



Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **717/2016**
DATE HEARD: **20 November 2017**
DATE DELIVERED: **1 December 2017**

In the matter between:

ABRINAH 7804 (PTY) LTD

Appellant

and

KAPA KONI INVESTMENTS CC

Respondent

Coram: Olivier J et Phatshoane ADJP et Pakati J

JUDGMENT

Olivier J:

- [1.] On 4 August 2015 the appellant, Abrinah 7804 (Pty) Ltd, and the respondent, Kapa Koni Investments CC, concluded a written contract in terms of which the appellant sold to the respondent fixed property.
- [2.] In terms of clause 4 of the contract the *“agreement (was) subject to the condition that the Purchaser obtains from a bank or other financial institution a loan for not less than R5 000 000.00 ... in principal within 6 ... months of signing of this agreement, to be secured by the registration of a mortgage bond over the property to be registered simultaneously with transfer”*.

- [3.] On the papers it was not in dispute that the provisions of clause 4 constituted a suspensive condition. It does indeed in my view appear to have rendered “*the agreement subject to a suspensive condition, in that the operation of the obligation flowing from (the agreement) is suspended, pending the happening of the uncertain future event which, in the present matter, was the loan approval by the financial institution*”¹. Compliance with clause 4 was clearly a “*precondition*” for the coming into operation of the contract, and of the appellant’s obligations in terms thereof. I will deal with the contrary submission of Mr Coetzee SC, counsel for the respondent, at a later stage.
- [4.] It was common cause that the condition was not fulfilled within the 6 month period stipulated in clause 4. On 5 February 2016 the respondent informed the appellant that it had only managed to secure a loan in the amount of R4 500 000.00.
- [5.] On 10 February 2016 a meeting took place between Mr Tsebane on behalf of the appellant and Mr Solani on behalf of the respondent. The fact that the respondent had only succeeded to secure a loan in the amount of R4 500 000.00 was discussed.
- [6.] In the founding affidavit Mr Solani’s stated that Mr Tsebane had insisted that the respondent obtain financing for the balance of R500 000.00. According to him Mr Tsebane did, however, undertake to discuss the issue with his wife and to revert to him.
- [7.] Mr Tsebane’s evidence contradicted this. He denied having undertaken to discuss “*the matter*” with his wife or to revert to Mr Solani in this regard. According to him he had insisted on the full purchase price in the written contract.

¹ **Kootbodien and Another v Mitchell’s Plain Electrical Plumbing and Building CC and Others** 2011 (4) SA 624 (WCC) para [44]

- [8.] In reply Mr Solani admitted that Mr Tsebane had not at the meeting been prepared to reduce the purchase price.
- [9.] In view of the fact that the respondent claimed final relief, and that Mr Tsebane's version of the events at the meeting could in my view not be said to have been so *"far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers"*², Mr Tsebane's version of the events at the meeting had to be accepted as correct³.
- [10.] In any event, and if the probabilities were to be considered, the question would be why Mr Tsebane would have undertaken to discuss the issue of the purchase price with his wife and then to revert to Mr Solani in this regard if he had already, at the very same meeting, made it clear that a reduction of the purchase price⁴ was out of the question.
- [11.] Shortly after the meeting⁵ a telephonic discussion took place between Mr Solani and Mr Tsebane's wife. Mr Solani's version in this regard is that Mrs Tsebane phoned him and that her *"attitude"* was *"that the agreement is still proceeding and (the respondent has) to find the remainder of the purchase price"*.
- [12.] Mr Tsebane denied that his wife called Mr Solani. According to him it was Mr Solani who had called her and who had requested her to persuade Mr Tsebane to accept a lower price. Mr Tsebane furthermore stated that his wife had responded by telling Mr Solani to deal only with her husband in this regard.
- [13.] The appellant did not attach a confirmatory affidavit by his wife to the answering affidavit, and the respondent submitted that Mr Tsebane's evidence about the

² **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 635 C

³ Compare **Gower and Another v Gower and Others** 2016 (5) SA 225 (SCA) para [36]

⁴ Presumably to the amount for which a loan had at that stage been secured.

⁵ Possibly on 12 February 2016.

telephonic discussion therefore constituted hearsay evidence and that it should be struck.

[14.] It was not Mr Tsebane's evidence that his knowledge of the call and of the contents of the discussion was based on what he had been told by his wife. He may well have been with her at the time of the call.

[15.] Mr Tsebane's evidence in this regard was not struck or ruled inadmissible by the court *a quo* and I see no basis for interfering in this regard. There is in any event no counter-appeal by the respondent.

[16.] This means that there was a factual dispute regarding the call and the contents of the conversation and that the trial court would once again have been constrained to decide the matter on the basis that Mr Solani had called Mrs Tsebane and, more importantly, that Mrs Tsebane had never informed Mr Solani that "*the agreement (was) still proceeding*" if the respondent could get financing for the shortfall of R500 000.00.

[17.] On 15 February 2016 the appellant's attorney addressed a letter to the respondent. In the letter it was pertinently pointed out that the condition in clause 4 had not been fulfilled. It was furthermore stated that "*Against the above background, we now afford you a period of 14 days to comply with clause no 2 of the agreement, failure of which (sic) shall result in the agreement being automatically cancelled*".

