

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

CASE NO 4800/2006

In the matter between:

RODNEY WILMOT PAGE

Plaintiff

and

PARK 2000 DEVELOPMENT (PTY) LIMITED

Defendant

**JUDGMENT DELIVERED ON BEHALF OF SMIT AJ
ON 22 OCTOBER 2010**

1. Plaintiff in this matter, Mr Rodney Wilmot Page, instituted action against Defendant for an order directing Defendant to take all necessary steps to effect transfer of certain immovable properties to Plaintiff against payment by Plaintiff of the balance of the purchase price in a sum of R891 000,00.
2. Plaintiff relied on the provisions of a contract of sale, concluded by the parties on 12 November 2003. In terms of the agreement, Plaintiff purchased 14 stands at Klapper Crescent, Strandloperkruis, in the Municipal District of Langeberg, for a sum of R990 000,00.

The purchase price was payable by way of a deposit of 10%, with the balance payable against registration of transfer of the stands in the name of Plaintiff.

3. Clause 10 of the agreement provided as follows:

"10. THIS SALE IS SUBJECT TO THE PURCHASER(S) OBTAINING A BOND OF 80% OF THE PURCHASE PRICE. SHOULD SUCH A BOND NOT BE GRANTED WITHIN 7 (SEVEN) DAYS OF SIGNATURE OF THIS AGREEMENT, THE SELLER(S) WILL HAVE THE RIGHT, BUT WILL NOT BE OBLIGED, TO CANCEL THE SALE, IN WHICH CASE ANY DEPOSIT ALREADY PAID, WITH INTEREST, WILL BE PAID BACK TO THE PURCHASER(S) AND NO ONE PARTY WILL HAVE A CLAIM FOR DAMAGES DUE TO SUCH CANCELLATION AGAINST THE OTHER."

4. It was common cause that Plaintiff paid a deposit of R99 000,00, but that a bond of 80% was not granted within the stipulated period of seven days.
5. Plaintiff, however, alleged that Defendant, at the expiry of the seven day period, elected not to cancel the agreement. It was further alleged that Plaintiff, on 27 January 2006, informed Mr Botha of the firm SA Hofmeyr & Son Attorneys ("Hofmeyr") that he no longer required a bond and that the balance of the purchase price would be paid in cash.

6. Defendant, in its Plea, raised the following defences:

6.1. That clause 10 of the agreement of sale contains a suspensive condition, i.e. Plaintiff being granted a mortgage bond of 80% of the purchase price within seven days of signature of the agreement.

6.2. That, as it is common cause that Plaintiff was not granted a mortgage bond within seven days of the signature of the agreement, the agreement of sale between the parties has lapsed.

6.3. **Alternatively**, and if the Court were to find that the agreement did not lapse as aforesaid, Defendant's conduct, after having become aware that the bond had not been granted, manifested a clear intention to cancel the agreement and to no longer be bound thereto.

6.4. **In the further alternative**, Defendant purported to cancel the agreement in the Plea.

7. Of significance is the admission in the Plea that Plaintiff verbally informed the said Mr Botha that **"he did not want to utilise mortgage financing as envisaged in clause 10 of the agreement of sale and that the amounts of R632 000,00**

and R793 944,68 were available on two existing mortgage bonds".

8. During the Rule 37 conference, it was agreed that Plaintiff would bear the onus of proving his case, but that, in the event of Defendant having to rely on paragraphs 4.6 and 4.7 of the Plea (the two alternatives), it **"would bear the onus to prove its intention to cancel the contract and a valid cancellation"**.
9. In its Reply to Plaintiff's Request for Further Particulars, Defendant furnished, *inter alia*, the following particulars:
 - 9.1. That Defendant was entitled (on the alternative basis) to cancel the sale within a reasonable period after it became aware that Plaintiff had not obtained a bond.
 - 9.2. That Mr WF Botha informed Plaintiff on or about 27 January 2006 that he was of the opinion that the agreement of sale had lapsed and that he would obtain instructions from Defendant in this regard and that this stance was reiterated by Defendant's attorney in a letter, dated 4 July 2006.
 - 9.3. That Defendant's attorney informed Plaintiff on or about 27 January 2006 that in his view the sale had lapsed due to non-fulfilment of the suspensive condition.

