilateral extension of the period of fulfilment was required to be given in writing. It is contended that the conditions were clearly inserted for the exclusive benefit of the Applicant who enjoyed 20 months to procure fulfilment of the conditions. It is contended that the

fact that the Applicant expressly enjoyed the exclusive right to waive the conditions, reinforces the submission that he did not have to follow any specific formalities to waive them. It is further submitted that the requirement of writing only pertains to the latter right, i.e. the right to unilaterally extend the period of fulfilment and not to a waiver as well. On behalf of the Respondent it is contended that the waiver of the suspensive condition should also be in writing.

12. I find that in the context of the agreement as a whole and reading clause 10 together with clause 13 of the agreement, which contains the so-called non-variation clause usually found in contracts of this nature, that waiver of the suspensive conditions needed to be in writing. However, in the light of the submissions made during the hearing and the case of the Applicant as it unfolded in the affidavits, it does not appear as if anything turns on whether the waiver had to be in writing or not as the Applicant now relies on a written letter as forming the basis of the waiver.

13. The requirements of waiver have been laid down in *inter alia* **Road Accident Fund v Mothupi 2000 (4) SA 38 : 49 SCA** where it was held :

"15. *Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it ...*

16. *The test to determine intention to waive has been said to be objective (cf Palmer v Poulter 1983 (4) SA 11 (T) at 20C-21A, Multilateral Motor Vehicle Accidents Fund v Meyerowitz 1995 (1) SA 23 (C) at 26H-27G; Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd 1996 (2) SA 537 (C) at 543A-544D). That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations (cf Traub v*

Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd 1983 (3) SA 619 (A) at 634H-635D; Botha (now Griesel) and another v Finance Credit (Pty) Ltd 1989 (3) SA 773 (A) at 792B-E; secondly, that mental reservations, not communicated, are of no legal consequence (Mutual Life Insurance Co of New York v Ingel 1910 TS 540 at 550); and, thirdly, that the outward manifestations of intention are adjudged by the perspective of the other party concerned, that is to say, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes.

17. *The third aspect has not yet been finally settled by this court, or so it would seem (cf Thomas v Henry and another 1985 (3) SA 889 (A) at 896G-898C). What the one party now says he then intended and what his opposite number now says he then believed may still be relevant (Thomas v Henry and another (supra) at 898A-C),*

although not necessarily conclusive. The knowledge and appreciation of the party alleged to have waived is furthermore an axiomatic aspect of waiver (Martin v De Kok 1948 (2) SA 719 (A) at 732-3). With those two qualifications I propose, in this judgment, to apply the test of the notional alter go."

14. I furthermore accept that the intention to waive must be communicated to the other party. Until then the party who has decided to waive might have a change of mind as pointed out by Innes CJ in **Mutual Life Insurance Co of New York v Ingel 1910 (TPD) 540 at 550**. See further **Traub v Barclays National Bank Ltd 1983 (3) SA 619 (A) at 634H**.

See also : **Leadingham v Commercial Union Insurance Co of SA Ltd 1993 (2) SA 760 (C) at 764C-E**

Regent Insurance Co Ltd v Maseka 2000 (3) SA 983 (W) at 995G-998D

Napier v Van Schalkwyk 2004 (3) SA 425 (W)

15. That communication must take place to the other party of a waiver would apply even in cases where the right to waive is exclusively that of a person such as the Applicant in this case. However, the fact that the existence of the conditions and their potential lapse benefited the Applicant did not mean that the Respondent was not also interested therein and entitled to rely upon the consequence of the non-fulfilment thereof. In **Meyer v Barnardo and another 1984 (2) SA 580 (N) : 585** it was remarked by Kubleben J :

"The plain meaning of the words used in an agreement must therefore prevail unless as a necessary inference it can be said it does not reflect the true intention of the parties. In deciding whether such an inference is justified, one must consider not only whether the condition was inserted for the benefit of the purchaser, but also - and this is not quite the same question - whether the seller had an interest in the stipulated consequence of non-fulfilment and would be or could therefore be

prejudiced if it were disregarded. A seller may understandably agree to a suspensive condition of this nature in order to accommodate the purchaser, but concomitantly regard it as a matter of importance to him that there should be certainty as to the fate of the sale at the end of the time period stated in the condition : whether it is at an end or enforceable. At the time of contracting and agreeing to the inclusion of such a condition, the seller may well appreciate that during the time specified in the condition he might be in a position to negotiate and conclude a more profitable sale with another buyer which in turn could be more conditional upon the non-fulfilment of the condition in the existing agreement. Or he may have in mind that he may be able to obtain an option to purchase from another prospective buyer with an expiry date just after the final date for fulfilment of the condition. Such are illustrations of the contingencies which a seller might feasibly contemplate when agreeing to such a conditions."

