Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION)

CASE No: 10830/2005

In the matter between:

MATTHEW PAUL LÖTTER N O	**First Plaintiff**
LORRAINE JENNIFER LÖTTER N O	**Second Plaintiff**

and

LEON NEPGEN	**First Defendant**
L M NEPGEN	**Second Defendant**

JUDGMENT DELIVERED : 22 FEBRUARY 2006

MOOSA, J:

INTRODUCTION

1. The crisp issue in this matter is whether the Deed of Sale dated 18 December 2004 entered into between the plaintiffs as purchasers and the defendants as sellers (the contract), has been validly cancelled or not. This issue is premised on the further issue whether the notice to remedy the breach was valid or not in terms of clause 10 read with clause 18 of the contract. For the sake of convenience, the plaintiffs will be referred to as the purchasers and the defendants as the sellers. Most of the relevant facts are common cause. The parties agreed that the matter

be adjudicated as a special case in terms of Rule 33. The parties agreed further on a written statement of facts which was admitted and recorded as evidence at the trial and marked Exhibit "A". It included certain annexures marked "B". These annexures consisted of certain documents and correspondence.

THE FACTS

2. The facts are briefly as follows. The sellers sold to the purchasers, as trustees of the Lötter Trust, certain immovable property situate in George in terms of the contract for the sum of R775 000. The purchasers paid the deposit of R75 000. The balance of the purchase price was to be secured by a guarantee issued by a recognised bank or financial institution on conditions acceptable to the sellers and payable on registration of transfer of the property. The guarantee was to be delivered within 30 days of the signing of the contract or such extended period that the sellers in their sole discretion may grant to the purchasers. The purchasers failed to furnish such guarantee within the stipulated time, that is, by 18 January 2005. It is common cause that such date was not extended by the sellers. The sellers' conveyancer sent a notice, dated 2 February 2005, to the purchasers by prepaid registered post to the *domicilium citandi et executandi* (*domicilium*) of the purchasers, calling upon them to purge the default, within seven days of the date of the notice. The sellers failed to comply with such demand by reason of the fact that they only collected the letter on 15 February 2005. The sellers elected to cancel the contract and on 14 February 2005 the sellers' conveyancer sent a letter, which was addressed to the Trust, to attorney Van der Vyver. The contents of the letter were on the same day communicated to the purchasers.

THE ACTION

3. The purchasers instituted action against the sellers, for specific performance in terms of the contract. The purchasers called upon the sellers to effect transfer of the immovable property which formed the subject-matter of the contract. The sellers pleaded that the purchasers had failed to comply timeously with the provisions of clause 2.2. and, as they were legally entitled to do, validly cancelled the contract in terms of clause 10, read with clause 18 thereof. The sellers admitted in the pleadings that the purchasers provided them with a bank guarantee for the payment of the balance of the purchase price against registration of transfer, but pleaded that same was only received after the contract had been lawfully cancelled, alternatively, the sellers pleaded that the right to cancel had already accrued due to the purchasers' failure to provide them with the necessary guarantee after lawful demand had been made.

THE MATERIAL CLAUSES

4. The clauses of the contract which are material to the resolution of the dispute are reproduced for easy reference. Clause 10 stipulates that:

> *"10. If the Purchaser commits any breach of this agreement or fails to punctually comply with any of the terms or conditions of this agreement, then the Seller shall be entitled to give written notice to remedy such breach, and should the Purchaser fail to comply with such notice within 7 (seven) days from date upon which it was sent or delivered, the Seller shall be entitled, without further notice and without prejudice to any other rights or remedies which he may have in law, including the right to claim damages, to:*
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> *10.1 cancel this agreement, in which event the Purchaser*

shall forfeit all moneys paid to the Seller or his agent in terms hereof and be responsible for any losses suffered by the Seller that is not covered by such moneys; or

10.2 to claim immediate performance and/or payment of all the Purchaser's outstanding obligations in terms hereof."

5. Clause 18, which is headed: Notices and *Domicilia*, provides as follow:

"18.1 The parties hereby choose ***domicilium citandi et executandi*** *for all purposes under this agreement at the respective addresses recorded in Schedule 'A' hereto.*

18.2 Any notice to any party shall be addressed to him at his ***domicilium*** *aforesaid and either sent by prepaid registered post, telefax or delivered by hand. In the case of any notice:*

18.2.1 Sent by prepaid registered post, it shall be deemed to have been received, unless the contrary is proved, on the third business day after posting;

18.2.2 Sent by telefax, it shall be deemed to have been received, unless the contrary is proved, on the day such notice is transmitted by the sender;

18.2.3 Delivered by hand, it shall be deemed to have

been received, unless the contrary is proved, on the day of delivery, provided that such date is a business day or otherwise on the next following business day."

