REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/2117

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

28/2/2013 .....
DATE

.....
SIGNATURE

In the matter between:

AFRICAST (PTY) LTD Plaintiff

and

PANGBOURNE PROPERTIES LTD Defendant

JUDGMENT

SUTHERLAND J:

Introduction

[1] Africast (Pty) Ltd, the plaintiff, seeks payment of damages from Pangbourne Properties Ltd, the defendant. The principal cause of action relied upon arises from an alleged breach of a written contract reached between them in terms of which plaintiff undertook to acquire land and erect a building to the defendant's requirements for a fixed price. When the merx was tendered the defendant asserted the view that no contract existed because it had lapsed because of the non-fulfilment of a suspensive condition. The suspensive condition required a notice to be given by the defendant to the plaintiff within a prescribed period stating that the defendant's board of directors approved the transaction that was the subject matter of the contract which occurrence, the defendant alleged, did not happen. The plaintiff treated this stance of the defendant as a repudiation, thereupon cancelled the contract and sought damages. The gravamen of the controversy over this question is a proper interpretation of the written contract signed by representatives of the parties, and related thereto, a sub-question about the existence of authority of the defendant's signatories to bind the defendant at the time when the signatures were effected.

[2] Alternative causes of action are relied upon by the plaintiff in the event that the court should hold that the contract had indeed lapsed as contended for by the

defendant. In essence, these causes are that the parties agreed to an extension of time to fulfil the suspensive condition which was thereupon fulfilled or, the defendant waived its entitlement to require the suspensive condition to be fulfilled or, the defendant is estopped from relying on the non-fulfilment of the suspensive condition.

[3] In addition, there is a controversy about the appropriate methodology to quantify damages; ie, assuming the plaintiff succeeds, may it claim loss of profits and ancillary alleged losses on the envisaged transaction, or is confined to calculate its damages merely according to the difference between the market value of the merx and the actual price achieved, if a sale to a third party was at less than the market price.

[4] The issue of quantification of any damages was excluded by agreement pursuant to Rule 33(4) of the Uniform Rules of court. A consent order was made to this effect at the outset of the trial, identifying which allegations in the pleadings were to be addressed in these proceedings.

[5] Self evidently, the adjudication of the matter has to be in stages.

The proper interpretation of the contract

[6] This first stage was the sole subject of evidence.

[7] The contract obligations were contained in two documents, the main contract and an addendum thereto. The main contract was drawn up before 5 March 2007 and signed on that date on behalf of the plaintiff. The addendum was signed on 11 April 2007 by both parties' representatives, and the main contract was also signed by the defendant's representatives, Kennedy and Groenewald. It is accepted by all that the relevant date of signature is 11 April 2007. All signatories warranted their authority to sign on behalf of their principals.

[8] The contract contained clause 16.1 and 16.2 which provided thus:

> "16.1 This agreement is subject to the suspensive condition (stipulated for the benefit of PANGBOURNE COMPANY and which may be waived by written notice given by PANGBOURNE COMPANY to SELLER COMPANY on or before the date for fulfilment of this condition) that within seven days (excluding Saturday, Sundays and public holidays) after the date on which this agreement is concluded (or such other period/s as the parties may agree to in writing from time to time) PANGBOURNE COMPANY gives SELLER COMPANY written notice that its board of directors has approved the purchase of THE PROPERTY by PANGBOURNE COMPANY in terms of this agreement. This condition is not capable of fictional fulfilment.

16.2 If this condition is not fulfilled or waived, then this agreement will terminate and neither party will have a claim against the other as a result thereof."

[9] The thesis advanced by the plaintiff on the meaning and application of this clause is that:

9.1. The phrase which says "after the date on which this agreement is concluded" means that date upon which the defendant's signatories were authorised to bind the defendant

9.2. On 11 April, notwithstanding the warranties of authority, the defendant's signatories Kennedy and Groenewald were, at that moment, not yet authorised to bind the defendant.

