IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOODHOPE PROVINCIAL DIVISION)

REPORTABLE
CASE NO. 460/2005

LO (PTY) LTD	**PLAINTIFF**
RY JANUSZ LUTEREK	**FIRST DEFENDANT**
GISTRAR OF DEEDS, **OWN**	**SECOND DEFENDANT**

JUDGMENT DELIVERED ON 27 OCTOBER 2006

D, J

UCTION

he question for determination in this matter is:

) Whether the suspensive condition relating to the rezoning of the erven to group housing contained in clause 13.5 of the contract was inserted into the Deed of Sale for the sole or exclusive benefit of the Plaintiff as purchaser; and

i) If it was inserted for the exclusive benefit of the Plaintiff, whether the waiver was at all orally communicated to the Defendant on or about 2 August 2004 as alleged by the Plaintiff.

he dispute arises from the written contract of purchase and sale oncluded between the Plaintiff and the First Defendant in respect of wo (2) vacant erven situated at Heidelberg, Cape, on 12 June 2004, n terms of which the Plaintiff purchased the said immovable roperties from the First Defendant for an amount of R80 000.00. The natter first came before Court by way of opposed motion roceedings. The dispute could not be resolved on the papers

esulting in the referral of the matter to oral evidence. Mr. Van der Merwe appeared for the Plaintiff whilst Mr. Smith appeared for the First Defendant.

CTUAL BACKGROUND

he Plaintiff is a company duly registered in terms of the laws of this ountry and has as its registered head office at 14 Springstreet, Mosselbay, Western Cape. The First Defendant is an adult male esident at Flat number 6, Linkside Park, Harry Muller street, Mosselbay, Western Cape. The Second Defendant is the Registrar of Deeds and oes not feature in these proceedings but was merely cited in its fficial capacity in terms of the provisions of Act 47 of 1937 as mended.

he Plaintiff claims specific performance in the following terms against he First Defendant (hereinafter the "Defendant") of his obligations in erms of the written Deed of Sale entered into between the parties on he 12th of June 2004 in respect of erven 943 and 944 Heidelberg:

"(1) Dat verklaar sal word dat die koopkontrak aangegaan tussen die partye op 12 Junie 2004 vir die verkoop van erwe 943 en 944 Heidelberg, hierby aangeheg gemerk aanhangsel "A", geldend en bindend is tussen die partye;

(2) Dat verklarr sal word dat Eiser geregtig is om oordrag van die eiendom bekend as erwe 943 en 944 Heidelberg te neem in terme van die koopkontrak, aanhangsel "A", teen betaling van die koopsom en die oordragskostes;

(3) Dat Eerste Verweerder gelas sal word om binne 14 dae na datum van die uitspraak in hierdie saak alle dokumente te teken en stappe te neem as wat nodig mag wees ten einde oordrag van die eiendomme hierbo vermeld teen betaling van die koopsom in die naam van Eiser oor te dra, by gebreke waarvan die Balju van Heidelberg, gemagtig en gelas word om al sodanige dokumente te teken en stappe te neem as wat nodig mag wees om oordrag van die eiendomme in die naam van die Eiser te bewerkstellig;

(4) Dat Eerste Verweerder gelas sal word om die koste van die saak te betaal."

is also not in issue that the Plaintiff represented by one of its directors, acques Esterhuizen and Defendant in person, on the 12th of June 004 and at Heidelberg, Western Cape Province entered into the written Deed of Sale relied upon by the Plaintiff in this action and in erms whereof Plaintiff bought two vacant plots to wit erven 943 and 44 Heidelberg, Western Cape Province and situated at Middleton nd Buitekant Streets, Heidelberg, Western Cape Province, from Defendant at a purchased price of R80 000.00.

n support of the relief claimed as set out above, the Plaintiff averred n its declaration that the Deed of Sale was subject to a suspensive ondition that the Plaintiff as purchaser be in a position to re-zone the roperty to group housing within six months of the conclusion of the Deed of Sale. This averment by the Plaintiff is admitted by the Defendant but Defendant in addition pleaded that the parties also

greed that if the rezoning did not take place within the stipulated eriod, the deposit paid by the Plaintiff to the first Defendant, would e forfeited to the First Defendant.