THE *DOMICILIUM*

6. In annexure "A" the postal address of the purchasers, which I assume is the *domicilium* address, is given as P O Box 5544, Boksburg North 1460. No street address or registered office of the purchasers appears thereon. No *domicilium* address of the sellers appears on annexure "A". The notice, dated 2 February 2005, in terms of clause 10, was sent on the same day by prepaid registered post by the sellers' conveyancers to the purchasers. The notice was sent to the postal address referred to in annexure "A". For the purpose of the stated case, the postal address of the purchasers was accepted as their *domicilium* where notices were to be sent. The notice states that the seven day period runs from the date of the notice, whereas clause 10 stipulates that the seven day period runs from the day upon which the notice is sent or delivered. Nothing, however, turns on this issue as the date of the letter and the date when the notice was sent by prepaid registered post coincides.

THE *MORA*

7. The contention of the sellers is that the purchasers, having failed to provide the guarantee for the balance of the purchase price within 30 days of the signing of the contract, were in *mora ex re* in terms of clause 2.2 and no further notice was required to place them in *mora*. This argument is not strictly correct. The contract, in addition to providing for *mora ex re* also provides for *mora ex persona*

in terms of clause 10 (*lex commissoria*). Clause 2.2 stipulates a *"dies certus an acquando"* for the purchasers to provide a guarantee and the failure to do so automatically placed the purchasers in *"mora debitoris"* as the rule *"dies interpellat pro"* applies. (See Lawsa : Vol 5 part 1, second edition, at para's 220 & 222.) However, before the sellers could exercise their right to cancel, the purchasers had to be placed *in mora ex persona,* in terms of clause 10, read with clause 18. The sellers contended that they complied with these procedural requirements. The purchasers disputed this assertion and contended that the notice was not received by them timeously to enable them to remedy the breach.

THE NOTICE

8. There is authority for the proposition that, in the absence of an agreement to the contrary, a party who wishes to exercise his right to cancel a contract must convey such decision to the other party before the cancellation can become effective. There is also authority that this applies equally to a notice calling upon the defaulting party to purge his default. The *ratio* for the proposition is that termination of a contract has important consequences upon the reciprocal rights and duties of the parties to the contract. **Holmes, JA** in **Swart v Vosloo** 1965 (1) SA 100 (A) at 105G-H states:

> *"…it must be taken as settled that, in the absence of agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party, and cancellation does not take place until that happens."*

Rumpff, JA (as he then was) in **Miller and Miller v Dickinson** 1971 (3) SA 581 (A) not only echoes the *dictum* of **Holmes, JA** in **Swart v Vosloo** (**supra**) but goes further and says that *a fortiori* it applies likewise to a notice addressed to a

defaulting party to remedy his breach. I quote from p 588E:

> *"If a declaration of cancellation of an agreement by a creditor, in order to be effective, has to be brought to the mind of the debtor, in the absence of an agreement to the contrary, a notice to remedy a default before such cancellation, would, I think,* ***a fortiori*** *be required to be received by the debtor."*

In the latter case the *lex commissoria* clause in the contract provided for the posting of a warning letter as a method of conveying the demand to the purchaser. Counsel for the sellers contended that the reference to the posting of a warning letter in the *lex commissoria* expressly or by implication, provided that the notice need not be communicated to or be received by the purchaser. The court, in rejecting this argument, said that the grammatical and ordinary meaning of clause 13 (*lex commissoria*) and clause 17 (*domicilium citandi et executandi*) of the contract leaves no room for the construction contended for by the seller.

THE EVALUATION

9. With that as the factual and legal background, I proceed to examine the relevant provisions of the contract to determine whether the notice is valid or not. Clause 10, which constitutes the *lex commissoria*, provides that should the purchasers fail to comply with such notice (*interpellatio*) within seven days from the date upon which it was sent or delivered, the sellers can elect to enforce or cancel the contract. Sub-clause 18.2 of the Notices and *Domicilia* clause, elaborates on what constitutes "sent" or "delivered". As the notice in the present instant was sent by pre-paid registered post, I will, for present purposes, confine myself to the concept "sent" as elaborated in sub-clause 18.2.1. That sub-clause stipulates that any notice sent by prepaid registered mail to the *domicilium* address, shall be deemed

to have been received, unless the contrary is proved, on the third business day after posting. There are also certain deeming provisions with regard to a notice sent by telefax or delivered by hand namely, sub-clause 18.2.2 and 18.2.3. Such service is not relevant to our present enquiry, save insofar as same may be relevant to the interpretation and/or construction of clause 18.2.1.