9.3. The requisite authority for them to bind the defendant was given on 20 April 2007, the date the board approved the transaction in these terms:

" It was resolved:

1. That the company proceed with acquisition of a property [as described] from Africast (Pty) Ltd, ('the seller'); and

2. That the company enter into a development agreement with the seller to construct an office park on the property as per the development proposal, the total price being [R66,688,792 million] the purchase consideration being paid on completion of the development; and

3. That any two directors or a director and the Company secretary be, as they hereby are, authorised to sign the property Sale agreement which includes the development Agreement, and that a Director or the Company secretary be, as they hereby are, authorised to sign all the necessary documentation to give effect to the resolution including, but not limited to, conveyancing documents, power of attorney to transfer, bind registration documents, and all other relevant documentation to finalise the transaction"

9.4. As a result, it is contended, the date that the contract was concluded could not have been earlier than 20 April.

9.5. The suspensive condition, itself, was fulfilled on 25 April 2007 by the transmission of an email from Rene de Villiers, the assistant to the defendant's company secretary, Groenwald, to Basil Logan, who, for these purposes at least, represented the plaintiff, within the prescribed period calculated from 20 April.

9.6. The repudiation by the defendant in August 2010 was therefore actionable and the cancellation by the plaintiff justifiable.

[10] By contrast, the defendant's case is that:

10.1. The date of conclusion in this contract cannot mean something other than the date the parties representatives signed it; ie 11 April 2007.

10.2. The defendant's signatories were authorised to sign on that date as warranted by them; a contention relying in part on certain evidence that was adduced and in part on an interpretation of clause 16.1.

10.3. The email of 25 April from the defendant to the plaintiff, even if it could be construed as the notice contemplated in clause 16.1 was too late, as the prescribed period elapsed at midnight on 20 April, calculated from 11 April.

10.4. As a result, the contract lapsed.

[11] It was not the plaintiff's case that, on any basis, the contract, if it had lapsed, was ever revived.

[12] Both parties invoked the elegant formulation of the appropriate approach to the interpretation of contractual provisions by Wallis JA in Natal Joint Municipal

Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paras [17] and [25 -26]:

"[17] Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself,' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be

mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, 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 meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."

The contested Authority of the Kennedy and Groenewald

[13] The evidence led that was pertinent to this question related to the procedures that operated during 2007 within the defendant concerning the conferring of general authority and *ad hoc* authority on its directors and servants to conclude contracts that bound the defendant. These procedures changed

during August 2010 when a *putsch* deposed the then management; however the only relevant period is that prior thereto.

[14] It was common cause that the defendant's standard operating procedure was that the board alone had to especially authorise any transaction, save those amounting to a maximum of R50 million, in respect of which the CEO (at the time, Craig Hutchinson) alone, could bind the defendant. It was further common cause that Kennedy, a director and Groenewald, the company secretary and not a director, were not authorised, in general, to bind the defendant in any sum. It was upon this factual premise that the plaintiff contended that because this transaction, at R66 million, was a transaction reserved for the board's approval, the appending of signatures by Kennedy and Groenewald was not authorised on 11 April and they only secured such authority on 20 April when the board resolved in the terms cited above.

[15] Kennedy was unavailable to testify owing to illness. Groenewald testified that he was indeed authorised to sign the contract documents on 11 April in line with the customary procedures of the defendant, which procedures included an habitual provision in the documents to be signed that would be, substantially, in accordance with the reservation set out in clause 16.1 of this contract in the form of a suspensive condition subordinating their acts of binding the defendant, pending formal board approval and a notice to the seller as stipulated. Moreover, it was practice for the investment committee, an entity composed in part of

directors and in part by others, to vet projects, even when the CEO acting alone, bound the defendant to a contract. At Groenewald's initiative, the board approved, on 22 February 2007, a 'framework' for the approval of transactions. This board resolution required an 'originating document' to be generated and be signed by two directors and 'all documentation to implement the transaction be signed by a director or the company secretary'. Groenewald testified that the signing of the documents on 11 April was an act of 'putting into effect' the originating document approved by the investment Committee. There was no rebuttal of this evidence.