[18.] Clause 2 of the contract reads as follows:

"The purchase price is the sum of R5 000 000.00 ... and will be paid in cash and/or secured by a written guarantee from a bank or other financial institution, payable free of exchange, against registration of transfer of the property into the name of the Purchaser and which guarantee shall be presented and/or cash shall be payable by the Purchaser to the Seller's hereinafter

appointed conveyancers within 14 ... days from date of being requested to do so by the conveyancers"

- [19.] The letter was responded to on 16 February 2016 in a letter by the conveyancing attorneys, Haarhoffs Incorporated⁶, Kimberley. A request was made on behalf of the respondent that the purchase price be reduced⁷, alternatively that the respondent be granted a further 28 days to obtain financing for the balance of R500 000.00. The author of the letter expressed the view that termination of the agreement would not be in the interest of either of the parties. Insofar as this remark may have been made on the understanding that the contract had not yet terminated at that stage, it would have been misconceived, as will in due course appear.
- [20.] In a letter dated 22 February 2016 the appellant's attorneys responded that the appellant's instructions were *"not to vary the Deed of Sale"*.
- [21.] On 25 February 2016 the conveyancing attorneys informed the appellant's attorneys that the respondent had obtained funding for the balance of R500 000.00 and on 26 February 2016 the respondent's attorneys tendered payment of that amount, as well as payment of the transfer costs, upon lodging of the transfer for registration.
- [22.] On 3, 4 and 7 March 2016 the conveyancing attorneys addressed letters to the appellant's attorneys, requesting information required for the purposes of the registration of the transfer of the property to the respondent.
- [23.] On 7 March 2017 the appellant's attorneys responded by e-mail to the conveyancing attorneys. It was stated that the respondent had *"still ... not complied with clause no 2, no 4 and no 9 of the Deeds (sic) of sale respectively"* and it was *"confirm(ed) the Deed of sale is cancelled"*.

⁶ The attorneys appointed by the appellant as the conveyancers (See clauses 2 and 8 of the written contract).

⁷ Presumably to the amount of the loan that had been secured.

[24.] The respondent's local attorneys responded to this in a letter dated 14 March 2016. It was agreed that the provisions of clause 4 had indeed constituted a suspensive condition. As regards the purported cancellation, and clearly with reference to the 14 period afforded in the letter of 15 February 2016, the author of the letter stated that the appellant's attorneys had had no right to request a guarantee and/or the payment of the cash in terms of clause 2, and that the purported cancellation was therefore unlawful.

[25.] It was against this background that the respondent then approached the court *a quo* on application for declaratory orders :

25.1 that the agreement concluded on 4 August 2015 was still valid⁸; and

25.2 that the purported cancellation of the agreement on 7 March 2016 was "*wrongful*"⁹.

[26.] The application was successful and the appellant was ordered to pay the costs thereof¹⁰. In the judgment of the court *a quo*:

26.1 it was apparently accepted that the provisions of clause 4 had constituted a suspensive condition, and it was stated that it was "*... trite that if a suspensive condition in a contract had not been fulfilled by the date stipulated in the contract, then the agreement automatically falls away*";

26.2 reference was made to Mr Tsebane's statement¹¹ that he had at the time of the meeting of 10 February 2016 been "*contemplating agreeing*

⁸ Prayer 1 of the notice of motion.

⁹ Prayer 2 of the notice of motion.

¹⁰ The notice of motion did not contain a prayer for costs. It was only in the replying affidavit that Mr Solani requested that the relief sought in the notice of motion be granted with costs.

¹¹ In his answering affidavit.

to revive the void ab initio agreement with the (respondent), if he was able to secure the full purchase price within a few days ...”;

26.3 it was found that the contents of the letter of 15 February 2016 had “... *breathed new life into the corpse in writing*” and that the granting of an opportunity to comply with clause 2 within 14 days had amounted to “*a waiver or an extension of the period by 14 days*”. It was held, with reference to **Van Schalkwyk v Griessel**¹², that the appellant was not entitled to “*aprobate and reprobate*”; the granting of the 14 days period apparently according to the judgment having constituted an election not to exercise the right to cancel or a waiver of that right;

26.4 it was found that, having regarding to the circumstances of the “‘agreement’ ... (of) 10 February 2016 ... *the respondent had not summarily terminated the agreement*” and that, while Mr Tsebane may at the time of the meeting of 10 February merely have been contemplating to revive the contract, he had in fact subsequently done so – presumably once more a reference to the letter of 15 February 2016, and the 14 day period granted therein;

26.5 it was held that, against this background and in view of the fact that loans for the full purchase price and the transfer of costs had in fact subsequent to the letter of 15 February 2016 and “*before the cut-off period*” stipulated therein been secured, it could not be said that the respondent had failed to comply “*with the stipulated conditions*”.

[27.] The appellant’s subsequent application for leave to appeal was dismissed with costs, but on application to the Supreme Court of Appeal in terms of section

¹² 1948 (1) SA 460 (A) at 473

17(2)(b) of the **Superior Courts Act**¹³ leave was granted to appeal to a full court of this division.

[28.] The grounds of appeal are basically that:

28.1 An extension of the period in clause 4 had never been agreed upon before the expiry thereof. In the result the agreement had become null and void when the period in clause 4 expired. An extension of the period after the expiry thereof would legally not have been possible;

28.2 The agreement had not been revived; and

28.3 The contract (presumably insofar as it may still have been valid) had been cancelled when the respondent had not by the end of the period granted in the letter of 15 February 2016 complied with clause 2.

[29.] In **Swart v Starbuck and Others**¹⁴ it was held that *“The effect of the suspensive condition in each offer was that, if the consent were not obtained, the contracts would be regarded as though they had not been written”* and it was reaffirmed that *“... generally speaking, a suspensive condition suspends the operation of all obligations flowing from a contract until the occurrence of a future uncertain event. **If the uncertain future event does not occur, the obligations never come into operation**”*¹⁵. In **Southern Era Resources Ltd v Farndell NO**¹⁶ it was held that *“Fulfillment of a suspensive condition results in the contract being enforceable. And, normally, **if the condition fails and the parties have not agreed otherwise, the contract is rendered void**”*¹⁷.