he Plaintiff in its declaration further averred that the suspensive ondition was included in the Deed of Sale for its sole benefit. This llegation by the Plaintiff is denied by the Defendant who pleaded hat the suspensive condition was inserted into the contract in the orm in which it appears in annexure "A", for the benefit of the Defendant and the Defendant in paragraphs 6.2.1 to 6.2.3 of his plea as elaborated on this averment. Plaintiff further in its declaration verred that on or about 2nd of August 2004, the Plaintiff waived the uspensive condition referred to above and which waiver was orally ommunicated to an agent of the Defendant, one Quinton otherforth (hereinafter "Mr. Rotherforth"). This averment in the eclaration as far as the manner in which the communication was one, is elucidated by the Further Particulars and the evidence dduced and is to the effect that the communication was made by he Managing Director of Plaintiff, Mr. Jacques Esterhuizen. The laintiff's allegations in this regard are denied as if specifically raversed.

he Plaintiff further alleged in it's declaration that it had complied with ll its obligations in terms of the Deed of Sale as far as the payments of he purchase price and delivery of guarantees, are concerned. This llegation by the Plaintiff is denied by the Defendant who, in mplification of the denial pleaded that:

) The Plaintiff failed to pay the deposit of R8 000.00 on or before 26th June 2004 and that such deposit was only paid to Hahn & Hahn Attorneys on July 2004;

i) The Plaintiff failed to deliver a guarantee for the payment of the balance of the purchase price of R72 000.00 within thirty days of the signing of the contract by both parties. A guarantee for the payment of R60 000.00 was delivered to Hanh & Hahn Attorneys during November 2004;

ii) The Plaintiff failed to deliver a guarantee for the payment of the balance of R12 000.00 within the stipulated period, or at all.

he Plaintiff further averred that notwithstanding demand, the Defendant failed to give transfer of the properties into Plaintiff's name, n allegation admitted by the Defendant who further pleaded:

) that upon non-fulfilment of the suspensive condition by the Plaintiff within the stipulated period, the contract terminated;

i) alternatively that the Defendant cancelled the contract as a result of the Plaintiff's breaches thereof, namely:

(a) to deliver the guarantee for the payment of the full balance of the purchase price within the stipulated period or at all and/or;

(b) to attend to the re-zoning of the properties in question to group housing within the stipulated period or at all.

he Plaintiff's further allegation that the Defendant avers that the Deed of Sale has lapsed because of non-fulfilment of the suspensive ondition, alternatively that he had lawfully cancelled the Deed of ale, are admitted. Plaintiff has also, at the request of the Defendant ontained in the Rule 37 minute, filed further particulars relating to the

laintiff's alleged oral communication of the waiver of the suspensive ondition.

AINTIFF'S CASE

Mr. Jacques Esterhuizen testified that he is a co-director with his father nd managing director of the Plaintiff company. As such he is in harge of the day to day activities of the company. The latter is a evelopment company. According to Mr. Esterhuizen the Plaintiff was nitially only interested to take transfer of the properties in the event of he rezoning of the erven to group housing. He mentioned that the laintiff was also developing a site direct across the street from the wo (2) erven and for which purpose it had also applied for rezoning o group housing. It was Mr. Esterhuizen's evidence that the Plaintiff ad insisted that a similar suspensive condition be included in all the ontracts which it had entered into during that time in respect of roperties which it purchased or offered to purchase in Heidelberg. It vas for this reason, testified Mr. Esterhuizen, that he in his own andwriting inserted the first part of clause 13.5, containing the uspensive condition, as a back stop, in the event of the application or rezoning to group housing, not being successful. He further testified hat on the date of the signing of the contract on behalf of the laintiff, he handed a cheque in respect of the deposit to the estate gent, Mrs. Louw. The Plaintiff then applied for a bond through Mrs. ischer, the bond originator in the amount of R60 000.00 in respect of he balance of the purchase price of the two (2) erven priced at R80 00.00. He was later on telephonically informed by Mrs. Fischer that he bond had been approved. After a couple of days after the pproval of the bond, Mr. Esterhuizen had a telephone conversation vith Mr. Rotherforth. It was during this conversation that Mr. Esterhuizen

sked Mr. Rotherforth to refund the Plaintiff an amount of R60 000.00 of he R72 000.00 then held in trust by Hahn & Hahn Attorneys. This sum of noney, according to Mr. Esterhuizen had been paid over by Attorney auch Gertenbach in respect of the balance of purchase price. ccording to Mr. Esterhuizen it was during the same conversation that e told Mr. Rotherforth that he should proceed with the transfer of the roperties, notwithstanding the fact that the rezoning to group ousing had not been approved yet, as the Plaintiff waives this ondition and seeks transfer of the erven into its name as soon as ossible.