10. The question which needs to be answered: is the notice vitiated by the fact that it was not received timeously? In my view the answer is to be found in the phrase "unless the contrary is proved" (the phrase). The purchasers had, in terms of clause 10, seven days from the posting of the notice to remedy the breach. The notice was posted on 2 February 2005. They had, in terms of clause 10, up to 9 February to purge the default. In accordance with sub-clause 18.2.1. the notice was deemed to have been received on the third business day after posting. In terms of such provision, the purchasers had until 7 February 2005 to purge the default if the seven day period is calculated from receipt in terms of the deeming provision. This basically allowed them two business days to act. The period is short and, in terms of the common law, may be unreasonable but one cannot escape the fact that the parties had contracted accordingly. However, there may be a saving grace for the purchasers to be found in the phrase "unless the contrary is proved". It is common cause that they rebutted the deeming provisions by establishing that they only received the notice on 15 February 2005. It is therefore necessary to place a proper construction on the phrase.

THE GOLDEN RULE OF CONSTRUCTION

11. The golden rule of construction is set out in the well-known judgment of **Cooper's & Lybrand and Others v Bryant** 1995 (3) SA 761 (A) at 767E-F as follows:

"According to the 'golden rule' of interpretation the language in the

document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnance or inconsistency with the rest of the instrument. ***Principal Immigration Officer v Hawabu and Another*** *1936 AD 26 at 31;* ***Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd*** *1934 AD 458 at 465-6;* ***Kalil v Standard Bank of South Africa Ltd*** *1967 (4) SA 550 (A) at 556D.*

The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself. See ***Swart en 'n Ander v Cape Fabrix (Pty) Ltd*** *1979 (1) SA 195 (A) at 202C (per* ***Rumpff, CJ****):*

'Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde ontmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel'."

12. I will proceed to determine the ordinary grammatical meaning of the phrase "unless the contrary is proved" within the context in which the phrase is used and within the scope, nature and purpose of the contract. The object of the exercise is to ascertain the true intention of the parties as contemplated in the contract. It is a canon of construction that every word or phrase is intended to have some effect or be of some use and should be construed in such a way that no clause, sentence or word shall be superfluous, void, insignificant or *pro non scripto*, unless such

construction would lead to absurdity. (**Wellworths Bazaars Ltd v Chandler's Ltd and Another** 1947 (2) SA 37 (A) at 43; **Attorney-General, Transvaal v Additional Magistrate for Johannesburg** 1924 AD 421 at 436; **Minister of Justice and Another v Breytenbach** 1942 AD 175 at 183.)

13. In applying the golden rule of construction, I am of the view that the literal and grammatical meaning of the phrase is perfectly clear and precise. It is capable of bearing one meaning only, namely that the deeming provisions of clause 18 can be rebutted by the purchasers presenting proof that they did not receive the notice on the third day after posting. The object of the notice was to grant the purchasers an opportunity to remedy the default. The fact that they did not receive the notice timeously denied them the opportunity to do so.

14. The *domicilium* was inserted for the benefit of the sellers. The deeming provision of clause 18 relieved the sellers from proving that the purchasers had not received the notice, timeously or at all. However, the inclusion of the phrase "unless the contrary is proved" shifted the onus of proof to the purchasers. The purchasers, according to the stated case, discharged that onus. The question is what are the legal consequences arising from the fact that the presumption contained in the deeming provisions had been rebutted? The contract does not throw any light thereon. What did the parties have in mind? Surely the matter could not have been left hanging in the air. Is there room to import an implied and/or a tacit term in the contract?