16. In **Borstlap v Spangenberg 1974 (3) SA 695 (A) 704F** Corbett AJA said :

"Dit is herhaaldelik deur ons howe beklemtoon dat duidelike bewys van 'n beweerde afstanddoening van regte geverg word, veral waar op 'n stilswyende afstanddoening staat gemaak word. Dit moet duidelik blyk dat die betrokke persoon opgetree het met behoorlike kennis van sy regte en dat sy optrede teenstrydig is met die voortbestaan van sodanige regte of met die bedoeling om hulle af te dwing."

17. **In Hepner v Roodepoort Maraisburg Town Council 1962 (4) SA 772**

(A) Steyn CJ said :

"There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue (Smith v Momberg 1895 (12) SC 295 at p 304; Victoria Falls & Transvaal Power Company Ltd v Consolidated Laagte Mines Ltd 1915 (AD) 1 at p 62) but in Martin v De Kok 1948 (2) SA 719 (AD) (at 733) this court indicated that that view may possibly require reconsideration. It sets, I think, a higher standard than that adopted in Laws v Rutherford 1924 (AD) 261 at 263, where

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

18. I believe that the test to be applied in cases where there is waiver by conduct or where an inference is to be drawn from conduct and/or written communication where there is no clear express waiver, such as in this case, is to apply the ordinary test of preponderance of probabilities and I will proceed to analyse the relevant allegations on the basis of the usual civil test of "proof".
19. The papers in this application are voluminous, nearly 400 pages. The issues, however, have crystallised to very few allegations of fact and the Applicant's case, as he finally submitted to the court on page 308 of his replying affidavit, is as follows :

"I deny that I am vague as to the date when I decided on behalf of the

Applicant to waive the remaining conditions. Insofar as this fact may not be clear, I state that it occurred on the 15th of January 2007 when I informed the Respondent's agent, Van Aswegen, that the Applicant would issue the necessary guarantees and that I expected the registration to take place during March 2007 (even before the date of fulfilment of the last conditions)."

20. In his founding affidavit on page 12, the following is said :

"On or about 15 January 2007 Jolene van Aswegen from Landbound telephoned me and advised that Mrs Griffin (Respondent) had telephoned her to indicate that the guarantees would be due by the 8th of February 2007, being 18 months from the date of acceptance of the agreement of sale. By then only one of the conditions had been fulfilled (namely the application for exemption for an EIA) whilst it was apparent that none of the other conditions would be fulfilled by March or April 2007. I had realised that fact much earlier already and decided on behalf of the Applicant to waive the remaining conditions

and to immediately take transfer of the property in the name of the Applicant. I therefore advised Mrs van Aswegen to inform Mrs Griffin that the guarantees would be delivered in time. Mrs van Aswegen did forward such a letter to the Respondent and I attach a copy thereof hereto as annexure 'HSJG10'. I also immediately contacted Mrs Jacobs of Jacobs & Partners and instructed her to obtain the guarantee requirements to enable me to issue the guarantees."

21. In this regard the quotation of **Traub v Barclays National Bank Ltd** (*supra*) at 634H is apposite.

"It is clear, in my opinion, that a creditor's intention not to enforce a right has no legal effect unless and until there is some expression or manifestation of it which is communicated to the debtor or in some way brought to his knowledge".

22. The communication that took place to the Respondent was as follows :

"Dear Mrs Griffin,

Our telephonic conversation with Mr Grobler dated 15 January 2007 refers. Mr Grobler confirmed that all the relevant guarantees will be issued on time. The registration of the abovementioned property will still take place during March 2007. Please do not hesitate to contact me should you have any queries."