ccording to Mr. Esterhuizen he similarly indicated to Attorney ecoraro of P.W. Hoffman Attorneys of Heidelberg, the bond ttorneys. Mr. Esterhuizen testified that he probably phoned Mr. otherforth from his cellular phone number 082 566 2890. The onversation, according to Mr. Esterhuizen, could have taken place a ay or two before or after 2 August 2004. He further testified that the ossibility existed that the telephone conversation might have been nitiated by Mr. Rotherforth and could have been made on his (Mr. sterhuizen's) landline and not cell phone. Mr. Esterhuizen testified that y the time he received notification of the bond, the Plaintiff had a hange of heart as far as the usefulness of the erven was concerned nd had decided to keep and develop the erven, even if the pplication for rezoning to group housing was not approved. On 17 lovember 2004 Mr. Esterhuizen had a telephonic conversation with Mr. Rotherforth during which he asked Mr. Rotherforth when can the ransfer documentation necessary to effect the transfer of the roperties be expected. In December 2004 Mr. Esterhuizen received he letter in Bundle A (A37) with certain documentation for signature

y the Plaintiff. He duly signed the documents on behalf of the Plaintiff nd returned same to Hahn & Hahn Attorneys. It was on or about 22 ecember 2004 that Mr. Esterhuizen received a copy of the letter A38 rom Attorney Pecoraro to which he responded with letter A40. Mr. sterhuizen subsequently received letter A43 from Mr. Rotherforth and copy of A41 from Mr. Pecoraro. The two letters were in response to he letter A40 which he had written. It was at this stage that Mr. sterhuizen handed over the matter to his attorneys, Goussard ttorneys of George. His attorneys on his instructions responded to A43 y writing letter A45. Correspondence was then generated between ttorneys.

nder cross-examination Mr. Esterhuizen conceded that in the eclaration it is alleged that the telephonic conversation took place n or about 2 August 2004 but that in his Affidavit filed in support of he earlier application, he under oath stated that it was on 2 August 004, whilst the Further Particulars provided at the Defendant's equest, his attorneys of record stated that the conversation took lace during August 2004. He further conceded that his outgoing ellularphone records for the period 2 August 2004 until the end of hat month, do not reflect that a call had been made from his ellularphone to the landline of Hahn & Hahn Attorneys. Mr. sterhuizen testified that on behalf of the Plaintiff he tendered ayment of the purchase price of the properties against transfer and onfirmed that he insists on specific performance of the First efendant's obligations in terms of the Deed of Sale. There were umerous contradictions which surfaced when Mr. Esterhuizen was ubjected to cross-examination. He obviously faced certain difficulties

when he attempted to explain certain aspects of his evidence. These will be dealt with when evidence is evaluated holistically.

Mr. Carmine Pecoraro testified that he was appointed as the bond attorney in this matter. On 29 July 2004 he received a telephone call from Ms Fischer informing him that a bond in the amount of R60 000.00 had been approved in favour of the Plaintiff. On or about 4 August 2004 he received confirmation of the bond approval by means of the document filed as A50 from the bond originator Ms Fischer. Mr. Pecoraro thereafter telephonically contacted Mr. Esterhuizen and informed him accordingly. It was during this conversation that Mr. Esterhuizen indicated to him that the Plaintiff had waived the suspensive condition relating to the rezoning of the erven to group housing provided for in the Deed of Sale. On or about 22 December 2004 Mr. Pecoraro received the letter filed of record as A38 and forwarded a copy thereof to Mr. Esterhuizen. He testified that an amount of R72 000.00 was refunded to him by Hahn & Hahn Attorneys. It is from this amount that he paid out R60 000.00 to the Plaintiff. Mr. Pecoraro stated that the balance of R12 000.00 is still in the trust account waiting to be paid over to Hahn & Hahn Attorneys on registration of transfer of the erven into the name of the Plaintiff. According to Mr. Pecoraro, he only became aware that the incorrect amount had been paid over after the first week in December 2004 when the firm's trust account was reconciled. Mr. Pecoraro wrote and sent the letter, (A53) to the transfer Attorneys and he was not thereafter informed that there was any problem pertaining to the transfer of the properties brought about by non-compliance. He believed everything was on track. It came to light when Mr. Pecoraro was cross-examined that his firm P.W. Hoffman had often done work

or the Plaintiff and Mr. Esterhuizen prior and subsequent to this ransaction. The loan Debit Authority telefaxed to Hahn & Hahn Attorneys by Mr. Pecoraro was not a guarantee and it hardly surprised im that Hahn & Hahn Attorneys did not accept it. Testifying in chief Mr. Pecoraro mentioned that he had no knowledge whether Mr. sterhuizen informed anyone else besides himself that the Plaintiff was waiving the suspensive condition in the contract.