IMPLIED OR TACIT TERM

15. It appears that the underlying rationale for a court to determine the true intention of

the parties, as contemplated in a contract, accords with that by which the court has to determine whether there is room to read into a contract an implied or tacit term. In this regard the *dictum* of **Claasen, J** in **Van Diggelen v De Bruin and Another** 1954 (1) SA 188 (SWA) at 193G is incisive and I quote:

> *"It seems to me the process of reasoning by which the Court is required to arrive at the true intention of the parties or at what was within the contemplation of the parties is the same process as that by which the Court has to determine whether an implied term is to be read into a contract. Dealing with the question of the implied terms* ***Stratford, JA*** *said in* ***Barnabas Plein & Co v Sol Jacobson & Son*** *1928 AD 25 at p.31:*
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> > *'The true view appears to me to be that you have to get at the intention of the parties in regard to the matter which they must have in mind but which they have not expressed'."*

16. **Centlivres, CJ** in **Mullin (Pty) Ltd v Benade Ltd** 1952 (1) SA 211 (A) at 214C-H – 215A very succinctly and lucidly captures the circumstances in which a term is to be implied in a contract:

> *"The question I am now considering has also been dealt with in a series of cases in this Court. See* ***Union Government (Minister of Railways and Harbours) v Faux Ltd****., 1916 AD 105;* ***Barnabas Plein & Co v Sol Jacobson & Son****, 1928 AD 25, p. 31;* ***Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co., Ltd.****, 1932 AD 25 at pp. 31 - 33;* ***West Witwatersrand Areas, Ltd v Roos****, 1936 AD 62 at pp. 74 - 75; and* ***West End Diamonds, Ltd v Johannesburg Stock Exchange****, 1946 A.D. 910*

at p. 921. ***SOLOMON, J.A.****, in delivering the judgment of the Court in the case first mentioned said on p. 112:*

'It is needless to say that a Court should be very slow to imply a term in a contract which is not to be found there. ...The rule to be applied by a Court in determining whether or not a condition should be implied, is well stated by ***LORD ESHER*** *in the case of* ***Hamlyn & Co. v. Wood & Co.****, 1891 (2) Q.B.D. at 491, as follows:*

> *'I have for a long time understood that rule to be that a Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned'.*

In ***Barnabas Plein & Co v Sol Jacobson & Son****,* ***supra*** *at p. 31,* ***STRATFORD, JA****, quoted with approval the remarks of* ***SCRUTTON, LJ****, in* ***Reigate v The Union Manufacturing Co*** *118 LT 483. Those remarks were as follows:*

'You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident 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 have replied 'of

course, so and so. We did not trouble to say that; it is too clear'.""

17. **Corbett, AJA** (as he then was) in **Alfred McAlphine & Son (Pty) Ltd v Transvaal Provincial Administration** 1974 (3) SA 506 (A) at 531H, described a tacit term as follows:

> *"…an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances."*

Brand, JA in **Botha v Cooper and Lybrand** 2002 (5) SA 347 (SCA) at 359E-360E sets out with great clarity the approach to be adopted in imputing or inferring an implied and/or a tacit term in a contract. **Lewis, JA** re-emphasises in **Transnet Ltd v Rubenstein** [2005] 3 All SA 425 (SCA) that a term to be imputed must not only be reasonable or desirable, but necessary and that there could be no room for such a term if it would be in conflict with the express provisions of the agreement.

THE SUBMISSIONS

18. Adv **Coetzee**, on behalf of the purchasers, submitted that in the event of them succeeding in rebutting the presumption, the seven days period envisaged in clause 10 started to run from the date of receipt of such notice. In such event, on the facts of this case, it would have started to run from 15 February 2005 and in that event the purchasers were not in default. Adv **Van der Merwe**, on behalf of the sellers, submitted that on a proper construction of the contract, receipt of the notice by the purchasers was not a requirement for the period in question to start

to run. He contended that the deeming provision in clause 18.2.1 had no direct bearing on determining the intent of the parties as far as clause 10 is concerned. I cannot agree with this argument. In my view, Clause 10 cannot be read in isolation. It must be read with clause 18. The two clauses are interrelated. The provisions of clause 18 in fact, amplify the procedural provisions of clause 10.