[16] The plaintiff's contention about lack of authority rested on a legal premise. The submission was made that no contract can be valid unless it contains the fundamental elements. Thus, it is contended that for example, in a sale, if there is no certainty about the identity of the merx, the identities of the seller and buyer and the computation of the price, there can be no contract, an uncontroversial statement of law. Invoking the authority in Tuckers Land Development Corporation v Perpellief 1978 (2) SA 10 (T) at 14 C – 15G, the contention is advanced that there is a critical additional element in a sale involving a juristic person; ie, a duly authorised agent to perform on its behalf. Building upon this foundation, it is argued that the phraseology of the text of the 20 April 2007 board resolution is incompatible with a ratification of prior acts and cannot be read as such. (Support is also invoked from the conduct of the defendant subsequent to

11 April 2010, which, it is contended, demonstrates that the defendant construed the contract to be binding on it; a line of argument addressed separately.)

[17] It is not controversial that there is no principle of law that compels a juristic person to confer authority on its agents in a specific way. The existence of authority, if any, is simply a question of fact. (See, eg De Villiers v BOE Bank Ltd 2004 (3) SA 1 (SCA) at [52] – [57].)

[18] In my view, the notion that Kennedy and Groenewald acted without authority on 11 April when they signed the contract is not established by the facts adduced in evidence. On the contrary, I find that they indeed acted with authority at that time. This finding is also substantiated, in part, by the findings about the proper interpretation of clause 16.1.

The Meaning of "concluded" a contract

[19] Although it is the word 'concluded' upon which the eye falls, it must borne in mind that no word is an island, entire to itself. A familiar word often has many tasks assigned to it. Accordingly, the critical focus should rest, rather, on the whole phrase used, and a determination made of the task assigned to it within the relevant text. This is it:

> " *This agreement* is subject to a suspensive condition.... *that within 7 days after the date on which this agreement is concluded.....* Pangbourne company give the seller a written notice that its board of directors has approved the purchase.....in terms of this agreement." (Emphasis supplied)"

[20] The event alluded to as the 'conclusion' of the contract imports by that word a notion of finality. The word "concluded" or its variants is in common usage in contracts, along with "signed" and "reached" to denote finality. The dictionaries, insofar as they might aid interpretation endorse this notion of finality; the Shorter Oxford English Dictionary (1978) offers the meanings, among others, of 'a binding act', a 'final determination' or 'final agreement'. Moreover, as pointed out by defendant's counsel, the customary equivalent phraseology in Afrikaans that '*n ooreenkoms is "gesluit*', illustrates the employment of a verb even stronger in its notion of finality than the English "*is concluded".* However, as important as the intrinsic connotations of the word itself may be is, the phrase which gives voice to 'this agreement' being suspended in no less important: can there be a suspension of an agreement that is yet to be 'concluded'? In my view, this would be bizarre.

[21] In legal practice, a 'draft' agreement mutates into a 'binding' agreement upon an unequivocal indication by each party's representative that there are no further points upon which consensus remains outstanding and the parties commit

to the terms encapsulated in the document before them. This does not have to mean that there remain no reservations about what has to be done *to render the agreement enforceable*, but it does mean that there is no contemplation of further negotiations about *what obligations or rights ought to go into* the contract. The ubiquity of suspensive conditions in so many contracts bears testimony to that. Pending the fulfilment of a suspensive condition, a contract is no less binding because the moment when it becomes enforceable is deferred. To speak of a contract subject to a suspensive condition being concluded only upon the fulfilment of a suspensive condition is not, in my view, consonant with a useful employment of the term 'concluded' or with the useful employment of the device of a suspensive condition. In Design Planning Services v Kruger 1974 (1) SA 689 (T) at 695B – F, Botha J distinguished the functional effect of a suspensive condition from a contractual term. At 695 C-F he held:

> "In the case of a suspensive condition, the operation of the obligations flowing from the contract is suspended, in whole or in part, pending the occurrence or non-occurrence of a particular specified event (cf. *Thiart v Kraukamp*, 1967 (3) SA 219 (T) at p. 225). A term of the contract, on the other hand, imposes a contractual obligation on a party to act, or to refrain from acting, in a particular manner. A contractual obligation flowing from a term of the contract can be enforced, but no action will lie to compel the performance of a condition (*Scott and Another v Poupard and Another*, 1971 (2) SA 373 (AD) at p. 378 *in fin.*). This distinction between a condition and a term is of particular importance in determining the consequences of the non-occurrence of the event postulated in a positive suspensive condition. In a case such as the present, there appear to me to be two separate and distinct lines of enquiry: the first relates to the effects of the non-occurrence of the event envisaged in the condition, and the resultant failure of the condition,