Mrs. Louw testified that Mr. Esterhuizen mentioned a condition egarding the rezoning of the properties in question and asked for a me period. She was very uncertain whether Mr. Esterhuizen nentioned the six (6) month as it later appeared in the condition. She vas, however, sure that she would have first discussed the period with he First Defendant. When cross-examined on this aspect, Mrs. Louw onceded that the First Defendant could have mentioned six (6) nonth period as she was under the impression that the Plaintiff would ttend to the rezoning of the properties in a much shorter period ecause it was busy with the rezoning of other properties in the area Mrs. Louw further testified that the First Defendant had insisted on the anction of "Deposit NOT REFUNDABLE" which she understood to nean that the Plaintiff would have to forfeit the deposit if the sale fell hrough. She added that she did discuss this with Mr. Esterhuizen who ccepted it. Under cross-examination she conceded that the words Deposit NOT REFUNFABLE" related to paragraph 13.5 only and not to he other conditions contained in paragraph 13. Mrs. Louw testified hat the First Defendant telephoned her at some stage and told her hat the transaction had fallen through and asked her to market the roperties again at a higher price and not to tell Mr. Esterhuizen about . This, according to her concession could have taken place during

anuary 2005. Mrs. Fischer testified that she knew Mr. Esterhuizen and hat she attended to the Plaintiff's bond application for R60 000.00 which was approved during July 2004 whereafter she advised Mr. sterhuizen and Mr. Pecoraro accordingly.

ST DEFENDANT'S CASE

Mr. Luterek testified that he instructed Mrs. Louw to market his two (2) roperties in Heidelberg for approximately R80 000.00. Mrs. Louw later ontacted him to advise him that she had a purchaser and she iscussed certain standard conditions with him as well as her ommission and that he was satisfied with such conditions. He testified hat Mrs. Louw later contacted him to inform him that the purchaser ntended rezoning the properties and wanted a further condition nserted into the contract in this regard. He was concerned that this ould delay the transaction indefinitely and he discussed this aspect with her and he suggested giving the purchaser the period of six (6) months to attend to the rezoning. He further insisted that such rezoning would be for the purchaser's account. When he received the written ontract for signature, he read paragraph 13.5 and he then inserted he words "Deposit NOT REFUNDABLE" at the end of such paragraph s he wanted some compensation if the sale fell through after having o wait six (6) months for the rezoning to take place. He further iscussed this with Mrs. Louw before returning the contract to her.

nder cross-examination he confirmed the above and testified further hat the period of 6 months was important to him as he did not want o wait indefinitely for his money and that he would never have greed to an open ended condition. He testified further that he was ot in a hurry to sell the properties and that he had no prior offers to

hat of the Plaintiff. He testified further that he was a suspicious person nd that he did not want to have to pay any costs for the rezoning if he purchaser resiled from the contract, hence his insistence that the ezoning would be for the purchaser's account.

Mr. Luterek testified in chief that he regularly spoke to his brother at ttorneys Hahn & Hahn and on occasion he also spoke to Mr. otherforth about the progress in this transaction. He was never dvised by anyone that the Plaintiff had waived the suspensive ondition and it was only about four (4) to five (5) months after the ontract was signed that he was advised that the Plaintiff wanted a efund of the money already paid to Hahn & Hahn. During December 004 he was advised that the Plaintiff had not rezoned the properties nd he instructed Hahn & Hahn to put them to terms and if they failed o do so, then to cancel the contract. He was advised in January 2005 hat the contract was cancelled and that he could re-market his roperties, which he did.

Mr. Rotherforth testified that during 2004 he was a professional ssistant at Hahn & Hahn and dealt with this transaction. In reparation for the hearing of the matter during 2005 he went through ll the message books and the firm's telephone records for the period uly 2004 to December 2004 and he could only find one reference to ne telephonic discussion with Mr. Esterhuizen and that was on 17 lovember 2004 when Mr. Esterhuizen asked him when Hahn & Hahn as going to refund the R60 000.00 to the Plaintiff. He recalled that Mr. sterhuizen was somewhat rude to him and the impression he got was hat Mr. Esterhuizen desperately needed the money. He further went hrough the office file and was satisfied that all the relevant

