

Saaknommer: 51/2001

**DIE HOOGSTE HOF VAN APPÈL VAN
SUID-AFRIKA**

In die saak tussen:

VAVASOR PROPERTIES (EDMS) BEPERK

APPELLANT

en

CHRISTIAAN FREDERIK EHLERS

EERSTE RESPONDENT

HESTER JOHANNA EHLERS

TWEEDE RESPONDENT

VOOR:

**MARAIS, STREICHER en CAMERON
ARR**

VERHOORDATUM:

12 MAART 2002

LEWERINGSDATUM:

28 Maart 2002

*Kontrak – Stilswyende term – Kan nie ingelees word nie – Partye het van
gemeenskaplike veronderstelling uitgegaan*

UITSPRAAK

CAMERON AR:

[1] Noordwes van Pretoria op die Britspad lê 'n stuk grond wat aan die

respondente behoort. In die verhoorhof was hulle die eisers. Hulle is man en vrou. Deurgaans het die eerste eiser namens hulle opgetree (ek volg die verhoorhof sowel as die advokate en verwys na albei as 'die eiser'). Die eiendom is gunstig geleë vir ontwikkeling, en in Maart 1997 het ene Pieterse namens die appellant ('Vavator') die eiser genader. Die voorstel was dat Vavator en die eiser 'n ooreenkoms aangaan om die eiendom te ontwikkel. Op 1 April 1997 het die eienaars en Vavator 'n ooreenkoms onderteken wat 'n vennootskap tussen hulle in die lewe gebring het. Die tersaaklike terme was soos volg:

‘2. Die eienaars sal 'n en comadite vennoot wees en as sodanig nie aanspreeklik wees vir enige vennootskapskulde en sal ook nie geregtig wees om enige regshandelinge insluitende die aangaan van skulde namens en vir die vennootskap, aan te gaan nie en Vavator sal die uitvoerende vennoot wees.

3. Vavator sal op eie koste 'n gangbaarheidsstudie doen om te bepaal of die nodige regte en padtoegange verkry kan word, die nodige planne optrek en 'n gangbaarheidsstudie doen om te bepaal of dit haalbaar is om die eiendom te ontwikkel, welke gangbaarheidsstudie

Vavator binne ses (6) maande vanaf datum van hierdie ooreenkoms moet finaliseer by gebreke waarvan hierdie ooreenkoms sal verval, die vennootskap ontbind sal wees en geeneen van die partye enige eise teen die ander party sal hê nie.

4. Die eienaars stel die eiendom, onderhewig aan die eienaars se besit/bewoningsreg so as wat die eienaars tot nog toe geniet het, tot die alleenbeskikking van die vennootskap en verleen redelike toegangsregte aan Vavator ten einde die voormelde gangbaarheidsstudie te doen.

5. Die eienaars verbind hulleself hiermee teenoor die vennootskap om, sodra Vavator besluit het om met die voormelde ontwikkeling voort te gaan, die eiendom te verkoop aan 'n ontwikkelingsmaatskappy wat Vavator gaan stig om die ontwikkeling te doen teen 'n netto koopprys R950 000.00 (negehonderd en vyftig duisend rand) betaalbaar in kontant by registrasie van transport van die eiendom in die naam van die maatskappy.

6. Vavator sal sodra dit besluit het om met voormelde ontwikkeling voort te gaan, 'n maatskappy stig

6.1 wat die eiendom soos voormeld van die eienaars sal koop;

6.2 wat die voormelde ontwikkeling sal voltooi en bemark;

6.3 wat geregtig sal wees om teen sekuriteit van verbandlenings die koopprys sowel as die transport- en ontwikkelingskoste te betaal;

6.4 waarin die eienaars 'n 30% (dertig persent) aandeelbelang kosteloos sal verkry en geregtig sal wees om een direkteur te benoem;

6.5 waarin Vavator 70% (sewentig persent) van die ander aandeelbelang hou en geregtig sal wees om die ander direkteure te benoem; en

6.6 waarvan die aandele dividenddraend sal wees.