[22] An examination of the functionality of the text in a clause being scrutinised ought to reveal a certain logic. In this clause, the function is, in my view, to qualify the enforceability of the agreement, between the date of signature or conclusion of the contract and a future uncertain event, ie, the sending of a stipulated notice. The function is not to qualify the signature or the conclusion of the agreement itself. Accordingly, in my view, in this text, the word "concluded" is no more than a synonym for "signed" (in writing) or "reached" (perhaps, orally more than in writing) a final and binding agreement and cannot be construed to denote contemplation of a future event after signature.

[23] In my view, there is no room for ambiguity about the clause bearing this meaning. It was argued that a proper interpretation of clause 16.1 ought to yield an appreciation that it is the approval of the transaction that is important, not the sending of the notice. I cannot agree. There is no absurdity to be avoided. The executory element of the condition was the giving of a notice setting forth prescribed information. If the purpose of the clause was merely to subordinate the agreement to the act of board approval, there would be no need for the clause to refer to a notice. In other words, on such an interpretation, the allusion to the notice would be superfluous and not make business sense. That is an outcome which, indeed, must be avoided.

The subsequent conduct of the defendant in relation to interpreting what meaning the parties attributed to the clause

[24] The plaintiff contended that although there was no direct evidence of what the respective parties understood the date of conclusion to be, there was ample evidence that they acted, in effect, on the understanding that it was 20 April rather than 11 April. An exercise to examine subsequent conduct as an aid to interpretation is sometimes permissible, in accordance with the dictum of Brand JA in Botha v Coopers & Lybrand 2002 (5) SA 347 (SCA) at 360 D – E [25]. What was stated there was that:

> "By beantwoording van die vraag wat waarskynlik die partye se antwoord op die buitestaander se tersaaklike vraag sou wees, laat die Hof hom hoofsaaklik lei deur die uitdruklike terme van die ooreenkoms en die omringende omstandighede ten tyde van kontraksluiting (sien byvoorbeeld South African Mutual Aid Society (supra op 606C) en Alfred McAlpine & Son (Pty) Ltd (supra op 531 in fine)). Dit is egter ook toelaatbaar om te kyk na die optrede van die partye na die sluiting van die ooreenkoms. Hierdie ondersoek is gerig op die vraag of die latere optrede van die partye versoenbaar is met die bewering dat die stilswyende term deel gevorm het van hulle kontrak. (Sien byvoorbeeld *Wilkens NO v Voges* (supra op 143C-D) en Christie (op cit op 196).)"

[25] The facts relied upon were:

25.1. The defendant co-operated with the project until August 2010 as if the agreement was binding.

25.2. Defendant's in- house attorney Midgely would not, on the probabilities, have allowed the transaction to proceed if it had not become binding, on his understanding.

25.3. Groenewald, described by all as meticulous, would not have acted as if the agreement was binding if the condition had not been fulfilled, more especially because he was indeed meticulous about the other suspensive conditions being fulfilled or waived.

25.4. Edward Nathan Sonnenbergs, said to be an eminent firm of attorneys, would not have let the transaction be submitted to the competition Commission if it was not satisfied that the agreement was binding.

25.6. Investec would not have granted a R40 million bond if it had not satisfied itself that the underlying agreement was binding.

[26] In my view, the mere fact that all these people might have conducted themselves in a manner that was consistent with an inference that they believed the agreement was enforceable does not prove anything useful. Even if an absence of a direct explanation for such conduct by the persons extraneous to these proceedings is left out of account, (which, in my view, is an important shortcoming in the argument) the fact that they might all believe the contract was enforceable or binding does not prove that they thought the date of the conclusion of the contract was 20 April 2007. Their conduct is equally consistent with mere oversight about that requirement, or mere indifference. Moreover, given the absence of ambiguity about the meaning of clause 16.1 it could at best be that they were all wrong.