ocumentation for this trial had been discovered by the First Defendant. He denied that he spoke to Mr. Esterhuizen on 2 August 004 and further denied that Mr. Esterhuizen ever informed him that he Plaintiff was waiving the suspensive condition. He knew the mportance of suspensive conditions in a contract and he would have onfirmed such a waiver in writing if Mr. Esterhuizen had informed him hereof. He only became aware of the suspensive condition when the irst Defendant contacted him in December 2004 to enquire whether he rezoning of the properties had taken place. He then contacted he Heidelberg municipality and was advised that the Plaintiff's pplication for rezoning had not been granted because certain fees ad not been paid by the Plaintiff. Mr. Rotherforth testified further that e only became aware of the alleged waiver of the suspensive ondition when he read Mr. Esterhuizen's letter dated 28 December 004, when his office reopened on 3 January 2005. He confirmed the etters received and written by him with regard to this transaction and eadily made concessions in favour of the Plaintiff. He was diagnosed s being HIV positive in August 2005 and as a result of this and the ncreased pressure at work he resigned from Hahn & Hahn in lovember 2005. He is currently employed as a legal advisor at Legal Wise and he has no interest in the outcome of this trial.

PLICABLE LAW

A party claiming specific performance in terms of a contract must:

) allege and prove the terms of the contract;

i) allege and prove compliance with its antecedent or reciprocal obligations or must tender to perform them;

See: ***SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle*** 1955 (3) SA 541 (D)

ii) allege non-performance by the defendant;

v) claim specific performance.

ee Harms, **Amler's Precedent of Pleadings**, 6th edition, p. 316

is trite law that a Court will, as far as possible, give effect to a laintiff's choice to claim specific performance. The Court, however, oes have a discretion in a fitting case to refuse such relief and to eave it to the Plaintiff to claim damages. This discretion must be xercised judicially and it is not circumscribed by rules. Each case has o be judged in the light of its own circumstances. Further on, the iscretion has to be exercised with reference to the facts as they exist hen performance is claimed and not as they were when the ontract was concluded.

ee eg: ***Santos Professional Football Club (Pty) Ltd v Igesund and nother*** 2002 (5) SA 697 (C); (on appeal reported as 2003 (5) SA 73 C); Harms, **Amler's Precedent of Pleadings** 316.

is for a defendant to allege and prove facts on which the Court can nd must exercise its discretion in his/her/its favour in this regard.

ee eg: ***Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*** 1982 (1) SA 398 (A).

ith regard to suspensive condition for sole benefit of the purchaser he legal position applicable is as follows:

a) Whether a suspensive condition in a Deed of Sale was inserted for the sole or exclusive benefit of a particular party, is a matter of interpretation of the contract and the normal rules applicable to the interpretation of the contract apply.

ee: ***Westmore v Crestanello*** 1995 (2) SA 733 (W) 735 E-G; ***Meyer v arnardo and Another*** 1984 (2) SA 580 (W) 586 J-H; ***Van Jaarsveld v oetzee*** 1973 (3) SA 241 (A); ***Marais v Van Niekerk*** 1991 (3) SA 724 (E).

Non-fulfilment of a condition that is exclusively for the benefit of one party may be unilaterally waived by that party and cannot be relied upon by the other party. Two riders must be added to this proposition:

i) it must be clear that the parties intended the condition to be exclusively for the benefit of the one party;

ii) if the contract places a time limit on the fulfilment of the condition, the party for whose exclusive benefit it was imposed, cannot waive it after the time-limit has expired.

See eg: ***Christie, The Law of Contract in South Africa,*** 5th edition, 146; ***Ming-Chieh Shen v Meyer*** 1992 (3) SA 496; ***Westmore v Crestanello*** 995 (2) SA 733 (W).

ATION OF EVIDENCE AND APPLICATION OF LAW TO FACTS

The words "Deposit NOT REFUNDABLE" appearing at the end of paragraph 13.5 of the agreement, according to Mr. Esterhuizen, were written into the contract prior to him appending his signature thereon. In his view these words related to all the conditions contained in clause 13.5. This, however, is difficult to comprehend since the words were only inserted by the First Defendant when Mr. Esterhuizen had inserted the Afrikaans words appearing in clause 13.5. Of significance though is Mr. Esterhuizen's concession that he signed the contract and initialled this clause containing the word "Deposit NOT REFUNDABLE", with full knowledge and understanding that if the Plaintiff did not waive the suspensive condition contained in clause 13.5 before 12 December 2004 or if the Plaintiff did not rezone the properties to group housing before such date and the sale fell through, the Plaintiff would then forfeit the deposit paid. This concession is strangely consistent with the First Defendant's evidence that he had no interest in what the Plaintiff intended to do with the properties but that his only concern

was that the time for the rezoning was limited and that such rezoning was for the Plaintiff's account and that he would be compensated for the waiting period if the sale fell through.