7. Die eienaars sal geen verpligting hê ten opsigte van die betaling van enige skuld of uitgawe van die vennootskap of ten opsigte van voormelde ontwikkeling of vir die aandele in voormelde maatskappy nie en Vavasor vrywaar die eienaars teen enige eis wat in dié verband teen die eienaars ingestel kan word.

[2] Dit is gemeensaak dat die opskortende voorwaarde binne die ses maande-tydperk vervul is, en dat die eiser ingelig is dat Vavasor aan prokureurs opdrag gegee het om 'n maatskappy te stig en 30% van die aandele aan hom oor te dra. Later is ooreengekom dat 'n bestaande 'rakmaatskappy' vir die beoogde doel gebruik sou word in plaas daarvan om 'n nuwe maatskappy te stig.

[3] Die eiser het die eiendom bewoon, en hierop het hy alternatiewe huisvesting begin soek. Hy het ook 'n konsepkoop-ooreenkoms aan Vavasor deurgestuur. Verskeie gesprekke het oor die volgende maande tussen die partye plaasgevind. Dit is gemeensaak dat Vavasor egter nooit

voortgegaan het met óf die stigting van 'n nuwe maatskappy, of die benutting van 'n rak-maatskappy, om die koop van die eiendom te volvoer nie.

- [4] In sy besonderhede van vordering vorder die eiser, teen tender van die eiendom, spesifieke nakoming van die ooreenkoms; alternatiewelik, kansellasië daarvan plus skadevergoeding en rente. Tydens die verhoor het hy getuig dat ten spyte van herhaalde probeerslae hy geen vaste onderneming van Vavasor of Vavasor se besturende direkteur, Annandale, kon verkry om voort te gaan met óf die koop van sy eiendom óf die voltooiing en bemarking van die ontwikkeling nie. Na herhaalde versekerings dat befondsing verkry sou word, wat nooit volvoer is nie, moes hy met teësin tot regsaksie oorgaan. Annandale het namens Vavasor getuig (Pieterse het intussen na Nieu Zeeland ge-emigreer). Sy getuigenis was dat, hoewel die gangbaarheidsstudie getoon het dat die

ontwikkeling kommersieël gangbaar was, en 'alles positief gelyk [het] om voort te gaan', verskeie onverwagte probleme verhoed het dat Vavator die finansiële rugsteuning vir die ontwikkeling kon verkry.

[5] Dit is nooit aan Annandale gestel dat Vavator of self finansiëel in staat was om die ontwikkeling te volvoer nie, of in staat was om die benodigde finansies elders te bekom nie. Die uitsluitlike vraag is dus of Vavator nietemin kontraktueel verplig was om die ontwikkelingsfinansies ten minste vir die aankoop van die eiendom te voorsien.

[6] Die verhoorhof (Jordaan Wn R) het die eiser hierin gelyk gegee. Die verskil tussen die koopprys van R950 000,00 en die eiendom se waarde soos tydens die verhoor bewys, naamlik R400 000,00, is as skadevergoeding toegeken, tesame met rente en koste. Die verhoorhof het verlof om te appelleer geweier; maar dit is later deur hierdie Hof

verleen.

[7] Die verhoorhof het die kernvraag geïdentifiseer as die betekenis van klousules 5 en 6 van die vennootskapsooreenkoms, en bevind dat Vavasor ‘verhinder’ het dat die beoogde maatskappy die koopkontrak sluit. Dit stel volgens die verhoorhof kontrakbreuk daar op grond waarvan die eis moet slaag.

[8] In sy besonderhede van vordering het die eiser gesteun op 'n gedeeltelik skriftelike, gedeeltelik mondelinge ooreenkoms, waarvan die mondelinge gedeelte was dat die beoogde maatskappy ‘voldoende fondse en personeel’ sou hê om sy verpligtinge na te kom. Tydens die verhoor is daar egter geen getuienis gelei wat die mondelinge beding bewys het nie. Die hoofkwessie op appèl was dus of die alternatiewe eisoorzaak bewys is, naamlik dat daar stilswyend beding is dat die beoogde maatskappy ‘voldoende fondse en personeel’ sou hê om al sy verpligtinge

na te kom'. Daar is nie betoog dat die terme van die kontrak onduidelik of dubbelsinnig is nie. Derhalwe is die getuienis tydens die verhoor afgele slegs relevant om die agtergrondsomstandighede by kontraksluiting aan te dui.