[27] Of no little importance, it must be noted that there is no evidence that anyone on behalf of the plaintiff, at the critical time, thought that the relevant date was 20 April; a point illustrated both by the late amendment of the claim to introduce that idea, and the questionable basis for construing the defendant's email of 25 April as a purported fulfilment of the condition. The defendant's email of 25 April was a reply to an enquiry about the board approval, not a response to a request to comply with clause 16.1. The email sent to plaintiff, in the person of Nolan, was perfunctory and attached a copy of the resolution, in contrast to the formal exchanges that took place over the other suspensive conditions mentioned in the contract.

The Lapse of the agreement

[28] It must follow upon these findings that the date upon which the contract was concluded was 11 April. The condition remained unfulfilled on 20 April. Thus, it lapsed. It was not revived. (Cf; Fairoaks Investment Holdings (Pty) Ltd Olivier 2008 (4) SA 302 (SCA); Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd [2011] JL 27157 (SCA) ZASCA 20 (17/03/2011).)

The Alternative Causes of Action

Did the parties extend the time for fulfilment of clause 16.1?

[29] This contention, not pressed too strenuously, is premised on the exchange of the emails on 23 and 25 April alluded to already. All that is contained therein is an enquiry about board approval, *en passant* at that, and confirmed as such in evidence by its author, Nolan, while he was addressing another extraneous matter with the defendant. The defendant's reply was equally perfunctory, saying no more than there was attached therewith a copy of the resolution.

[30] It is not possible to construe this exchange as contemplating an extension of time to fulfil the condition. The contention fails on the facts adduced.

Did defendant waive its entitlement to require fulfilment of the suspensive condition?

[31] Clause 16.1 contemplated that a waiver of its provisions might be desired. It provided that the condition was:

> "stipulated for the benefit of [the defendant] and which may be waived by written notice given by [the defendant] to [the plaintiff] on or before the date for fulfilment of this condition)"

[32] The first enquiry must be about the facts: is there such a written notice given within the prescribed time? There is no evidence of such a notice at any time.

[33] In Trans-Natal Steenkool Korporasie v Lombaard en 'n Ander 1988 (3) SA 625 (A) at 640B, Van Heerden JA held that a waiver under the contemplated circumstances had to comply with the time restrictions imposed by the agreement:

> "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 verly is, hy ook na die sperdatum van die voordeel daarvan afstand kan doen. In die tagtigerjare is egter in drie uitsprake bevind dat 'n latere afstanddoening 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 580 (N); en *Mekwa Nominees v Roberts*1985 (2) SA 498 (W). Ek hoef slegs te sê dat ek ten volle saamstem met die gevolgrekkings wat in hierdie drie sake bereik is."

[34] The plaintiff's thesis relies on events after the critical date, whichever it was, on either party's case. The plaintiff drew encouragement from the decision in DS Enterprises Ltd v Northcliff Townships Ltd 1972 (4) SA 22 (W) at 27B. That matter was about a sale of land and contemplated development thereof. The contract contained a suspensive condition that the buyer procure the statutory approval of developmental rights to be given within a prescribed period; if the rights were not granted within the period, the agreement would lapse. In addition, the contract stipulated that the buyer (who self-evidently proposed to develop the land) could waive this condition within a prescribed period. What followed was that the rights were not granted and the buyer did at any time waive the condition. Nevertheless, the seller billed the buyer for instalments on the price and the seller paid up. This carried on for years until the seller took up the stance that the sale had lapsed. The buyer sought relief from the court. The court, (at 26E-G), held that the seller's conduct in billing the buyer amounted to a waiver of the need for the buyer to formally waive its entitlement to the fulfilment of the suspensive condition, and the payments by the buyer constituted

acceptance of such waiver. The court held that this conduct revived the contract (at28E).

[35] In my respectful view, the soundness of this outcome is not free from doubt. Not unsurprisingly, the decision has been the subject matter of some sophisticated dissection and distinguishing. (See, eg: Cronje v Tuckers Land Development Corporation (Pty) Ltd 1981(1) SA 256 (W) at 259 Gff.)

[36] However signal above all, in the present case, is the absence of a contention that the contract was revived and in the absence thereof, reliance on the decision in DS Enterprises is not helpful to the plaintiff's cause. In my view, no waiver is established.

Estoppel

[37] The foundation of this leg of the plaintiff's case is the premise that the contract indeed lapsed and was not of force or effect, nor was ever revived.