- 9.4. That Defendant did not authorise anybody to exercise an election on its behalf at any time to be bound to the agreement of sale.

THE EVIDENCE:

10. Plaintiff testified that he is retired at Still Bay and that he was basically speculating in building houses, buying properties, etc, during November 2003. During that time he had a fairly close association with a local estate agent, one Myra Prinsloo of Carit Estates, Still Bay. She informed him that she was marketing the stands under consideration on behalf of the seller, Park 2000. The witness was interested and his negotiations with Prinsloo resulted in him purchasing a parcel of 14 stands for a sum of R990 000,00. Prinsloo advised him to make provision for the eventuality of sufficient funds not being available by inserting a clause which made provision for the raising of a bond of 80%. The parties thereupon concluded the deed of sale with incorporation of the suspensive condition contained in clause 10 of the agreement.
11. The witness did not apply for a bond, but it is common cause that he paid a deposit of R99 000,00 on 15 December 2003. The witness was aware of the fact that Defendant was involved in a dispute with an entity, known as Colarossi, which sold the property to

Defendant. The witness was referred to a letter from Buchanan Boyes Smith Tabata Attorneys ("BBST"), dated 12 December 2003 ("A31"), requesting payment of a deposit of R99 000,00, as well as a handwritten fax ("A74") by the witness to BBST, including a deposit slip which reflected that a sum of R99 000,00 had been paid into the trust account on 15 December 2003.

12. The witness was thereupon referred to a document ("A75"), which was part of the FICA documentation which was required for purposes of passing transfer. This document was called a **"Client Identity Verification"** and was signed and sworn to by the witness on 9 March 2005 in the presence of attorney WF Botha, in his capacity as Commissioner of Oaths, who verified the identity of the witness. The witness was required to specify the source of income to be utilised to pay:

- 12.1. transfer and/or bond costs; and
- 12.2. deposit and/or balance purchase price.

Both questions were replied to by the witness by writing in **"own funds"**. The FICA documents, signed by the witness, were retained by Mr Botha.

13. On approximately 25 January 2006, the witness received a letter ("A33") from Hofmeyr, represented by Mr Botha, stating that:

"Ons merk dat u die bogemelde eiendomme gekoop het onderhewig daaraan dat u lenings by 'n finansiële instelling verkry.

Ons is tans besig om ons rekords op datum te bring en ontvang graag binne 10 dae die nodige bewys van finansiering wat bekom is. Indien ons nie binne daardie tyd van u verneem nie, sal ons aanvaar dat u nie die finansiering bekom het nie."

Plaintiff thereupon proceeded to the offices of Mr Botha, armed with two mortgage loan statements from Absa ("A34" & "A35"). The one statement was addressed to Seven Seasons Trading 97 (Pty) Limited ("Seven Seasons"), showing that the instalment status, that is the amount available on the bond, was a sum of R632 200,00. The second statement ("A35") was addressed to Plaintiff's wife, Mrs SM Page, which showed that the flexi reserve amount available as at 10 December 2005, amounted to R793 944,68.

- ✓ Mr Botha wrote the word **"available"** on the statements next to the said two amounts reflecting the available balances on the statements. The witness asked Mr Botha whether he would require him to transfer the funds into their trust account, whereupon Mr Botha replied that it would not be necessary as he was quite

satisfied. Between 27 January 2006, when Plaintiff saw Mr Botha, until receipt of the letter, dated 4 July 2006, hereinafter referred to,

satisfied. Between 27 January 2006, when Plaintiff saw Mr Botha, until receipt of the letter, dated 4 July 2006, hereinafter referred to, nobody asked him about financing in the form of a bond and nobody gave any indication that the contract had lapsed.

14. Plaintiff thereupon received a letter, dated 4 July 2006 ("A36"), from attorneys Marais Müller Yekiso Inc ("Marais Müller") in Cape Town, informing him:

- 14.1. that, in terms of clause 10 of the sale agreement, he had to obtain a bond of 80% on or before 19 November 2003;
- 14.2. that he had failed to obtain the said bond, or had not waived the provisions of the bond clause;
- 14.3. that their client had been advised by Senior Counsel that the agreement had lapsed;
- 14.4. that a cheque was annexed for an amount of the deposit paid by Plaintiff, plus interest thereon.