[9] By 'n betragting van die ooreenkoms is dit opvallend dat die eiser as vennoot in die ontwikkelingsprojek nie bloot tot die vennootskap bydra deur sy eiendom beskikbaar te stel nie. Die ooreenkoms gaan verder en bepaal dat sodra die opskortende voorwaarde vervul word, die beoogde maatskappy die eiendom sal koop. Daarby bepaal die ooreenkoms dat die eiser kosteloos 'n 30% belang in die beoogde maatskappy verkry, hoewel hy nie aanspreeklik is vir vennootskapskulde nie en daarby gevrywaar word teen enige eis ten aansien van die vennootskap.

[10] Was dit die partye se bedoeling, en is die vennootskapsooreenkoms vatbaar vir die uitleg, dat afgesien hiervan daar 'n verpligting op Vavator

sou rus om te verseker dat die beoogde maatskappy die eiendom teen die vasgestelde prys koop? Die vraag is of die kontrak self, behoorlik geïnterpreteer, daarop dui dat die beoogde maatskappy deur Vavator van die benodigde befondsing voorsien moes word, en, indien nie, of daar 'n stilswyende term tot die effek ingelees moet word.

- [11] Klousule 6.1 bepaal dat Vavator 'n maatskappy sal stig 'wat die eiendom . . . van die eienaars *sal koop*' (kursivering bygevoeg). Dui die natuurlike betekenis van hierdie woorde, in hulle konteks gelees, daarop dat Vavator onder 'n verpligting geplaas word om die befondsing te voorsien wat die beoogde maatskappy in staat sou stel om die koop te voltrek? Die woordgreep is in die toekomstige tyd en nie 'n gebiedende bepaling, aangesien die maatskappy wat die verpligting moet uitvoer nog nie bestaan nie. 'Sal koop' beteken nie dat Vavator die finansiering moet verskaf om te verseker dat dit wel gebeur nie. Die toekomstige tyd dui

na my mening eenvoudig daarop dat die partye ten tye van kontraksluting gedink het dat die koop wel sou plaasvind.

[12] By 'n natuurlike uitleg van die kontrak se bewoording is daar na my mening dus nie die verpligting te lees waarop die eiser wil steun nie. Die eiser se hoofargument op appèl was egter dat die vennootskapsooreenkoms uit 'n kommersiële oogpunt absurd sou wees indien daar nie stilswyend ooreengekom is nie dat Vavasor die benodigde finansiële rugsteuning sou verskaf nie. Derhalwe moes 'n beding tot die effek in die kontrak ingelees word.

[13] Na my mening kan die argument nie slaag nie. Die kontrak is na my mening sonder die beding volkome kommersieël sinvol *mits daar uit 'n ander bron finansies bekombaar was*. Indien die partye ten tye van kontraksluiting onder die gemeenskaplike veronderstelling verkeer het dat, mits die gangbaarheidsstudie positief is, die benodigde finansies

vanuit een of ander bron beskikbaar gestel sou word, dan was dit geensins sinneloos om 'n bepaling wat Vavasor verplig om die finansies te verskaf weg te laat nie.

- [14] Dit is geykte reg dat 'n stilswyende beding by 'n kontrak ingelees kan word slegs indien dit met sekerheid gesê kan word dat, indien die partye ten tye van die kontraksluiting ondervra sou gewees het oor die uitdruklike invoeging al dan nie van die betrokke term, hulle beide sou geantwoord het, 'natuurlik geld die term; dit is nie eens nodig dat ons dit uitdruklik invoeg nie.' Nienaber AR het in *Wilkins NO v Voges* 1994(3) SA 130 (A) at 136 - 137 die posisie soos volg uiteengesit:

‘A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it-which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The

inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The *onus* to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional.'

[15] Soos Colman R dit gestel het in *Techni-Pak Sales (Pty) Ltd v Hall* 1968(3) SA 231 (W) at 236 E - G:

'The Court has no power to supplement the bargain between the parties by adding a term which they would have been wise to agree upon, although they did not. The fact that the suggested term would have been a reasonable one for them to adopt or that its incorporation would avoid an inequity or a hardship to one of the parties, is not enough. The suggested term must, in the first place, be one which was necessary as opposed to merely desirable, to give business efficacy to the contract; and, what is more, the Court must be satisfied that it is a term which the parties themselves intended to operate if the occasion for such operation arose, although they did not express it.'