THE AUTHORITIES

19. I have not been referred by counsel to any authority which is a case in point. Neither could I find any such authority in my research. Those cases to which I was referred to or which I found in my research dealt with similar clauses as *in casu*, save and except that they did not contain a rebuttable deeming provision. (**Chesterfield Investment (Pty) Ltd v Venter** 1972 (3) SA 777 (T); **Muller v Mulbarton Gardens (Pty) Ltd** 1972 (1) SA 328 (W); **Miller and Miller v Dickinson** (**supra**); **Moodley v Reddy** 1985 (1) SA 76 (D) at 77B-D; **SA Wimpy (Pty) Ltd v Tzouras** 1977 (4) SA 244 (W) at 245B-F; **Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd** 1984 (3) SA 834 (W) at 835F-H.) They are thus distinguishable from the instant case by such provision. Adv **Van der Merwe** submitted that this phrase does not affect the ratio in those cases where it was excluded. He argued that at best the inclusion of the phrase serves to neutralise the import of the deeming provision. If his argument is correct, clause 10 becomes more onerous to the purchasers because the seven day period would start to run from the day the notice was posted. They would not then have had the benefit of the deeming provisions of clause 18.2.1 after having been burdened with proving that they did not receive the notice on the third business day after posting and after having succeeded in discharging such onus. Surely this could not have been within

the contemplation of the parties.

20. Adv **Van der Merwe** argued further that the words “unless the contrary is proved” cannot be construed to mean that the contrary was intended and that receipt was in fact required. He submitted that the words “within 7 (seven) days from date upon which it was sent or delivered” in clause 10 are clear and unambiguous and it is irrelevant whether the purchasers received the notice late or not at all. He loses sight of the fact that clause 10 is amplified by clause 18 and the parties deliberately and intentionally inserted the term “unless the contrary is proved”. It not only appears once but thrice in clause 18. It also applies where the notice is sent by telefax or delivered by hand. The phrase cannot be superfluous. It must have some meaning and effect. In this regard I have alluded to the principles of construction relating thereto earlier.

21. There are other persuasive authorities on the construction of similar statutory provisions. In **Maharaj v Tongaat Development Corporation (Pty) Ltd** 1976 (4) SA 994 (A) the sale of immovable property was governed by the provisions of the Sale of Land on Instalments Act, 72 of 1971. The seller on 20 November 1974 sent a notice to the purchaser by prepaid registered post calling upon him to remedy the breach by 20 December 1974. The purchaser on 27 January 1975 tendered the arrears but such tender was refused. The trial court, in refusing to declare that the contract was invalidly cancelled, held that the period stipulated, in terms of Section 13(1) of the Act, commenced to run from the date of posting and not from the date of receipt. On appeal to the Appellate Division, **Wessels, JA** writing the judgment for the full court, reversed the judgment of the trial court and

held that the period of 30 days, as stipulated in Section 13(1), ran from the date the notice was received. The issue revolved around the intention of the legislature.

22. The *ratio decidendi* in **Maharaj** (**supra**) was confirmed by the Appellate Division in **Phone-A-Copy Worldwide (Pty) Ltd v Orkin and Another** 1986 (1) SA 729 (A) at 749J-750A-D. In regard to a similar provision in Section 12(b) of the Hire-Purchase Act, 36 of 1942, the court, in **Weinbren v Michaelides** 1957 (1) SA 650 (W) and in **Forsdick Motors Ltd v Mahomed** 1957 (3) SA 133 (D), held that it is not sufficient that the demand be posted, it ought to be received. However, in **Marques v Unibank Ltd** 2001 (1) SA 145 (W), with similar provisions, the court held that in terms of Section 11 of the Credit Agreements Act, 75 of 1980 a demand sent by prepaid registered post to the address specified in the agreement, does not have to come to the attention of the credit receiver in order to be effective. This decision is in conflict with the decisions of the Appellate Division in the cases of **Maharaj** (**supra**) and **Phone-A-Copy Worldwide (Pty) Ltd** (**supra**). The court in **Marques** (**supra**) held that the cases were distinguishable. I am, however, not persuaded by such distinction. In **Fourie v Olivier en 'n Ander** 1971 (3) SA 274 (T) the demand was sent to the purchaser's *domiclium* and residential address and both were returned undelivered. The *lex commissoria* clause provided for the demand to be sent by registered post. The court held that for the demand to be valid, it should in fact have been received by the purchasers.

23. Of interest is the provision of Section 7 of the Interpretation Act, 33 of 1957. It provides that the service of a letter sent by prepaid registered post, shall, unless the contrary is proved, be deemed to have been effected at the time at which the

letter would be delivered in the ordinary course of post. It is consistent with the provisions of clause 18.2.1 in the present case. **Galgut, J** in **Maron v Mulbarton Gardens (Pty) Ltd** 1975 (4) SA 123 (W) at 126B, found support in Section 7 of the Interpretation Act for the proposition that the period of 30 days, in terms of section 13(1) of the Sale of Land on Instalments Act, ran from the date of receipt of the notice. **Wessels, JA** in **Maharaj** (**supra**) at page 999H alluded to the *dictum* of **Galgut, J** in **Maron** (**supra**), but at page 1001H did not find it necessary to express an opinion thereon and left the matter open.