Plaintiff did not accept the purported repayment of the deposit plus interest.

During the period of some 30 months since conclusion of the sale agreement, Plaintiff never received any indication of Defendant's stance that the agreement had lapsed.

It was put to Plaintiff that Mr Botha will say that, after having been informed that a bond had not been granted, he told the witness **"in that case, Rodney, the sale has lapsed, because it was made subject to the granting of a bond"** (page 53).

15. In cross-examination Plaintiff reiterated that the issue as to whether a bond had been granted was not raised during the meeting on 27 January 2006. Mr Botha knew from the FICA documentation that there would not be a bond and that Plaintiff would be providing the finances from his own resources. It was put to Plaintiff that Mr Botha would testify that he did ask whether a bond had been granted, but Plaintiff replied that it was not necessary because he showed Mr Botha that he had finances available.

It was initially put to Plaintiff that the sale had lapsed because of the failure to grant a bond (page 53). It was put to Plaintiff that Mr Botha told him during the meeting on 27 January 2006 that he had to furnish proof that he had obtained a bond by 19 November 2003 as required by the agreement and that Plaintiff thereupon went

home and returned some 15 minutes later with the bond statements at pages "A34" and "A35". The witness replied that he had no recollection of the allegations put to him, but that it would have been out of keeping with his normal conduct. He thought that he did take the documents with him. The witness denied that Botha advised him that the two documents did not constitute compliance with clause 10 of the agreement. He testified that Botha told him that it was sufficient and that he does not need to pay the money into his trust account.

It was then put to Plaintiff that, during the adjournment, Botha had instructed Counsel that the proposition put to him that Botha told him that the agreement had lapsed due to non-fulfilment of the condition was not correct. Botha's instructions were now that he formed that opinion subjectively, but that he did not convey it to Plaintiff. Plaintiff denied that Botha told him that he would go back to his client to find out whether the finance offer by him was acceptable and reiterated that Botha seemed to be completely satisfied with the documentation presented to him. Plaintiff did not provide Mr Hennie Mouton of BBST with a bank guarantee as requested in the letter of 12 December 2003 ("A31"). The witness could not remember having received the letter, but conceded that he must have received it when he was confronted with his own handwritten fax ("B9"), addressed to Mr Mouton, with the attached

bank deposit slip as proof of payment of the deposit of R99 000,00.

The witness never forwarded the letter from the bank in accordance with his undertaking in the said fax, because at that point in time he had heard about the Court cases.

That was Plaintiff's case.

16. Defendant's first witness was Mr Hendrik Johannes Mouton, a director of BBST. Mr Mouton's primary involvement was on behalf of Imperial Bank and Standard Bank, who were to provide development finance for the transaction between Colarossi and Defendant. The banks required pre-sales before granting development finance. The following requirements must be met before a transaction can be regarded as a final pre-sale:

- 16.1. The deposit, if required, must be paid.
- 16.2. If the transaction is subject to obtaining a bond, bond approval is required.
- 16.3. If a balance purchase price remains payable, it must be secured.

The witness addressed the letter of 12 December 2003 ("B8") to Plaintiff to ascertain whether the transaction with Defendant constituted a pre-sale as required by the banks. The witness had

direct instructions from Mr Renier van Rooyen to do the transfer to Plaintiff and to write the letter of 12 December 2003.

The witness received a deposit and considered that the letter by Plaintiff to Myra Prinsloo (dated 10 December 2003 – "B7") which he had on file, signified that bond approval had been obtained. His firm prepared the transfer documentation appearing at "B10" to "B12" to satisfy the banks that steps were being taken to effect the transfer to Plaintiff. Mr Van Rooyen never gave the witness a mandate to proceed with the transaction despite the fact that a bond had not been granted, or to exercise an election to proceed with the transaction despite that fact.

When the witness wrote the letter of 12 December 2003, he was under the impression that the transaction between the parties was valid. The same applied when the witness wrote the letter of 8 March 2005 ("B52" and "B53") to Plaintiff and Hofmeyr informing them that the deposit, plus interest, had been paid to Hofmeyr.