Colman R wys ook daarop dat die leer van stilswyende terme 'relates not to what the parties might have agreed to or would probably have agreed to after further negotiation, had there been any, but to what they must have intended at the time when they negotiated and agreed as they did'

(237B).

[16] In die huidige geval kan daar na my mening nie gesê word dat Annandale namens Vavasor ten tye van die sluiting van die ooreenkoms sou gesê het, indien die moontlikheid van probleme met finansiering geopper sou gewees het, 'maar natuurlik sal Vavasor dan die finansiering verskaf!' Inteendeel. Die kontrak het vir die eiser aansienlike voordele ingehou, met minimum-risiko. Uit 'n kommersiële oogpunt kom die betoog dat Vavasor daarby onder alle omstandighede moes instaan vir die finansiering van die eiendomsaankoop vir my allermens oortuigend voor. Dit lyk my meer waarskynlik te gewees het dat dit die partye se gemeenskaplike veronderstelling was dat finansiële ondersteuning vir die beoogde ontwikkeling uit een of ander bron bekom sou kon word. Die getuienis aan beide kante strook met hierdie afleiding. Vavasor is egter nooit onder 'n kontraktuele verpligting geplaas om te verseker dat dit

gebeur nie.

[17] Dit dien in hierdie konteks beklemtoon te word dat die kontrak soos hy uiteindelik daar uitgesien het, afkomstig was van die eiser self, wat 'n ervare prokureur is. Pieterse namens Vavator het vir die eiser 'n konsepvennootskapsooreenkoms verskaf. Hierop het die eiser beduidende wysigings aangebring (insluitende 'n verkorting van die opsietydperk vanaf 12 na 6 maande), en daarna die kontrak vir Pieterse teruggefaks. In hierdie omstandighede is die gebrek aan 'n uitdruklike bepaling dat Vavator onvoorwaardelik vir die finansiering van die ontwikkelingsprojek moet instaan onvermydelik opvallend.

[18] Daar kan na my mening dus nie met die vereiste sekerheid gekonstateer word dat óf Vavator óf immers die eiser self bevestigend sou geantwoord het indien die betrokke term tydens kontraksluiting aan hulle gestel sou gewees het nie.

[19] Indien die bedoeling van die partye was om ingevolge klousule 6.1 'n verpligting op Vavator te plaas om toe te sien dat die beoogde maatskappy

die eiendom koop en die koopprys betaal, moet dieselfde geld ten opsigte van klousule 6.2. Klousule 6.2 bepaal dat die beoogde maatskappy 'die voormelde ontwikkeling sal voltooi en bemark'. Die feit dat die kooptransaksie onmiddellik moes plaasvind, terwyl die ontwikkeling later sou plaasvind, bied geen basis daarvoor om die twee 'verpligtinge' as afsonderlik te beskou, soos betoog deur die eiser se advokaat nie. Dit is 'n verdere rede waarom die beding waarop die eiser steun nie ingelees kan word nie. Dit is naamlik onwaarskynlik dat Vavasor kon bedoel het om te onderneem om nie slegs op eie risiko nie, maar suiwer ook op eie koste, vir die totale finansiering van die eiendomsaankoop en die ontwikkelingsprojek in te staan nie. In daardie geval sou dit immers onnodig gewees het vir die partye om die stigting of benutting van 'n verdere maatskappy te beoog, en kon Vavasor net sowel die eiendom self aangekoop het, en self onderneem het om die ontwikkeling te voltooi en te bemark.

[20] 'n Verdere oorweging is die volgende. Dit blyk duidelik uit klousule 6.3 dat die beoogde maatskappy geregtig sou wees om die ontwikkelingskoste ten minste ten dele te verhaal 'teen sekuriteit van verbandlenings' op die eiendom. Dit dui ten minste daarop dat die beoogde maatskappy ten dele self moes sorg dat die finansiering bekom word, uit bronne anders as Vavasor. 'n Stilswyende term dat Vavasor onvoorwaardelik vir daardie koste moes instaan is volgens my mening dus nog minder vanselfsprekend af te lei.