23. In terms of clause 14.2 of the agreement, guarantees were to be delivered to the seller two months prior to transfer, which was to occur within 20 months of the acceptance of the agreement. Guarantees therefore had to be delivered on 7 February 2007. The advice that the guarantees would be delivered in time and that the transfer will take place in terms of the agreement, does not have a bearing on the suspensive conditions and cannot constitute a waiver thereof. The furnishing of the guarantees was a term of the agreement, not a condition. All that the Applicant was doing by confirming that the guarantees would be furnished, was attempting to avoid being in breach

of the agreement. The guarantees had to be furnished on time regardless of whether in 3 months' time the suspensive conditions were fulfilled or waived. The letter makes no mention whatsoever of waiver. It was submitted by counsel for the Applicant that the 15th of January 2007 when this letter was sent, was the day on which the waiver took place and the manner in which it had taken place was in accordance with the letter that was written. The events that took place after that day on which reliance was placed in the voluminous affidavits, can therefore be disregarded as irrelevant to establish whether waiver had taken place, except insofar as evidence of the understanding of the parties at a later stage may be relevant to assess whether the communication of the 15th of January 2007 was objectively understood by the parties to have been a waiver of the suspensive conditions. In this regard it is instructive to notice that on 20 February 2007 after the alleged waiver, the attorneys doing the conveyancing and who were instructed on behalf of the Applicant, wrote a letter to the Respondent's attorney explaining their position and after referring to the fact that they had had the opportunity to consult

with their client, Mr Grobler, they advised :

- "6. *In terms of the provisions of the agreement, transfer must accordingly be effected by not later than 30 April 2007, (this is wrong, transfer had to take place not later than 7 April 2007) which is further substantiated by the fact that the majority of the suspensive conditions referred to in annexure 'A' must be fulfilled (or can be waived) by the end of March 2007.*
7. *From the above, it is clear that your client's conclusion that guarantees were due by the 8th instance was factually incorrect.*
8. *We furthermore draw your attention to the rights reserved by our client in terms of paragraph 10 of annexure 'A' to the agreement, namely the exclusive right to waive any of the suspensive conditions contained in the agreement at*

any time or to unilaterally extend the period of fulfilment thereof."

24. Nowhere in this letter is there a reference to the suspensive conditions having already been waived. This letter deals entirely with the issuing of the guarantees and the context in which clauses 6 to 8 quoted above were put in, was to the effect that the Applicant still had his rights in terms of the addendum.
25. In further correspondence between the attorneys, the Respondent's attorney repeatedly invited the Applicant's attorney to explain how and when waiver of any of the conditions took place. This was never forthcoming. The first time a clear and unequivocal statement was made as to when and how the waiver had taken place was in the replying affidavit which I quoted hereinbefore and which was dated 27 August 2007. The letter of 15 January 2007 does not mention any waiver. The Applicant's contention is that an inference must be made that the conditions were waived. In effect, the Applicant relies on a

"tacit waiver".

26. I am of the view that to draw the inference based on a tacit waiver, one should apply the same test as is applied in imputing tacit terms into contracts. The test there to determine what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test.

Wilkins NO v Voges 1994 (3) SA 130 AD : 136H-137D

27. If one looks objectively at the communication that took place and apply the bystander test, one could ask the rhetorical question : would any person in the position of Mrs Griffin understand that the conditions were waived on 15 January 2007 or was the communication only related to the supplying of the guarantees and compliance with the terms of the agreement? I am of the view that the objective alter ego of the Respondent would understand the communication to relate only to the supplying of the guarantees as contained in the agreement. One

may ask a further question to test whether waiver had taken place :
What would the position have been if on the 16th of February 2007 a massive sinkhole appeared in the property rendering the property unsuitable for the purposes of township development for which the Applicant had acquired the property or if unlawful occupiers occupied the property and it became clear that the township development would not be able to proceed for many years, if at all? Could and would the Applicant not then have turned around and rely on the non-fulfilment of the suspensive conditions to get out of the transaction? On his version, he could not have, but would it have been understood by the objective bystander that he had waived all his rights? In **Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1 KB 592 : 605** it is said :

"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; i.e. if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties : 'What will happen in such a case?'

they would both have replied : 'Of course so and so will happen; we did not trouble to say that; it is too clear. '"

The inference sought to be drawn must be necessary and not only reasonable.

**Union Government (Minister of Railways) v Faux 1916 AD 105 :
112**

Mullin (Pty) Ltd v Benade Ltd 1952 (1) SA 211 A : 214

**Minister van Landbou Tegniese Dienste v Scholtz 1971 (3) SA 188
A : 209**

I do not believe that any objective bystander in these circumstances would have come to the conclusion that the Applicant had by necessary implication waived the suspensive conditions as at 15 January 2007.

28. I therefore come to the conclusion that the Applicant has not made out a case that it has a *prima facie* right to the property. In view of the above finding, I do not need to deal with the further requirements of an interim interdict. The application is dismissed with costs.



J J WESSELS AJ

27 SEPTEMBER 2007

Delivered on 3 October 2007.

JW0166