17. Plaintiff's next witness was Mr Willem Frans Botha, who practices under the name of Hofmeyr at Still Bay. In accordance with their normal practice his office opened a file in this matter on 10 May 2004. He knew Plaintiff because they live in a small town and he knew that Plaintiff was involved in property matters. He was the

country attorney who acted in the litigation between Colarossi and Defendant. He used BBST, Cape Town, as his correspondent and testified that Mr Hennie Mouton, the previous witness, was not involved as his correspondent in the Page matter. Mr Botha was responsible for the letter, dated 26 April 2004, addressed to purchasers of stands in the development to inform them about the litigation involving Colarossi. On 8 March 2005 the deposit of R99 000,00 paid by Plaintiff, plus interest thereon, was paid by Mr Mouton of BBST into the bank account of Hofmeyr. On 1 May 2005, Plaintiff signed the documentation at "B55" to "B57" authorising Hofmeyr to invest the said deposit, plus interest, on behalf of Plaintiff. The documentation at "B58" to "B60" was signed on 9 March 2005 for purposes of compliance with the provisions of FICA.

On 25 January 2006 the witness addressed the letter ("B64") to Plaintiff, requesting him to present proof within 10 days that he had acquired the finance to fund the transaction. Plaintiff turned up at his office where he read the letter and thereafter informed the witness that, due to the long time lapse, he no longer required bond financing. The witness informed him that he required proof thereof, whereupon Plaintiff left and returned some 15 minutes later with the bond statements at "B65" and "B66". The witness wrote "**available**" opposite the entries reflecting the available

balances on the statements, whereupon he told Plaintiff that the documents did not constitute compliance with the provisions of clause 10 of the sale agreement, because they reflected Seven Seasons and Mrs Page as bondholders. The witness did not inform Plaintiff that there had not been compliance with the suspensive condition. The witness contacted Mr Van Rooyen, explained the problem and requested him to make a decision in regard thereto. He later learnt that Mr Van Rooyen had requested Marais Müller to obtain an opinion regarding the matter. The witness was thereupon referred to a letter, dated 4 July 2006, addressed by Marais Müller to Plaintiff ("A67") informing him that Defendant had been advised by Senior Counsel that the agreement had lapsed due to non-fulfilment of clause 10 and tendering repayment of the deposit plus interest.

The first time that the witness became aware of the fact that the bond had not been granted in accordance with clause 10, was during the visit by Plaintiff to his offices on 26 January 2006. The witness was never mandated by Mr Van Rooyen to proceed with the agreement despite the fact that a bond had not been granted.

In cross-examination the witness was referred to the letters at "B14" and "B15", addressed to the purchasers informing them about the litigation with Colarossi and affording them the

opportunity to resile from the agreements. These letters were written on 26 April and 30 May 2004, which was long after the expiry of the seven day period provided for in the said clause 10. The witness reluctantly accepted that Plaintiff probably received these letters. The witness testified that the file was opened on 10 May 2004, but he did not read the contract until some 21 months later. The witness agreed that Plaintiff, when he completed the FICA documents and specifically the Affidavit ("B60"), wrote in that the deposit and balance purchase price would be paid from his own funds and that monthly bond instalments were not applicable. The explanation by the witness was that, at that stage, he did not compare the information contained in the Affidavit with the contents of the deed of sale. The witness could think of no reason why Plaintiff would have had any doubts that the transaction would go through when he signed the FICA documents on 9 March 2005.

The witness was confronted with a Reply to the Request for Particulars, where it was stated that **"Mr Botha informed Plaintiff that he was of the opinion that the agreement of sale had lapsed and that he would obtain instructions from the Defendant"**. The witness attempted to explain the contradiction between the said statement and his evidence by saying that the difference may be due to the notes that were taken. What was not put to the witness, however, was a statement

contained in the Affidavit by Mr Van Rooyen in the interim application to the effect that **"Mr Botha advised Applicant that there had not been compliance with the suspensive condition contained in clause 10 of the agreement of sale"** (page "A52"), which Affidavit was confirmed by Mr Botha in a Confirmatory Affidavit at page A61.

The perception of the witness was that the agreement had lapsed, which meant that the question whether Plaintiff had obtained financing, was really irrelevant.