¹³ 10 of 2013

¹⁴ 2017 (5) SA 370 (CC) para [6] and footnote 5

¹⁵ My emphasis.

¹⁶ 2010 (4) SA 200 (SCA) para [11]

¹⁷ My emphasis.

- [30.] The result of the non-fulfilment of a suspensive condition can be compared to the result of the fulfilment of a resolutive condition, where *“the whole transaction inter partes (is regarded) as if the absolute contract had never existed”*¹⁸.
- [31.] Could this consequence of the non-fulfilment of a suspensive condition be prevented by waiver of the benefit of such a condition or, in the event that the suspensive condition had already failed, in a manner of speaking be undone by such a waiver?
- [32.] There is no doubt that it would be possible where such a condition is for the sole benefit of one party and where that party waives it before the expiry date stipulated in the contract¹⁹.
- [33.] Even if the part of such a condition that stipulates an expiry date could be argued to have been intended for the partial benefit of the seller, the purchaser would still be entitled to waive the benefit afforded to it by the part of the condition that renders the coming into operation of the contract subject to the purchaser obtaining a loan²⁰.
- [34.] That the protection afforded by such a suspensive condition can in principal be waived is therefore beyond doubt, but the question is whether such right could be exercised after the agreed (or timeously extended) expiry date for the fulfilment of the condition.
- [35.] In **Wax v Goldman**²¹, and other cases that followed it in that division, it was held that waiver could indeed also take place after such an expiry date²².

¹⁸ See the quote from **Wessels on Contract** (Volume 1) in **Amoretti v Tuckers Land and Development Corporation (Pty) Ltd** 1980 (2) SA 330 (W) at 332 to 333

¹⁹ **Manna v Lotter and Another** 2007 (4) SA 315 (C); **Kootbodien and Another v Mitchell's Plain Electrical Plumbing and Building CC and Others**, footnote 1 *supra*, para [49]

²⁰ Compare **Meyer v Barnardo and Another** 1984 (2) SA 580 (N) and **Westmore v Crestanello and Others** 1995 (2) SA 733 (W)

²¹ 1965 (4) SA 386 (W)

- [36.] In **Mekwa Nominees v Roberts (1)**²³ it was however held²⁴, with reference to **Phillips v Townsend**²⁵ and **Meyer v Barnardo and Another**²⁶, that a contract that had lapsed due to the non-fulfillment of a suspensive condition could not be revived by waiving the suspensive condition at that stage²⁷.
- [37.] This controversy was effectively settled in **Trans-Natal Steenkoolkorporasie Beperk v Lombaard en 'n Ander**²⁸, where the **Phillips** and **Mekwa** judgments, as well as the judgment to the same effect in **Meyer v Barnardo and Another**²⁹, were approved³⁰.
- [38.] On the respondent's own version there had clearly been no attempt on the part of either of the parties to waive the benefit of clause 4 before the expiry date stipulated therein (and it was never the respondent's case that the expiry date in clause 4 had been extended before then).
- [39.] The fact that Mr Solani had after the expiry date attempted to persuade Mr Tsebane to accept a lesser purchase price, alternatively to grant a further period within which to secure the balance of the purchase price, is a clear indication that Mr Solani even after the expiry date had no desire to bind the respondent to the contract if the appellant would not accept a lesser purchase price, or if the respondent could not at that stage obtain financing for the balance of the purchase price.

²² See also **Alessandrello v Hewitt** 1981 (4) SA 97 (W)

²³ 1985 (2) SA 498 (W)

²⁴ At 501

²⁵ 1983 (3) SA 483 (C) ([1983] 1 All SA 8 (C))

²⁶ Reference in footnote 20 *supra*.

²⁷ See also **Marais v Kovacs Investments 724 (Pty) Ltd** [2009] 1 All SA 174 (C); **Marais v Van Niekerk** 1991 (3) SA 724 (E)

²⁸ 1988 (3) SA 625 (A) ([1988] 2 All SA 475 (A))

²⁹ Reference in footnote 20 *supra*.

³⁰ AT 640; See also **McPherson v Khanyise Capital (Pty) Ltd** 2010 JDR 0060 (GSJ) para [23]

- [40.] On the evidence it is therefore clear that the respondent could not be said to have abandoned its benefit in terms of clause 4 at that stage. The respondent would in any event, as already shown, not have been entitled to rely on a waiver on its part that had purportedly occurred after the expiry date. It was in fact also not alleged, either in the founding affidavit or in the replying affidavit, that the respondent itself had waived its benefit and protection in terms of clause 4.
- [41.] Instead it was contended, and only in reply, that the letter of 15 February 2016, and the fact that it afforded the respondent a period of 14 days from that date to comply with clause 2, “*by necessary implication*” indicated that the appellant “*was no longer relying*” on the respondent’s non-fulfillment of the suspensive condition in clause 4.
- [42.] The respondent therefore, instead of claiming that it had itself at any time waived the protection afforded by clause 4, effectively claimed that the appellant had waived its common law right to rely on the respondent’s failure to comply with the suspensive condition. This is clearly also what the court *a quo* in effect found to have been the position, when reference was made to “*a person who has waived his accrued right to cancel or has elected after such accrual not to enforce (that) right*”.
- [43.] Even though it is of course trite that an applicant generally has to make out its case, and set out its cause of action, in its founding affidavit, I will very briefly deal with this contention.
- [44.] The respondent bore the onus to prove that the conduct of Mr Tsebane at the meeting and/or in granting the 14 day period in the letter, “*constituted a renunciation of a right or legal advantage*”³¹. In assessing a waiver defence not only the probabilities must be considered, but also “*the factual presumption that*

³¹ **Nkata v Firstrand Bank Ltd** 2016 (4) SA 257 (CC), footnote 50

a party is not likely deemed to have waived his rights ... Clear evidence of waiver is required”³².