THE FINDINGS

24. Clause 10 read with clause 18 provides for three methods of conveying the notice to the *domicilium* of the purchasers. The one is by prepaid registered post; the second is by telefax; and the third is by hand. Clause 18 provides that a notice sent by pre-paid registered post shall be deemed to have been received on the third business day, a notice sent by telefax shall be deemed to have been received on the day it is telefaxed; and a notice delivered by hand shall be deemed to have been received on the day of delivery provided it is a business day otherwise on the following business day. In all three instances, the presumption can be rebutted by proof to the contrary. It is clear from clause 18 that the issue of the receipt of the notice did indeed engage the minds of the parties. However, they failed to express their intention as to what would happen if it was proved that the receipt was either received late or not at all. In applying the **Scrutton** test of the "officious bystander", as set out in **Reigate v Union Manufacturing Co** (**supra**) and quoted with approval in **Barnabas Plein & Co v Sol Jacobson & Son** (**supra**) at 31, the "officious bystander" is asked, "what will happen if the purchasers prove that they

did not receive the notice timeously or at all?" The "officious bystander" would have replied: "Of course, if the purchasers did not receive the notice timeously or at all, such notice would be invalid". Such stipulation, in my opinion, would not only be reasonable or desirable but necessary and would not be in conflict with the express provisions of the contract.

25. The purchasers did not expressly plead the existence of the implied and/or tacit term nor did they formulate such a term. The issue was whether the contract was validly cancelled and in this regard the thrust of the purchasers' case was that the notice to purge their breach was invalid. This emerged more succinctly when the parties agreed to have the matter adjudicated as a special case in terms of Rule 33 and a statement of facts was admitted as evidence at the hearing of the matter. It also formed the central issue during the argument before me. The nature and purpose of the pleadings were clearly and concisely described by **Rose-Innes, J** in **Robinson v Randfontein Estates GM Co Ltd** 1925 AD 173 at 198 as follows:

> *"The object of the pleadings is to define the issues; and parties will be kept strictly to the pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion for pleadings are made for the Court, not the Court for pleadings."*

It does not appear that the sellers have been prejudiced by the defective pleadings of the purchasers. As I mentioned earlier, the same considerations which inform the determination of the true intentions of the parties to a contract, also inform the determination whether an implied and/or tacid term can be read into a contract.

In my view the inference is irresistible that it was an implied and/or a tacit term of the contract that the purchasers not only receive the notice but receive it timeously to enable them to remedy the breach, failing which the notice shall be invalid.

26. I am strengthened in this conclusion by the fact that the forfeiture clause is a drastic provision and has far-reaching consequences for the purchasers. It provides for the purchasers to forfeit all monies paid by them to the sellers or their agents and be responsible for any losses suffered by the sellers that are not covered by such monies. The termination of a contract also has important consequences upon the reciprocal rights and duties of the parties (**Swart v Vosloo** (**supra**) at 115E). In the absence of an agreement to the contrary, a reasonable time must be given to a purchaser to perform (**Nel v Cloete** 1972 (2) SA 150 (A) at 159H – 160A).

27. It is common cause that the notice in the instant case was sent by pre-paid registered post to the *domicilium* of the pruchasers on 2 February 2005 and was received by the them on 15 February 2005. It was therefore not possible for the purchasers to comply with the terms of such notice. In my view it was an implied and/or tacit term of the contract that should the purchasers not receive the notice, as envisaged in clause 10 read with clause 18, timeously or at all, such notice shall be invalid. I accordingly conclude that the notice was invalid and in the circumstances the contract was not validly cancelled.

THE ORDER

28. In the premises the plaintiffs' claim succeeds and an order is made in the following terms:

(a) The defendants are ordered to sign all necessary documents and take all such necessary steps to pass transfer of the property to the Trust on payment of the balance of the purchase price.

(b) In the event of the defendants failing to comply with the provisions of clause (a) above within a reasonable period of time from the date of this order, the Sheriff of this court or his deputy is authorised and ordered to sign the necessary documents and take the necessary steps on behalf of the defendants.

(c) The defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of this action which costs include the costs of the Application under Case No 2051/05 (Cape of Good Hope Provincial Division of the High Court of South Africa).

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