18. Mr Van Rooyen, who is the only director of Defendant, thereupon testified that he was aware of the fact that the agreement under consideration was subject to a suspensive condition. After seeing the letter by Mr Mouton, dated 12 December 2003 ("B8"), the witness accepted that the transaction had been fully completed. The witness only learnt that the bond had not been granted to Plaintiff when Mr Botha telephoned him on 27 January 2006. The witness testified that the sale price of the erven under consideration will presently amount to at least R2,8m. In cross-examination the witness testified that he did not know on 20 November 2003 (eight days after conclusion of the agreement) whether the suspensive condition had been fulfilled or not. He left everything in the hands of Mr Hennie Mouton of BBST.

When he saw the letter by Mr Mouton, he knew that a deposit had not been paid. He accepted that the contract was in order and thereafter received proof of payment of the deposit. The witness reluctantly conceded that the said letter by Mr Mouton did not request proof of financing.

19. **The interpretation of clause 10:**

19.1. The first matter that has to be resolved by me, is the question whether the agreement automatically lapsed when a bond was not obtained by Plaintiff within the period of seven days as envisaged in clause 10 of the agreement.

19.2. Mr Scholtz, who appeared with Mr Mouton on behalf of Defendant, contended that the agreement did lapse and that the words following upon the phrase "**seven days of registration of this agreement**" should be regarded as *ex abundanti cautela*. He referred to the decision by Shock J in **Townsend v Philips**, 1983(3) SA 403(C), where it was found that non-compliance with the suspensive condition in that case resulted in failure of the agreement. The Court found that, even if such a clause is

intended for the purchaser's benefit, the purchaser cannot waive the condition after expiry of the time limit.

- 19.3. The legal position, however, is that the non-fulfilment of a suspensive condition renders a contract void *ab initio*, unless the parties have agreed otherwise (my underlining).

SEE:

Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch [2010] Zasca 92, paragraph 19, and the authorities referred to in footnote 10.

- 19.4. 19.4.1. Mr Scholtz referred me to the decision in **Florida Road Shopping Centre (Pty) Ltd v Caine**, 1968(4) SA 587(NPD), where the suspensive condition, at the end thereof, provided as follows:

"Should any of the aforesaid conditions not be fulfilled then we shall have to give you notice of cancellation of the agreement which shall thereupon lapse."

The majority of the Court held that the agreement lapsed on non-fulfilment of the suspensive condition and that the provision quoted above was inserted *ex abundanti cautela* and should be disregarded.

19.4.2. It is, however, clear from the judgment by Fannin J that the Court had difficulty in ascertaining what the intention of the parties were and Mr Coetsee, who acted on behalf of Applicant, referred me to the following passage on page 604B of the report:

"On the whole, in the light of all the considerations I have mentioned, I incline to the view that the final paragraph of clause 14 was inserted *ex abundanti cautela*, and that that is all the offeror really meant. Alternatively, I find myself in the position in which the Appeal Court found itself in *Cairns'* case, *supra*, in which Davis AJA, said (p.124):

"I still do not know, and I know of no means of ascertaining at this stage, what the parties really intended: I have to 'cut the Gordian knot'."

and I find it impossible to give to the paragraph the meaning contended for by the respondent, and I interpret it against him."

19.5. 19.5.1. I was further referred to the decision by Davis J in **Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch** (unreported), where the following provision was added to the suspensive condition:

"10.3 If the suspensive condition referred to in clause 10.2 has not been fulfilled within 18 months from date of the rezoning application, then either party will be entitled to resile from the agreement"

19.5.2. The decision by Davis J, as I read it, was not that that clause 10.3 was to be regarded as *ex abundanti cautela*. He found that the settlement agreement, which the parties envisaged when the original suspensive period transpired, lapsed on 5

October 2005. At paragraphs 77 and 78 the learned Judge found as follows:

"[77] The evidence further points to the fact that the period allowed for the fulfilment of suspensive condition expired on 5 October 2005 without the requisite rezoning being in place. Notwithstanding the correspondence and indications that a new written agreement could be negotiated, the existing settlement agreement lapsed on 5 October 2005. No further written amendment was concluded so that the settlement agreement was no longer of legal force or effect.

[78] For these reasons, the very legal foundation upon which relief is sought by applicant was based no longer can be said to exist. The justification for the relief is therefore unsustainable."

The Appellate Division, in **Paradyskloof**, *supra*, assumed that the agreement did not lapse, but upheld the appeal on other grounds.