I found it rather strange that Mr. Esterhuizen's testimony is that there was no negotiation regarding the period of six (6) months mentioned in clause 13.5, a period within which the rezoning had to be done and that it was himself who suggested such a period to Mrs. Louw, the estate agent. It is of note that Mrs. Louw readily conceded that the First Defendant could possibly have suggested the time period of six (6) months as she was under the impression that the Plaintiff could attend to the rezoning of the two properties within a much shorter period because it was already busy with such rezoning in the area. This Court cannot also lose sight of the fact that Mr. Esterhuizen during January 2005 deposed to an Affidavit filed in support of an urgent application the Plaintiff brought against the First Defendant. Significantly Mr. Esterhuizen stated in that Affidavit *inter alia* that the said suspensive condition was negotiated (beding) for the exclusive benefit of the Plaintiff. To now testify that there was no negotiation on this aspect, is indeed not only contradictory, but is most certainly disingenuous to say the least.

It is important to mention that the application proceedings the Plaintiff Company brought against the First Defendant form an integral part of this matter. In the same Founding Affidavit Mr. Esterhuizen also stated that on 2 August 2004 he expressly orally informed Mr. Rotherforth of the firm Hahn & Hahn Attorneys in Pretoria (the appointed conveyancers by the First Defendant who were to attend to the registration of transfer) that the Plaintiff was waiving the said

uspensive condition and that it desired that the registration of transfer hould take place as quickly as possible. The First Defendant and Mr. otherforth in answer to the Founding Affidavit told a totally different tory. The First Defendant denied that the suspensive condition in the orm in which it appears in the contract was inserted into the contract or the exclusive benefit of the Plaintiff. Mr. Rotherforth denied that Mr. sterhuizen or any other person on behalf of the Plaintiff orally advised im that the Plaintiff had waived the provisons of the suspensive ondition and that the first time that he became aware of the alleged vaiver of the rezoning clause in the contract was when he received a etter from the Plaintiff dated 28 December 2004.

was initially alleged by Mr. Esterhuizen that he used his cellular hone number 082 566 2890 in telephoning Mr. Rotherforth about the vaiver of clause 13.5. However, the cellular phone records in respect f the above-named cellular phone number generated by Vodacom overing the period 1 August 2004 to 31 August 2004 handed in by the onsent of the Plaintiff and marked as Exhibit "B", do not show that Mr. sterhuizen did infact, make that call. Mere intention or mental esolution to waive a right which is not communicated to the other arty affected by such waiver and which is not evidenced by any vert act known to him, cannot in law constitute a waiver of the right y the person entitled to enforce it (***Mutual Life Insurance Co of New ork v Ingle*** 1910 TPD 540).

Mr. Esterhuizen did concede when he was cross-examined that there vas no record of any telephone call made from his cellular phone to ttorneys Hahn & Hahn during the period stretching from 1 August 004 to 31 August 2004 on Exhibit "B". He then suggested that Mr.

otherforth could have telephoned him or that he had used another elephone to communicate the waiver to Mr. Rotherforth. The latter ssertion apart from the fact that it contradicts Mr. Esterhuizen's ffidavit as well as his previous evidence in the same matter and on he same aspect, in my view, smacks of untruthfulness and dishonesty n the part of Mr. Esterhuizen. With regards to the refund of R60 000.00 Mr. Esterhuizen testified he informed Mr. Rotherforth that the Plaintiff's ond had been approved and that he requested Mr. Rotherforth to efund to him an amount of R60 000.00 which Mr. Rotherforth agreed o do. When cross-examined on this Mr. Esterhuizen conceded that it vas more probable that he would have telephoned Mr. Rotherforth as e wanted to inform him about the waiver of the suspensive condition nd he wanted to request him to refund the R60 000.00. His problems ompounded, however, even on this point because when it was ointed out to him that Mr. Rotherforth would not have agreed to uch a refund at that stage as the R72 000.00 had not yet been eceived by Hahn & Hahn Attorneys, he suggested that the telephone all must have been on a date after Hahn & Hahn Attorneys had eceived the sum of R72 000.00. I hasten to mention without comment hat when a witness jumps from one assertion to the other whenever e finds himself in some difficulty, then it would not be misplaced for ny trial Court to come to an inescapable conclusion that such witness is engaged in a game the aim of which is certainly to mislead he Court. I am very much aware that the Deed of Sale *in casu* ontains no provision in terms of which any waiver could be ommunicated to the other side. But then, any form of clear and nequivocal intimation of waiver would suffice (See ***De Villiers and nother NNO v BOE Bank Ltd*** 2004 (3) SA 1 (SCA); ***Alesandrello v Hewit*** 981 (4) SA 97 (W)). I accept that the waiver in the context of this

matter could have been made orally and would have had legal orce. What troubles me though is whether or not this waiver was nade at all no matter how. If the Plaintiff succeeded in proving that he waiver was infact communicated to Mr. Rotherforth (who then cted as the First Defendant's agent) that waiver could have been eemed to be a communication to the First Defendant. (See ***Basson v emini and Another*** 1992 (2) SA 322 (D).