[45.] As regards the reference of the court *a quo* to an “*agreement*” on 10 February 2016, in other words the date of the meeting, the respondent would not on the papers, and on the appellant’s version of the events during and after the meeting, in my view have discharged its onus to prove such a waiver, on the part of the appellant, that had occurred at the meeting. Mr Tsebane’s conduct at the meeting could certainly not be said to have justified the inference of an intention on his part to waive the right to rely on the failure of the suspensive condition at that stage.

[46.] As regards the letter of 15 February 2016 the fact that the appellant’s attorney had, in the very same letter, pertinently recorded that clause 4 had not been complied with, is in my view objectively³³ irreconcilable with an intention to waive the right to rely on that as a defence.

[47.] The fact is, in any event, that the non-fulfilment of the suspensive condition in clause 4 within the stipulated period (which was never extended within that period) resulted in the contract never coming into operation or being rendered null and void. This happened by law and automatically, and would not at that stage, in other words after the expiry of the period stipulated in clause 4, have been subject to an election on the part of the appellant. Thereafter the appellant, just like the respondent and for the same reasons, would not have been able to waive any right that it may earlier have had in respect of the contract.

“The condition was clearly a condition inserted for the benefit of the purchaser. When it was not fulfilled the agreement lapsed.

³² **Witon Chemicals (Proprietary) Ltd v Rebuff (Proprietary) Ltd** 2002 JDR 0625 (T) at p 12

³³ “The test to determine intention to waive has been said to be objective That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations ...; secondly, that mental reservations, not communicated, are of no legal consequence ...; and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter’s notional alter-ego, the reasonable person standing in his shoes”: **Road Accident Fund v Mothupi** 2000 (4) SA 38 (SCA) at 49H.

*The lapsing of the agreement could not possibly have given rise to a right on the part of the seller which could unilaterally be waived by the seller, thereby resurrecting the agreement, ...” : **Fairoaks Investment Holdings (Pty) and Another v Oliver and others***³⁴

*“An agreement subject to a suspensive condition automatically falls away if the condition is not fulfilled by the date fixed by the parties for its fulfilment (Meyer v Barnardo and Another [1984 \(2\) SA 580 \(N\)](#)). It follows, therefore, that nothing which is done after the date fixed for the fulfilment of the condition can affect the position. If the condition is held to have been fulfilled by the relevant date, the contract is good and enforceable; if not, there is no binding contract between the parties thereto. No question of fictional fulfilment can therefore arise by reason of the conduct of one of the parties to a contract after the date fixed for the fulfilment of the condition.” : **Basson v Remini and Another***³⁵

- [48.] The failure of the suspensive condition could therefore not have resulted in the “(accrual) of (a) right to cancel”, as apparently found by the court *a quo*.
- [49.] Mr Solani furthermore, once again only in reply and in response to Mr Tsebane’s averment that it had never been agreed to extend the period within which the suspensive condition³⁶ had to be fulfilled, claimed that the offer of a 14 day period in the letter of 15 February 2016 amounted to an election on the part of the appellant to grant the respondent an extension of the period for the fulfilment of the suspensive condition, which election had been “accepted” by Mr Solani, “either explicitly, alternative by implication”³⁷.
- [50.] The court *a quo* found³⁸ that the offer of a 14 day period in the letter of 15 February 2016 had “constituted a waiver or an extension of the period”. It is, with respect, not clear from the judgment as a whole what “period” was being referred to by the court *a quo* in making this finding. Although clause 4 was not

³⁴ 2008 (4) SA 302 (SCA) para [22]

³⁵ 1992 (2) SA 322 (N) at 327 B - D

³⁶ In other words clause 4 of the written contract.

³⁷ See paragraphs [16] and [17] of the answering affidavit and paragraphs [13] and [14] of the replying affidavit.

³⁸ In paragraph [17] of the judgment.

in so many words referred to in paragraph [17] of the judgment, the reference (in the same paragraph) to a “*suspensive condition*” could be argued to be an indication that it was found that the letter had extended the period stipulated in clause 4. In paragraph [10] of the judgment, however, the court *a quo* found that the letter had “*afforded* (the respondent) *an extension of a period of 14 days to comply with Clause 2 of the agreement*”.

- [51.] Insofar as the court *a quo* may however have found that the 14 day period “*afforded*” in the letter effectively extended the period stipulated in clause 4 for the fulfilment of the suspensive condition, the first problem would be that the contract would, in the absence of any prior extension of the expiry date in clause 4, have lapsed or have been rendered null and void when the suspensive condition had not been fulfilled by the end of the 6 month period. There would thereafter, and at the time of the letter of 15 February 2016, not have remained any contractual period that could be “*extended*”.
- [52.] The second problem would be that the letter quite clearly, in granting the period of 14 days, referred to clause 2, and not to the suspensive condition in clause 4. It in other words purported³⁹ to afford the respondent the opportunity to comply with the provisions of clause 2, and not with the provisions of the suspensive condition in clause 4.
- [53.] Even if the consequences of the failure of clause 4 as a suspensive condition could after the expiry date thereof in a manner of speaking have been undone by an extension of the period stipulated in clause 4, the fact is therefore that the letter in any event never offered to extend that period. Whatever Mr Solani may according to him have “*accepted*”, it could on the plain meaning of the contents of the letter not have been an offer to extend the period stipulated in clause 4.