[21] Ek kom dus tot die gevolgtrekking dat hoewel Vavasor kontrakbreuk gepleeg het deur te versuim om die koop van die eiser se eiendom deur die beoogde maatskappy te laat volvoer, die eiser geen skade gely het as gevolg van die kontrakbreuk nie, omdat Vavasor nie op grond van die kontrak onder 'n verpligting gestaan het om te sorg dat die maatskappy in staat was om die koop deur te voer nie.

[22] In hierdie omstandighede is die gevolgtrekking onafwendbaar dat daar 'n onoorkomelike gebrek in die eis voorkom, en moes die aksie in die verhoorhof van die hand gewys gewees het. Dit is derhalwe nie nodig om te handel met die verdere aspekte betreffende rente wat in die verhoorhof se bevel vervat is nie.

[23] Die appèl moet dus met koste slaag. Die bevel in die verhoorhof word ter syde gestel, en vervang met die volgende:

‘Die eisers se eis word van die hand gewys met koste.’

**E CAMERON
REGTER VAN APPÈL**

STREICHER AR STEM SAAM

MARAIS JA/

MARAIS JA: [1] I have had the advantage of reading the judgment of my learned brother Cameron JA. With respect, I am unable to concur in the conclusion he has reached. For me, the key to a proper understanding of the contract is an appreciation of its dual character. It is neither solely a partnership agreement nor solely a contract which regulates the basis upon which a potential sale of immovable property is to take place. It is a composite agreement which accommodates both in one document and the jural relationships which spring from it are governed partly by special principles derived from the law of partnership and partly by general principles derived from the law of contract. Care must be taken not to conflate, consciously or unconsciously, these two distinct sources of legal

obligation into a single hybrid source of obligation and then to attempt to deduce from it what obligations do or do not exist.

[2] The basic elements of the written agreement are quite clear. The plaintiffs, Mr and Mrs Ehlers, owned and lived on a piece of land which Vavasor thought it might be profitable to exploit commercially by developing it as a precinct for the motor industry. But it was not prepared to buy it from the plaintiffs until it had conducted a viability study. That study was not to be confined to such matters as the feasibility of acquiring the necessary developmental rights and road access and the drawing of plans. It was also to extend to the financial feasibility of developing the property which would have to take into account the methods, availability and cost of financing the development. That is the plain meaning of clause 3 (“**en** (my

emphasis) ‘n gangbaarheidstudie doen om te bepaal of dit haalbaar is om die eiendom te ontwikkel”).

[3] Just as Vavasor was not prepared to commit itself to buying the property until that study had been completed and it was satisfied of both the physical and financial viability of the development it had in mind, so were the plaintiffs not prepared to wait indefinitely for that to be done and to be committed indefinitely to holding their property available for purchase and use in the development. Hence the time limit of six months imposed by clause 3 for the completion of the viability study.

[4] Although the plaintiffs were to be partners in the partnership (the Doreg 27 Ontwikkeling) which would undertake the development they were not expected to contribute to the assets of the partnership by donating their property to it. The partnership was to be conducted through the medium of a

company to be formed by Vavasor alone and that company was to be obliged to buy the property from the plaintiffs for R950 000. The formation of that company and the purchase of the plaintiffs' property was to take place as soon as Vavasor decided to go ahead with the development and the purchase price was to be paid in cash against transfer of the property to the company so formed.

[5] The plaintiffs' interest in the company was to be 30% and that of Vavasor 70%. The plaintiffs were to pay nothing for their interest and were not to be liable for any of the partnership's obligations. Vavasor alone was to be the executive partner and the plaintiffs were barred from concluding any transactions or incurring any debts on behalf of the partnership. Vavasor was to indemnify them for any claims made against them arising out of the partnership or the development.