[38] What is required to be proven by a party invoking an estoppel was articulated by Corbett JA in Aris Enterprises (Finance) v Protea Assurance 1981(3) SA 274 (AD) at 291D-E as follows:

> "The essence of the doctrine of estoppel by representation is that a person is precluded, ie estopped, from denying the truth of a representation previously

> made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice (see Joubert *The Law of South Africa* vol 9 para 367 and the authorities there cited). The representation may be made in words, ie expressly, or it may be made by conduct, including silence or inaction, ie tacitly (*ibid* para 371); and in general it must relate to an existing fact."

[39] The plaintiff introduced the estoppel argument in a replication, where in paragraph 1.4 it was alleged that:

> "the defendant is estopped from relying on the non-fulfilment of the suspensive condition"

and several factual grounds were thereafter set out describing the defendants' conduct after the conclusion of the agreement on 11 April 2007, which allegedly support a justification to invoke an estoppel against the defendant.

[40] However, in argument the plaintiff was at pains to disavow that the defendant ever *misrepresented* to the plaintiff that the *suspensive condition had been fulfilled.* Rather, it was contended, what gave rise to the claim of estoppel was the misrepresentation by defendant that it *regarded the contract as binding and would not rely on the non-fulfilment of the suspensive condition.*

[41] Two factual questions arise:

41.1. What was within the knowledge of the plaintiff about the non-fulfilment of the suspensive condition?

41.2. What did the defendant do to *mislead* the plaintiff about the truth?

[42] There is no evidence to suggest that the plaintiff itself ever thought the suspensive condition had been fulfilled. It is correctly argued on defendant's behalf that the enquiry by Nolan on 23 April is proof that the plaintiff knew that the notice had not been given within the prescribed period, which expired on 20 April. A request could not have been made then to the defendant to waive for the reasons given above. What would have been necessary to revive the transaction would have been to create a fresh contract without the requirement as provided for in clause 16.1, an event requiring express conduct by both parties. (Cf: Cronje v Tuckers Land Development Corporation (supra)).

[43] Moreover, the conduct by the defendant over several months that it acted as if there was a binding contract is admitted in argument. The defendant's

explanation is that it was wrong; it noticed that the agreement lapsed only late in the day. It could have agreed to a fresh contract, but for reasons of its own it chose not to do so.

[44] Thus, so it is argued on defendant's behalf there was no 'deception' that misled the plaintiff, and without a deception and reasonableness in the estoppel asserter's reliance on the deception, there can be no room for estoppel to be invoked. (See: Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd (supra) at [16] and [17]; and Rabie & Sonnekus, The Law of Estoppel in South Africa, Butterworths (2nd Edition, 2000) at p 63, Para 5.1, where the authors state:

> "In general, the premise applicable in all circumstances is that the estoppel assertor can only successfully rely on estoppel if the reasonable person in the street, in the position of the estoppel assertor would also have been misled by the conduct on which the estoppel is founded. To determine whether the reasonable person would have been misled, it might be helpful to answer the applicable question in the negative: The reasonable person would have been misled if it can be ascertained that the circumstances were such that they would have put the reasonable person on his guard and compelled him to ask more questions before accepting the allegations or representations of the representor at face value. If in reality the estoppel assertor had under the same circumstances neglected to ask for further explanation or had not been on his guard due to the fact that he tends to be more gullible than reasonable person would have been, then the conduct of the representor is not to objectively be classified as unreasonable or wrongful, and the reliance on estoppel must fail. It has already been emphasised that the doctrine of estoppel cannot be misused to protect the

> naïve or gullible against his own stupidity. Even the man in the street must take cognisance of facts that may have a bearing on his legal position.
> Formulated otherwise, this qualification is also referred to when it is said that the reliance on representation must be reasonable.
> The person who bases an estoppel on a representation made to him, must establish that he reasonably understood the representation in the sense contended for by him. It follows that he has to prove that his reliance on the representation was reasonable. He will therefore have to show that he did not know that the representation was untrue or incorrect, that he did not have information which put him upon enquiry, or, if he did, that he exercised reasonable care and diligence to learn the truth, and, generally that he was not mislead by a lack of reasonable care on his part."