19.6. The present situation, in my view, is distinguishable from the **Florida Road** and **Paradyskloof** situations, in that the

parties in this matter specifically agreed in no uncertain terms that the seller would have the right to **cancel** the sale. I cannot ignore that provision as it is trite law that the wording used by the parties must be given effect to if it is not ambiguous. The parties agreed that the seller would acquire the right to **cancel** the agreement on non-fulfilment of the bond provision, from which it follows that they agreed that the contract would remain alive until cancellation thereof by the seller.

19.7. I accordingly conclude that the agreement did not lapse as a result of the fact that the bond was not obtained within seven days.

20. **The election not to cancel the agreement:**

20.1. It was common cause that Plaintiff did not apply for a bond and that Defendant's attorney, Mouton, on the instructions of Mr Van Rooyen, wrote a letter in the following terms to Plaintiff on 12 December 2003, that is some 24 days after the expiration of the suspensive period:

"We refer to the above matter and hereby request that you furnish us with the following:

1. The deposit of R99 000,00 as per clause 1 f the Deed of Sale, to be paid into our ABSA Bank Trust Account Number 4035042536. Kindly fax proof of payment to 021-9141080.
2. A bank guarantee for the balance purchase price of R891 000,00, payable in favour of Buchanan Boyes, Bellville."

20.2. It is also common cause that Plaintiff, on 15 December 2003, paid the deposit which was only tendered back on 14 July 2006 in the letter by Marais Müller ("B67") in which it was contended that the agreement had lapsed.

20.3. Mr Scholtz contended that this conduct did not constitute an election not to cancel the agreement, as neither Mr Mouton, nor Mr Van Rooyen, knew whether a bond had been granted timeously. Mr Scholtz relied on the decision in **Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd**, 1996(2) SA 537(CPD), as authority for his contention. The decision in that case, however, was to the effect that an innocent party to a contract who elected to abide by the agreement following a breach by the other party, had to have knowledge of the material facts constituting the breach, as well as the

rights thereby created when he elected to affirm the contract.

20.4. The said judgment, in my view, has no application in this matter, in that there was no breach by Plaintiff and that Defendant was not an innocent party.

20.5. Mr Van Rooyen was well aware of the terms of the suspensive condition and it would have been the easiest matter for him to determine whether a bond had been obtained by Plaintiff. In these circumstances, Defendant cannot rely on the alleged lack of knowledge on the part of Van Rooyen and Mouton and I accordingly find that Defendant duly exercised the option to affirm the contract and is bound thereby.

21. **The cancellation of the agreement:**

21.1. Defendant, in its Plea, in the alternative to the defence that the agreement had lapsed due to non-fulfilment of the agreement, alleged that it manifested a clear intention to cancel the agreement and to no longer be bound thereto. In the further alternative Defendant purported to cancel the agreement by way of the Plea.

21.2. Mr Scholtz, as I understood his argument, contended that Defendant, if it were to be found that it elected to affirm the agreement, retained the right to summarily cancel the agreement if it so desired. I do not agree with this submission. I am of the view that Defendant, once it elected to abide by the agreement, was subject to the normal rules applicable to cancellation of contracts and that it could only cancel the agreement in the event of a material breach on the part of Plaintiff.

21.3. No such breach was committed by Defendant and I accordingly conclude that the right to lawfully cancel the agreement never accrued to Defendant.

22. I accordingly conclude that Defendant is bound by the terms of the agreement and that Plaintiff is entitled to the relief claimed by him.

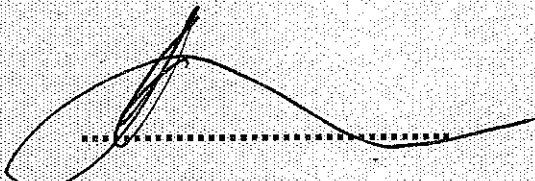
23. An order is granted in the following terms:

23.1. Defendant is directed to take all necessary steps to effect transfer of the immovable stands identified in Annexure "A" to the contract of sale to Plaintiff, against payment of

the balance of the purchase price in the amount of R891 000,00.

23.2. In the event of Defendant failing to comply with the order set out in 23.1 above, the Sheriff responsible for the area in which Still Bay is situated is authorised and ordered to take all such necessary steps on behalf of Defendant.

23.3. Costs of suit.



SMIT AJ