Another aspect of Mr. Esterhuizen that somewhat must be considered n an endeavour to find if anybody else knew timeously about this vaiver, is to be gleamed from his communications with his own ttorneys P.W. Hoffman. It is to be recalled that in his testimony Mr. sterhuizen stated that his Attorneys P.W. Hoffman made several vritten requests to Hahn & Hahn Attorneys to refund the R60 000.00 etween 16 August 2004 and 28 October 2004. We know that ttorneys P.W. Hoffman eventually received a refund. What I find trange and somewhat telling is that regard being had to orrespondence as a whole written by P.W. Hoffman to Hahn & Hahn ttorneys over the period mentioned *supra* one does not find even a ngle correspondence that mentions waiver. It is most certainly not nreasonable to have expected the Plaintiff's Attorneys to emphasize his aspect, especially because the bond had already been pproved during July 2004. We now know from Mr. Esterhuizen's estimony and from the annexures filed of record that Messrs. Bailey & e Roux land surveyors were given instruction by Mr. Esterhuizen to ttend to the rezoning applications including the rezoning of the First efendant's properties which are the subject matter in this litigation. It vas totally an insurmountable mountain to climb for Mr. Esterhuizen vhen he was asked to explain why he had allegedly waived the

uspensive condition on 2 August 2004 and yet instructed the land urveyors during September 2004 to proceed with such rezoning pplication as evidenced in Exhibit "A" page 56-57.

Mr.van der Merwe referred to the approach to be adopted where a Court is confronted with two (2) irreconcilable versions as uthoritatively dealt with in ***Stellenbosch Farmers' Winery Group Ltd nd Another v Martell et kie and Others*** 2003 (1) SA 11 (SCA). It is ommon cause that the latter judgment was indeed followed and pplied by the Supreme Court of Appeal in ***Santam Bank Beperk v iddulph*** 2004 (5) 586 (SCA) and ***Louwrens Oldwage*** 2006 (2) SA 161 SCA). I am indeed bound to follow the approach as enunciated by ur Supreme Court of Appeal. In fact, in ***Santam Bank Beperk v iddulhp*** 2004 (5) SA 586 (SCA) 592 B-C, the Court held that even if a witness may not have been a satisfactory one, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities, the essential feature of the tory which he tells are true. Bearing the above guidance in mind, I ause and rhetorically ask a question, which essential features of the tory told by Mr. Esterhuizen in the instant matter can infact be abelled as truthful? I hope to find answers to this rhetoric question as I roceed to analyze the testimony in this case and marry the facts to he legal principles.

Mr. van der Merwe submitted that in his view Mr. Esterhuizen's version was corroborated by A37 and in particular by Mr. Rotherforth's esponses to A40 and A45, A41, A43 and A47 respectively. Mr. van der Merwe relied for this submission on authorities such as ***Seeff Commercial and Industrial Properties (Pty) Ltd. v Silberman*** 2001 (3) SA

52 (SCA) 952 H; ***McWilliams v First Consolidated Holdings (Pty) Ltd*** 982 (2) SA 1 (A); ***Decro Paints and Hardware (Pty) Ltd v Plascon-Evans aints (TVL) (Pty) Ltd.*** 1982 (1) SA 213 (O) 220 F-H; ***Hamilton v Van Zyl*** 983 (4) SA 379 (E) 388E – 389B.

ven if I have already referred to this aspect of the Plaintiff's case, I ndertake to revisit same in order to ensure that I do not lose sight of he content of this submission by Mr. van der Merwe. Mr. van der Merwe submitted further that Mr. Rotherforth's evidence denying the ral communication of the waiver to him must be rejected by the Court because in his view such evidence is unreliable, untruthful and ot credible regard being had to the improbabilities therein ontained. Mr. van der Merwe was very critical of Mr. Rotherforth's nemory and the practice followed by Hahn & Hahn Attorneys. I will bviously evaluate Mr. Rotherforth's testimony.