[6] What is abundantly clear therefore is that Vavasor was required to make up its mind after completion of the viability study whether to go ahead with the development. A decision to do so would trigger the plaintiffs' obligation to sell their property for R 950,000 to a company to be formed by Vavasor for the specific purpose of buying the property, providing a corporate framework for the Doreg 27 Ontwikkeling partnership, enabling appropriate shareholdings to be conferred upon Vavasor and the plaintiffs, and developing the property. Reciprocally, a decision by Vavasor to go ahead with the development would oblige it to form a company to undertake and give effect to the obligations spelt out in clause 6.

[7] It is critical to the proper interpretation of the agreement to bear in mind the distinction between the different and shifting capacities in which Vavasor and the plaintiffs were parties to the agreement. I have already

pointed out that the plaintiffs were not required to transfer their property to the partnership which would come into being in corporate garb in their capacity as partners and in fulfilment of any obligation to contribute to the capital assets of the partnership. They were obliged to do so only in their capacity as sellers. Equally, the partnership's obligation to them to buy the property and pay the price was not owed to them in their capacity as partners. Nor was Vavator's obligation to them to bring about the formation of the company which was to purchase the property. For the purposes of that transaction they rank in law as ordinary parties to a commercial contract who contracted at arm's length with one another.

[8] In their capacity as partners, the plaintiffs had other rights against their partner Vavator. They could enforce Vavator's undertaking to fund the development if Vavator failed to do so. However, if objectively

assessed, it were to become apparent at any time that the development was doomed to failure, the plaintiffs would not be entitled to insist that the development go ahead. That would not be compatible with their obligation as partners to act in good faith. But Vavasor would not be entitled to undo the purchase by the partnership of the property.

[9] For that reason I consider it to be unsound to equate the obligation in clause 6.1 with the obligation in clause 6.2 and then to narrow the ambit of the former as if it were subject to the same limitations as the law of partnership imposes upon the superficially wide breadth of the obligation in clause 6.2.

[10] To my mind, no question of a tacit term arises. The ordinary meaning of the language in which the agreement is couched obliged Vavasor, once it had decided to go ahead with the development after having had the benefit of a viability study comprehending inter alia financial viability, to bring into

being a company which would buy the property for a predetermined price, pay that price, and take transfer of the property. That is quite a different case from that in which A undertakes to B that A will procure C to buy B's property. There C is an identifiable, existing, person (whether natural or legal) with an existing patrimony (be it large or small) and B is able to decide whether to sell to C in the light of C's ascertainable financial ability to fulfil the obligation to pay the price. In such circumstances, there can be no suggestion that A is obliged to ensure that C is financially able to and does pay the price.

[11] This is a case in which Vavasor alone would decide whether there was to be a purchase at all. If it decided that there would, there would be no identifiable existing person (whether natural or legal) who would be entitled to be the buyer and whose financial strength or weakness the plaintiffs could have assessed before committing themselves to selling the property to her,

him or it. The buyer was to be a subsequent creation of Vavasor's. I use the word "creation" advisedly for the buyer could and would not be a natural person. The plaintiffs were to be obliged to sell their property to Vavasor's creation. It had to be created for the specific purpose of buying the property for R 950,000 and paying cash against transfer.

[12] In my opinion, it would be absurd to suppose that Vavasor was free to give birth to a legally and financially still-born company which was incapable of effectively acquiring the property by buying it and obtaining transfer by paying for it. Just as Vavasor would have failed to fulfil its contractual obligations if it had formed a company the memorandum of association of which did not allow it to acquire immovable property, so would it have failed to do so if it provided it with no share or loan capital or other financial means to enable it to function effectively or at all. Unless it was Vavasor's obligation to empower the company legally and financially to

purchase the property and pay for it, it would not matter whether its failure to do so was simply the result of it choosing not to do so although able to do so, or the result of its own financial inability to do so. In neither event would the plaintiffs have any cause for complaint in law.

[13] It would also mean that in order to escape the charge that it had been guilty of any breach of contract by failing to form a company to buy the property, it would be open to Vavasor to form a penniless company and cause it to sign a deed of sale without having any intention whatsoever of the company actually acquiring the property and the plaintiffs being paid the purchase price.