³⁹ I use this word advisedly, because the contract, including clause 2, had by then already lapsed.

- [54.] The further difficulty is that Mr Solani had, on the available and undisputed evidence, in any event in fact not accepted the “*extension*”⁴⁰ offered in the letter of 15 February 2016. The letter of 16 February 2016 had obviously been intended as a response to the letter of 15 February 2016, and although the author thereof was the conveyancing attorney, the letter was clearly drafted on behalf of the respondent. In that letter the appellant was requested to agree to reduce the purchase price to the amount in respect of which the respondent had at that stage been able to secure a bond, alternatively to grant the respondent “*28 business days to obtain the remainder of the purchase price*”, as “*14 Days might, , not be sufficient in this regard*”. The letter of 16 February 2016 did not convey the acceptance by the respondent of any period offered in the letter of 15 February. To the contrary, it in effect conveyed a counteroffer. The letter of 16 February 2016 was responded to by the appellant’s attorneys in the letter of 22 February, and the refusal “*to vary*” the contract quite clearly constituted a rejection of the counteroffer.
- [55.] It follows that, insofar as the court *a quo* found that the letter of 15 February 2016 had constituted or had led to a 14 day extension of the period for the fulfilment of the suspensive condition in clause 4, such a finding would in my respectful view have been wrong.
- [56.] As will be seen below, if both parties had after the expiry of the period in clause 4 desired to continue with the sale of the property to the respondent, the only solution would have been to conclude a new contract, albeit possibly on substantially the same terms as the lapsed contract. I will revert to this issue, but the fact is that it was never the respondent’s case that a new contract had in some way come into existence after the meeting and/or the letter.

⁴⁰ Irrespective of whether it was granted in respect of the period stipulated in clause 2 or in respect of the period stipulated in clause 4.

- [57.] It was in fact also not the finding of the court *a quo* that a new agreement had in some way come into existence. The finding of the court *a quo*⁴¹ was that “*new life*” had been breathed into the lapsed and null and void written contract and had revived it.
- [58.] No allegation of a revival of the written contract was made in the founding affidavit. In the replying affidavit, Mr Solani claimed that the appellant had, by granting an extension, accepted “*that the agreement was still alive, either by way of an extension of the supply of guarantees or by incorporating the new extension in a contract which by implication was revived or concluded on the same terms and conditions*”⁴².
- [59.] The onus to prove this was also on the respondent⁴³, and a case to this effect should obviously have been made out in the founding affidavit.
- [60.] As already mentioned, the court *a quo* nevertheless found that the letter of 15 February 2016 had indeed constituted a waiver of the appellant’s right to rely on the non-fulfillment of the suspensive condition in clause 4, and went on to find that this had resulted in a revival of the contract. It was held that the letter had given the respondent until 29 February 2016 to comply with the agreement, and that the fact that the respondent had within that period obtained a loan for the balance of R500 000.00 meant that “*it cannot now be said that the (respondent) failed to comply with the stipulated conditions*”⁴⁴.
- [61.] In the first place, and as already pointed out, the letter quite clearly purported to extend the period for compliance with the provisions of clause 2 of the contract, and not those of clause 4. It could therefore not in any way objectively have

⁴¹ See paragraphs [17] and [18] of the judgment.

⁴² My emphasis.

⁴³ Compare **Amoretti v Tuckers Land and Development Corporation (Pty) Ltd**, footnote 18 *supra*, at 331H – I

⁴⁴ See para [17] of the judgment of the court *a quo*.

been interpreted as having been intended as a waiver of the appellant's rights in respect of the already failed suspensive condition in clause 4.

[62.] Secondly, and as already said, the contents of the letter itself would not in my view have justified the inference that the appellant had thereby abandoned its right to raise the defence that the agreement had lapsed, not come into existence or had been rendered null and void as a result of the failure of the condition in clause 4.

[63.] Thirdly, and insofar as the court *a quo* found that the respondent had complied with the request in the letter, that would in any event in my respectful view have been wrong. The letter, and clause 2, required the respondent to do more than to merely secure a loan or loans for the full purchase price. It in effect afforded the respondent 14 days within which to pay the purchase price to the conveyancers in cash, alternatively to deliver to the conveyancers guarantees for payment of the purchase price. This the respondent had undeniably not done, which means that even if the contents of the letter could be seen as an extension of time (which, as already pointed out, would in any event legally not have been possible), the respondent would not have complied with what it had been required to do within that time.

[64.] The finding of the court *a quo* that the appellant had not "*summarily terminated the agreement*"⁴⁵ was also, with respect, not in accordance with the legal principles applicable in the event of the non-fulfillment of a suspensive condition within the time stipulated in a contract, alternatively within any extended period that may have been agreed upon prior to the expiry of the period stipulated in the contract. As already pointed out, such a contract would automatically lapse, fall away or become null and void. It would not have been necessary, or in fact legally possible, for the appellant to terminate the agreement in such circumstances.

⁴⁵ See para [18] of the judgment of the court *a quo*.