Mr. Pecoraro telefaxed a Loan Debit Authority to Hahn & Hahn Attorneys but when cross-examined he readily conceded that this was ot a guarantee (kantoor waarborg) and that it came as no surprise o him when Hahn & Hahn Attorneys did not accept it. I find it rather trange that when Mr. Pecoraro discovered through reconciliation hat the sum of R72 000.00 had been refunded, he did not merely pay ack to Hahn & Hahn Attorneys the sum of R12 000.00. This, he could o simultaneously with the refund of R60 000.00 he made to the laintiff. Mr. Pecoraro's testimony that he had no knowledge whether Mr. Esterhuizen informed anyone else beside himself that the Plaintiff was waiving the suspensive condition in the contract is to me of some mportance. It serves as an indicator that the probabilities are such hat Mr. Esterhuizen in fact never waived and/or communicated his

waiver to Mr. Rotherforth as testified by the former. It is not out of the rdinary for this Court to have expected an experienced businessman n the person of Mr. Esterhuizen to have advised his own attorney of uch a crucial fact, if he indeed informed the seller (First Defendant) of he said waiver.

Mrs. Louw's, as well as Ms Fischer's evidence did not, in my view, dvance the Plaintiff's case any further especially on the aspect of mportance in this matter. The facts in the instant matter strangely lend hemselves squarely on the following law, succinctly set out in ***Design nd Planning Service v Kruger*** 1974 (1) SA 689 (T) 697G:

> **"In my view, when a suspensive condition, of a kind which has not been inserted in the contract for the specific benefit of one of the parties only, remains unfulfilled after the lapse of a reasonable time for fulfilment, the contract is discharged automatically, by virtue of an implied term to that effect, unless there is something in the contract negating the implication of such a term, and subject to the possibility of fictional fulfilment of the condition by reason of the conduct or inaction of either of the parties. Ordinarily, no action on the part of either of the parties' equivalent to a placing in *mora* of the other in relation to the fulfilment of the condition as such is required before the contract comes to an end."**

here is, in my view, nothing in the contract in the instant matter that egatives the implied term to the effect that non-fulfilment of the uspensive condition renders the contract a nullity. It is well established hat a suspensive condition in a contract makes the operation of the ontract subject to the occurrence of a future event. Once the ondition is fulfilled, the contract becomes binding and its terms can

e enforced. See: ***Tuckers Land and Development Corp (Pty) Ltd. v trydom*** 1984 (1) SA (A).

It is important to note that the suspensive condition must be fulfilled on or before the time limit stated in the contract and if this does not happen, the operation of the contract terminates automatically and immediately upon such non-fulfilment. See: ***Phillip v Townsend*** 1983 (3) SA 403 (C); ***Dirk Fourie Trust v Gerber*** 1986 (1) SA 763 (A). I was very much impressed with the straight forward and logical manner used by Mr. Rotherforth in testifying. He was in my view a very good witness. I have no reason to doubt his honesty on the aspects he testified about. Mr. van der Merwe subjected this witness to thorough cross-examination dealing at length not only with evidence he presented but also Mr. Rotherforth's professional and even personal life. Mr. Rotherforth has no reason to protect any party in this litigation. He long left Hahn & Hahn Attorneys. I find him to have been unbiased and reliable as a witness in this matter.

I have studied the various annexures contained in Exhibit "A". I do not agree that A37 and Mr. Rotherforth's responses to A40, A43, A45 and A47 in any much helpful manner supports Mr. Esterhuizen's testimony regarding the waiver of the suspensive condition. It is indeed the law that the conduct of the contracting parties also has relevance in the determination of the question of whether or not waiver had taken place. In the instant matter I have been unable to deduce anything even from the conduct of the parties supporting the contention that there was waiver. On the contrary, the fact that Mr. Esterhuizen allegedly waived the suspensive condition on 2 August 2004 (or during August 2004) and during

September 2004 the same Mr. Esterhuizen instructed the land surveyors to proceed with such rezoning application as evidenced by Exhibit A56-57, is clearly indicative of the truth, namely, that there was no such waiver at all. In my view the Plaintiff's claim stands to be dismissed.

STS

The general rule that a successful party is entitled to its costs must clearly apply in the instant matter. There is and can be no justification in the circumstances of this matter to depart from the general rule.

ER

In the result I make the following order:

a) The Plaintiff's claims are hereby dismissed with costs.

b) The First Defendant shall pay the wasted costs (as tendered) of 1 June 2006 occasioned by the non-availability of its witness.

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D, J