(see too: LAWSA, Vol 9; 2nd Ed, (2005) *Estoppel* (Rabie & Daniels): Para 657.)

[45] Moreover, in my view, it seems plain that a 'misrepresentation' that qualifies to be a misrepresentation for the purposes of an estoppel must be a misrepresentation of a fact; ie, the estoppel denier must be shown to have initially told or insinuated by conduct, a falsehood or induced a reasonable belief in a falsehood. In this case, no misrepresentation of a fact is relied upon; ie that the suspensive condition was met. The defendant's 'belief' that it had a binding agreement, as evidenced by its common cause conduct, is invoked as the 'misrepresentation'. This, in my view, is not good enough. An estoppel cannot be raised against a party who says that it thought it had a contract but, it turns out that, in law, it was wrong to think so. In Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C) at 56H – 57 D it was held:

" The following statement of the doctrine of estoppel by Spencer Bower *Estoppel by Representation* para. 15, was cited, apparently with approval, by WATERMEYER, J.A. (as he then was) in *Union Government v Vianini Ferro-Concrete Pipes (Pty.) Ltd., supra* at p. 49:

> 'Where one person (the representor) has made a representation to another person (the representee) in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time and in the proper manner objects thereto.'

In amplification of this statement it may be emphasized that the representation must relate to a statement of an existing fact (see *Baumann v Thomas, supra* at p. 436; *Spencer Bower*, pp. 39 - 48; Halsbury, 3rd ed. vol. 15 pp. 224 - 5) and that a mere statement as to, for instance, a future intention will not found an estoppel (see *Kelsen v Imperial Tobacco Co. Ltd.*, 1957 (1) A.E.R. 343). The representation may be made expressly or by conduct. It must be made with the intention that it should be acted upon in the manner in which it was acted upon or the conduct of the representor must be such as to lead a reasonable man to take the representation to be true and believe that it was meant that he should act upon it in that manner (see *Halsbury*, 3rd ed., vol. 15 p. 228; *Service Motor Supplies* (1946) *(Pty.) Ltd v Hyper Investments (Pty.) Ltd.*, 1961 (4) SA 842 (AD) at p. 849). The person to whom the representation was made must act thereon in the manner intended and in doing so must alter his position to his prejudice. He must act upon the representation believing it to be true. If he knows, or believes, that the real facts are not as stated in the representation, he cannot be heard to say that he was induced to act to his prejudice on the faith of the representation. (*Spencer*

Bower, paras. 137, 138, 199; *Halsbury*, 3rd ed. vol. 15 pp. 229 - 30; cf. *Angehrn & Piel v Federal Cold Storage Co. Ltd.*, 1908 T.S. 761)."

(Also see; Simpson v Selfmed Medical Scheme 1992 (1) SA 855 (C) at 866D.)

[46] At best for the plaintiff, the ostensible non-fulfilment of the suspensive condition or the late giving of the notice gave rise to a patent uncertainty about the effect of the contract. It was obliged to take steps to clarify that ambiguity in order to be regarded as having acted reasonably in the circumstances. It did not. (cf: Concor Holdings t/s Concor Techicrete v Potgieter 2004 (6) SA 491 (SCA) at esp 496D).

[47] Accordingly, I cannot find any evidence of a misrepresentation. The argument for an estoppel therefore fails. Other interesting aspects of estoppel addressed in argument need not be addressed. Furthermore, the need to determine a calculation methodology for the computation of damages falls away.

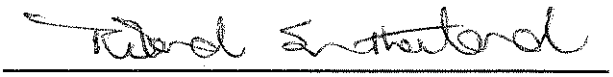
Costs

[48] The parties were before the court for trial in 2012 upon which occasion the matter was postponed to allow the amendments by the plaintiff to raise the issue about the authority of the defendant's signatories. In due course such

agreement that the wasted costs reserved then should be costs in the cause. in these proceedings.

The Order

[49] The plaintiff's case is dismissed with costs, including the wasted costs occasioned by the postponement of the trial in 2012.



ROLAND SUTHERLAND
Judge of the South Gauteng High Court,
Johannesburg.
27 February 2012.
Rts/B16/p5

Hearing: 5 – 8 February 2013.
Judgment Delivered: 6 March 2013.

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