[65.] It would in any event not in law have been possible to revive the contract in the manner suggested by the court *a quo*. In the **Westmore** case⁴⁶ Marais J expressed himself as follows in respect of the proposition of a revival of a contract in such a manner:

*“I do not readily comprehend how a purchaser could unilaterally waive a clause of a lapsed or defunct agreement (which by definition no longer exists) and by doing so unilaterally miraculously **breathe new life into the corpse**”* (My emphasis)⁴⁷.

[66.] In the **McPherson** judgment⁴⁸ it was also held that a lapsed agreement could not simply be revived. A new agreement would in effect have to be concluded. It was held that the parties could conclude such a new agreement on the same conditions as those contained in the lapsed agreement or by incorporating those terms, but then they would have to eliminate or amend the condition (especially the cut-off date, which would already have passed by then) that had led to the lapsing of the initial contract; otherwise the new agreement would simply immediately self-destruct due to the non-fulfilment of the suspensive condition. It was also held that, where the contract is by law required to be in writing, an oral agreement to eliminate or to amend a material clause of the lapsed agreement would not be possible. It would have to be in writing and signed by both parties⁴⁹.

[67.] In **Cronje v Tuckers Land and Development Corporation (Pty) Ltd**⁵⁰ it was also held that the revival of the whole of a lapsed agreement would necessarily include the revival of the suspensive condition in it that had caused the agreement to lapse and, because the period stipulated in that condition would

⁴⁶ Reference in footnote 20 *supra*.

⁴⁷ At 736A

⁴⁸ Reference in footnote 30 *supra*.

⁴⁹ See also

⁵⁰ 1981 (1) SA 256 (W)

already have expired, the revived contract would immediately terminate or “self-destruct”.

[68.] The following passages in **Marais v Kovacs Investments 724 (Pty) Ltd**⁵¹ are also instructive in this regard:

“In the present matter there is no suggestion that any waiver of the non-fulfilment of clause 4.1 of the deed of sale took place on or before 15 August 2005. It follows, in my view, that on that day the deed of sale automatically “fell away”, lapsed and became a dead letter.

It could be revived only by a fresh agreement between the parties. The respondent could not, after 15 August 2005, “unilaterally miraculously breathe new life into the corpse” (Westmore v Crestanello and others 1995 (2) SA 733 (W) at 736A–B). It is the respondent’s case, however, that there was, indeed, an agreement between the parties to “waive” fulfilment of the suspensive conditions; this agreement, it is contended by Mr Dickerson, was tacit and is evidenced by both parties’ conduct in proceeding, for some months, as if the conditions had, indeed, been fulfilled.”⁵²

“The second difficulty which I have with Mr Dickerson’s argument is that the subject-matter of the deed of sale was immovable property. In terms of [section 2\(1\)](#) of the Alienation of Land Act [68 of 1981](#), no alienation of land is of any force or effect “unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority”. These formalities apply also, of course, to an amendment of a deed of alienation. The agreement of the parties relied on by the respondent in terms of which they allegedly agreed to regard the deed of sale as valid and effective despite the non-fulfilment of the suspensive condition in clause 4.1, was not reduced to writing or signed by or on behalf of either of them: it is the respondent’s case that it was tacitly concluded, as evidenced by their conduct. If I am correct in holding that any such agreement would necessarily have constituted an amendment of the deed of sale (as I do), it follows that it was invalid and of no force or effect for lack of compliance with the required statutory formalities”⁵³

⁵¹ Reference in footnote 27 *supra*.

⁵² At 179 – 180 of the judgment.

⁵³ At p 180 of the judgment.

[69.] The finding in paragraph [18] of the judgment of the court *a quo* that the appellant had, in “*the circumstances surrounding the ‘agreement’ from 10 February 2016*”, revived “*the contract*”, clearly implies a finding that the whole of the lapsed contract, including clause 4, had been revived. As already pointed out, a “*revival*” in these terms would have led to the written contract immediately again lapsing and “*self-destructing*”, and the written contract would accordingly at the time of the application not have been valid.

[70.] The respondent’s contentions in this regard, in paragraph 29 of the replying affidavit, were:

69.1 that Mr Tsebane had, when the 14 day period was offered in the letter of 15 February 2016, “*accepted*” that the agreement was at that stage “*still alive*”; alternatively

69.2 that the granting of the 14 day period amounted to the incorporation of such an “*extension*” into the lapsed contract, thereby reviving it “*on the same terms and conditions*”, or to the incorporation of the said period into a (new) contract that was thereby concluded “*on the same terms and conditions*”.

[71.] The first contention is without any merit. Whatever Mr Tsebane may have believed and “*accepted*” would not have made any difference to the legal consequences of the non-fulfillment of the suspensive condition. In any event, Mr Tsebane’s statement that he had contemplated reviving the agreement that was according to him at that stage void *ab initio*⁵⁴, militates against him having been under an impression that the contract was “*still alive*” after the expiry date stipulated in clause 4. The 14 day period was clearly granted, as far as Mr Tsebane was concerned, with a view to possibly reviving the contract. The statements by the appellant’s attorneys in their letters that the contract would

⁵⁴ Replying affidavit: paragraph 24.3.

not be varied, and later that the contract was cancelled, were misconceived and not in accordance with the law, because the contract at that stage no longer existed .