[14] The interpretation of the agreement for which Vavasor contends is the basis for Vavasor's stance in this case. That stance amount to this: Vavasor admits that it failed to carry out its contractual obligations to establish the company which would be obliged to buy the property but says that the

plaintiffs have suffered no damages because Vavasor was not obliged to provide the company with the means to pay for the property. Bluntly stated, the proposition is that Vavasor was to be in a position to render itself immune from any claims for damages for its own breaches of contract.

[15] A reading of the agreement which gives rise to these absurd results is, in my view, untenable and in conflict with the ordinary meaning of the words used. I am unable to agree that the agreement would make commercial sense if it were to be read as excluding any obligation on Vavasor's part to fund the company to be formed, provided that at that time there were, or were thought to be, funds available from another source. It would mean that the plaintiffs were prepared to commit themselves contractually to holding their property available for possibly as long as six months for purchase by an as yet non-existent company which no one would be contractually obliged to fund to enable it to pay for the property and, in

return, to be content with a mere *spes* that the company would find the money.

[16] An interpretation of an agreement which would be commercially absurd cannot escape being labelled as such merely because, if certain things were to happen which no one is obliged by the agreement to make happen, the purpose of the agreement will adventitiously have been achieved.

[17] However, if I am perhaps wrong in so thinking, and the implication of a term would be necessary, I have no doubt that a term should be implied.

With respect, I do not believe that the hypothetical question posed in paragraph [16] of the judgment of Cameron JA is the question which must be asked. It presupposes that it would have been in order for a company with no financial resources or facilities of its own to be formed by Vavator and that that company might then experience “probleme met finansiering”.

It does not address a logically anterior question which I think is the true

question to be posed: Does the agreement mean that the company which Vavasor is obliged to establish need not be one which can in both fact and law buy, take transfer of and pay for the property?

[18] The plaintiffs would certainly have answered that question in the negative. Can it realistically be supposed that Vavasor might have answered it in the affirmative? I think not. Vavasor would not have dared to answer in the affirmative for if it had, the proposed transaction would have fallen to the ground. There can be no doubt that the plaintiffs would not have been willing to commit themselves to Vavasor to hold their property for six months for possible acquisition by the partnership and then to sell their property to a company to be established by Vavasor but which Vavasor was refusing to commit itself to fund. Vavasor would have known that that would be the reaction of the plaintiffs and would therefore have had to reply to the question in the negative.

[19] The reasoning in the previous paragraph postulates that Vavasor might have contemplated answering in the affirmative but was driven to answer in the negative if the transaction was to survive. In point of fact there is no reason to suppose that it would at that time have even considered answering in the affirmative. As has been pointed out in the judgment of Cameron JA, Vavasor did not at that time anticipate any problem in financing both the purchase of the property and the development. That is an added reason why it is unrealistic to suppose that it might have answered in the affirmative to the hypothetical question I have posed. In the words of Nienaber JA (quoted in paragraph 15 of the judgment of Cameron JA) the placing of an obligation upon Vavasor to fund the company which it was obliged to establish to buy and take transfer of the plaintiffs' property is "necessary to render the contract fully functional".

[20] In my opinion, the reference in clause 6.3 to the company's entitlement to fund the purchase price and the development costs by way of loans secured by mortgage bonds cannot be regarded as lending any support to the counter argument. In marked contrast to the usually encountered bond clause in deeds of sale of immovable property (entire sale and with it the obligation to pay the price conditional upon obtaining of a bond), the company's obligation to pay the price is not stated to be conditional upon the obtaining by it of loans secured by mortgage bonds. Secondly, there is no obligation upon the company to finance the purchase by way of such loans.

[21] It was not for the plaintiffs to prove that Vavasor was in a position to provide the company with enough money to pay for the property. Nor was it relevant in law whether or not Vavasor was in such a position. If, on a proper construction of the agreement, it was its contractual obligation to provide the company with the money, its inability to do so (which I may say

was not proved) would not be an answer to a claim for damages against it (Vavasor). Those damages would have to be assessed by comparing the financial position in which the plaintiffs would have been if Vavasor had established the company, the company had bought the property, and Vavasor had provided it with sufficient funds to pay for it, with the position in which they are as a consequence of the failure to do these things. That is what the Court *a quo* did.

[22] In my opinion the appeal should be dismissed with costs.

R M MARAIS
JUDGE OF APPEAL