- [72.] As regards the second contention, the revival of the lapsed contract on the “*same terms and conditions*” would, as already explained, have led to the revived contract immediately lapsing once again, because the 6 month period in clause 4 would have had to be calculated from the date of the “*signing*” of that contract, and would therefore already have expired.
- [73.] The allegation of the “*incorporation*” into the “*revived*” contract of the 14 day period offered in the letter of 15 February 2016 would not have made any difference to this result. It had, as already mentioned, clearly not been offered as a period within which to comply with clause 4 of the contract, and it could therefore by no stretch of the imagination be said to have extended the period therein with 14 days.
- [74.] Mr Coetzee based his entire argument, if I understood it correctly, on submissions that the appellant’s offer of the 14 day period in the letter of 15 February 2016 is indicative of an understanding, on the part of the appellant, that failure of the condition in clause 4 had not resulted in the lapsing of the contract and that that in turn implies that the appellant had in fact in concluding the contract not intended the provisions of clause 4 to constitute a suspended condition.
- [75.] The first problem with this argument is that it is in conflict with the case that Mr Solani attempted to make out in his replying affidavit. The gist of what Mr Solani stated was clearly that the failure of the condition in clause 4 had indeed resulted in the appellant being entitled to avoid the contract on the basis of such failure, but that the appellant had chosen not to exercise that right. Mr Solani did not challenge the description in the answering affidavit of the provisions of clause 4

as a suspensive condition. In his replying affidavit he himself in fact referred to those provisions as a suspensive condition⁵⁵.

[76.] Furthermore Mr Solani in his founding affidavit referred to, and clearly relied on, the contents of the letter that his attorneys had addressed to the appellant on 14 March 2016, and in that letter the author also described the provisions of clause 4 as a suspensive condition.

[77.] The offer of a 14 day period can also not be viewed in isolation when considering whether the appellant had intended clause 4 to be a suspensive condition. Mr Tsebane's statements that the clause had constituted a suspensive condition and that the failure thereof had resulted in the agreement being rendered void *ab initio* are clearly irreconcilable with an understanding that the clause had in fact not constituted a suspensive condition.

[78.] As already indicated, the provisions of clause 4 comply with the trite test for determining whether provisions can be interpreted as having been intended as a suspensive condition⁵⁶.

[79.] Mr Coetzee conceded that, should it be found that clause 4 was indeed a suspensive condition, it would effectively put an end to the respondent's case on appeal.

[80.] It follows that I am of the view :

80.1 that the provisions of clause 4 were intended to suspend the operation of the contract until a loan or loans had been obtained for the full purchase price;

⁵⁵ Record : p 074

⁵⁶ See para [3] *supra*.

80.2 that failure of that condition resulted in the contract not coming into operation and in effect falling away, lapsing and/or being rendered null and void;

80.3 that the finding that the contract had been revived in the manner suggested by the court *a quo*, was wrong; and

80.4 that the order that the contract “*concluded on 04 August 2015 (was) still valid*” should not have been granted.

[81.] Mr Solani’s alternative contention that a new contract had been concluded, once again on the “*same terms and conditions*” as those in the lapsed contract, when the 14 day period was granted and allegedly accepted by him, presents different problems.

[82.] Mr Solani did not explain when and how the offer was allegedly accepted.

[83.] The contents of the letter of 16 February 2016 would, as already mentioned, have constituted an implied rejection of the offer of a period of 14 days in the letter of 15 February 2016.

[84.] Furthermore, and even if the letter of 15 February 2016 could be argued to have been a written offer by the appellant to conclude such a new contract, there was no allegation that the alleged acceptance thereof was also in writing. In fact, on all indications it would not have been. The “*new*” agreement would then have been invalid, because it would not have been in writing and signed by both parties, and would therefore not have complied with the requirements of section 2(1) of the **Alienation of Land Act**⁵⁷.

[85.] A further problem is that it was the appellant’s attorneys who had through the letter of 15 February 2016 “*afforded (the respondent) a period of 14 days to*

⁵⁷ 68 of 1981; Compare **Marais v Kovacs Investments 724 (Pty) Ltd**, footnote 27 *supra*

comply with clause no 2 of the agreement”, the clear implication being that the appellant required the respondent to pay the full purchase price in cash, or deliver guarantees, within 14 days of the date of that letter⁵⁸.

[86.] This would have amounted to a contractual term substantially different from clause 2 of the lapsed contract. Clause 2 of the lapsed contract provided for such a request by the conveyancers (appointed by the appellant), and the author of the letter of 15 February 2016 was not the appointed conveyancer, as intended in clause 2 and clause 8⁵⁹ of the written contract. The respondent’s attorneys in fact acknowledged this⁶⁰ when pointing out that the appellant’s attorneys would not in terms of clause 2 of the (lapsed) contract have had the right to demand the payment of the cash or the furnishing of guarantees.

[87.] The “*incorporation*” of the 14 day “extension” as a contractual term in the manner suggested by the respondent and accepted by the court *a quo*, viz that the 14 day period started on the date of the letter, would also have amounted to the incorporation of a term materially different from clause 2 of the lapsed contract, and arguably even in the substitution of clause 2, because clause 2 of the written contract provided that the 14 day period would run from the date of a request by the conveyancing attorneys that the purchaser pay the purchase price in cash or deliver guarantees for such payment. Amendments like these would have had to be in writing and signed by both parties.

[88.] In any event, the respondent never sought a declaratory order to the effect that a new agreement had been concluded and was valid at the time of the application.

[89.] This brings me to the finding of the court *a quo* that, because the respondent had managed to obtain financing for the full purchase price within the period of

⁵⁸ That is what the respondent could in terms of clause 2 have been requested to do.

⁵⁹ Which recorded that Haarhoffs Incorporated would be the conveyancing attorneys.

⁶⁰ In their letter dated 14 March 2016.

14 days from the letter of 15 February 2016, “*equity require(d) that the property be transferred to it*”⁶¹.

[90.] In this regard I would refer to the **Meyer** case⁶², with which I respectfully agree and in which it was held⁶³ that equity played no role in circumstances like these and that what is relevant is “*the intention of the parties at the time of contracting*”. It was further held⁶⁴ that “*the fact that in the result the loan was only one day late, that provision is made for her to call for a guarantee to secure payment, and that she has in the result not suffered any prejudice is irrelevant if one bears in mind, as in my view one must, that **it is the intention of the parties at the time of contracting which is the determining factor***”⁶⁵.

[91.] In the present matter the intention of the parties at the time of the conclusion of the agreement had clearly been that the coming into operation of the agreement, and therefore of the respondent’s right to the transfer of the property into its name, was not only “*subject*” to the respondent obtaining a loan or loans for the full purchase price, but also to that happening within the stipulated period. The issue of time had therefore clearly been important and the parties had, at that stage, clearly intended that there should within 6 months of the signing of the contract be certainty as regards the respondent’s ability to pay the purchase price.

[92.] This brings me to the declaratory order that the cancellation of the agreement on 7 March 2016 was “*wrongful*”. No clear reason/s can be discerned from the judgment for this order. The only inference that can be drawn is that the court *a quo* found that the respondent had, by securing the required amount “*before the cut-off period*” and “*within the extended period*”, complied with “*the stipulated*

⁶¹ Para [18] of the judgment.

⁶² Reference in footnote 20 *supra*.

⁶³ At 586B

⁶⁴ At 586C

⁶⁵ My emphasis.

provisions” of what the court *a quo* had viewed as the revived written contract⁶⁶, and that the contract would therefore not have been susceptible to cancellation on the basis that there had not been compliance as required in the letter of 15 February 2016.

- [93.] As I have already said, the respondent in fact did not comply with the request in the letter. It did not within the “*extended*” period of 14 days comply with clause 2 of the agreement, in other words by paying to the conveyancers the purchase price in cash or by delivering to them guarantees for such payment, as requested.
- [94.] In my view the cancellation would therefore, if the contract had at that stage been valid and in existence, indeed not have been unlawful on this particular basis.
- [95.] As already mentioned, the respondent’s attorneys took the stand⁶⁷ that the appellant’s attorneys had not in terms of clause 2 of the contract been entitled to demand that the respondent comply with clause 2, and it appears as if it was on that ground that they stated in their letter of 14 March 2016 that the cancellation of the contract on the basis of a failure to comply with the demand in the letter, would have been unlawful.
- [96.] In view of my conclusion above that the agreement of 4 August 2015 fell away or lapsed when the suspensive condition failed, it is unnecessary to decide this point.
- [97.] The contract no longer existed after the expiry of the 6 month period stipulated in clause 4. At the time of the letter of 15 February 2016 there was therefore no clause 2 to comply with, and at the time of the letter of 7 March 2016 there would have been no clause 9 in terms of which the appellant could have had a

⁶⁶ See paragraphs [17 and [18].

⁶⁷ In their letter of 14 March 2016.

right to cancel⁶⁸. There had, at the time of the purported cancellation, existed no contract which could be cancelled.

[98.] In my view court *a quo* should therefore have found that the contract of 4 August 2015 had lapsed, that it had not been revived and that it had no longer existed at the time of the application, and should on this basis have dismissed the application in respect of both declaratory orders sought by the respondent.

[99.] There would then, in my view, not have been any reason why the appellant should not have been awarded costs in the application.

[100.] It follows that I am of the view that the appeal should succeed and that the orders of the court *a quo* should be set aside, and substituted with an order that the application is dismissed with costs.

[101.] There is no reason why the costs of the appeal should not follow this result.

[102.] When leave to appeal was granted the costs order against the appellant in the unsuccessful application for leave to appeal was not varied in terms of section 17(2)(b) of the Superior Court Act, which provides that, if leave to appeal is granted by the Supreme Court of Appeal, it “*may vary any order as to costs made by the judge or judges concerned in refusing leave*”. The subject of the appeal that the appellant was granted leave to pursue is the main application, and not the application for leave to appeal. In the circumstances it would unfortunately not in my view be competent for this court to order that those costs be costs in the appeal. It would be up to the appellant to decide whether to approach the Supreme Court of Appeal in this regard.

[103.] The following orders are therefore made:

1. THE APPEAL SUCCEEDS AND THE ORDERS OF 14 OCTOBER 2016 THAT:

⁶⁸ Clause 9 of the contract of 4 August 2015 provided, *inter alia*, that if the purchaser failed to furnish a guarantee as required in clause 2 within 14 days, the seller would be entitled to declare the sale cancelled, without notice.

- “1. The agreement between the Kapa Koni Investments CC and Abrinah 7804 (Pty) Ltd concluded on 04 August 2015 is still valid;***
- 2. The purported cancellation of the agreement by Abrinah 7804 (Pty) Ltd on 07 March 2016 was wrongful;***
- 3. Abrinah 7804 (Pty) Ltd pays the costs of this application on the party and party scale”.***

ARE SET ASIDE AND SUBSTITUTED WITH THE FOLLOWING ORDER:

“The application is dismissed with costs.”

2. THE RESPONDENT IS ORDERED TO PAY THE COSTS OF THE APPEAL.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.

V M PHATSHOANE
ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur.

B M PAKATI
JUDGE
NORTHERN CAPE DIVISION

For the Appellant:

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(Instructed by Towell & Groenewaldt Attorneys)

For the Respondent:

Adv W J Coetzee SC
(Instructed by Towell & Groenewaldt Attorneys)