"REPORTABLE"

CASE NO.: I 115/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HENRY FERDINAND MUDGE	**PLAINTIFF**
and	
LLOYD EBERHARD ULRICH (NO)	**1ST DEFENDANT**
HERMANUS JOHANNES MARITZ	**2ND DEFENDANT**
HUGEL NUMBER SIX PROPERTIES CC	**3RD DEFENDANT**

CORAM: **DAMASEB, JP**

Heard on: 2006.09.12 – 2006.09.15

Delivered on: 2007.07.25

JUDGMENT

[1] **DAMASEB, JP**: The plaintiff in this action seeks to enforce a written agreement for the purchase by him of the 100% membership interest in the 3rd defendant – an agreement he concluded with the late Jörn Schneider on 24th

August 2004. Schneider owned the said membership interest. The 3rd defendant was formed for the sole purpose of owning immovable property, being the remainder of Erf No. 6468, Windhoek (hereafter 'the property'). The plaintiff's problem is that on 9th August 2004 the late Schneider had concluded a written agreement with the 2nd defendant for the sale of the same 100% membership interest in the 3rd defendant (hereafter the 'disputed membership interest'). 2ND defendant also wants to enforce his written agreement of 9th August 2004. Only one of them can prevail.

[2] When in February 2005 the executor of the estate of late Schneider sought to transfer the disputed membership interest to 2nd defendant on the basis *qui prior est temper potior est jure*, the plaintiff approached this Court on an urgent basis to stop that transaction. He premised his relief on two bases: (a) that he had an enforceable *prior oral agreement* with Schneider followed by the written agreement of 24th August 2004 which he had fully complied with (including the suspensive condition) and (b) the 2nd defendant's offer to late Schneider to purchase the disputed membership interest had lapsed and could not have been revived; alternatively that 2nd defendant had not complied with the suspensive condition requiring him to secure finance on a certain date for the purchase of the disputed membership interest.

[3] After hearing full argument and considering the law applicable, I rejected the reliance on an alleged oral agreement to support the urgent interdictory

relief, while upholding the basis that he established, *prima facie*, although open to some doubt, that he had complied with the written agreement while the 2nd defendant, *prima facie*, had not. I said in respect of the alleged oral agreement:[1]

> "It is common cause that the applicant's written contract with the deceased was concluded on 24th August 2004. By seeking to rely on the alleged prior oral agreement (which allegedly was concluded in July 2004) the applicant is in effect saying that the written agreement is inconsistent with the oral one in respect of the date from which the parties must be taken to have agreed to the obligation to transfer the disputed member's interest in the third respondent. To that extent he is seeking to *contradict* and to *qualify* the written agreement of 24th August 2004. That is not open to him …"

[4] In the event I granted an interdict to stop the transfer to the 2nd defendant pending the outcome of an action by the plaintiff to enforce his agreement. The present action is the sequel to that order.

[5] I also said the following in my judgment on the urgent application:

> "The applicant's failure to provide proof he complied with the suspensive condition in respect of the loan is remarkable, especially in view of the allegation subsequently made by the second respondent that he did not. I have considered the matter carefully though and have come to the conclusion that the way in which the second respondent denies compliance by the applicant does not really throw serious doubt on the applicant's version that he did.
>
> …
>
> It is common cause that the second respondent only signed a loan application on 30th August 2004; that is well after the date on which, in terms of the suspensive condition, he should have applied for a loan. The second respondent, in my view, has not put up facts which throw serious doubt on the applicant's case that the second respondent had

[1] Unreported Judgment in Case No.: A91/2005 delivered on 2006.03.31.

> not complied with the suspensive condition in the agreement of 9th August 2004. I am accordingly satisfied that the applicant has established a *prima facie* right, although open to some doubt, that on account of the second respondent's non-compliance with the suspensive condition in the agreement of 9th August 2004, his agreement should be enforced against the first respondent in preference to that of the second respondent."

This was on the assumption the plaintiff had a valid agreement - which alone could give him the *locus* to challenge the 2nd respondent's right to transfer of the disputed membership interest.

[6] In view of what has now transpired in the present proceedings, I need to refer to certain passages from the affidavits of the plaintiff in the urgent application which were foundational to my granting the relief in the urgent application[2].

> " 12
>
> Needless to say I was very upset when the existence of the other option came to my knowledge. As far as I was concerned, I had already entered into an agreement with Schneider. At first I thought to just wait and hope the other option would not materialise and then insist that we proceed with our agreement. If the other option did not come to fruition, my concerns would have been unwarranted. I however did not see my way open to just leave the matter at that and informally discussed the matter with an acquaintance, who also happens to be a lawyer and per letter dated 13th August 2004 made it clear to Schneider that I considered his granting of the option to a third party as contrary to our agreement and invalid as we had already concluded a valid agreement in respect of the property.
>
> …
>
> I also point out … that by that stage my application for a loan in respect of the full purchase price had already been approved and the deferred purchase was

[2] Vide the Founding Affidavit in the urgent application; the numbering is to the paragraphs in the affidavits.

> done solely for my benefit so that I would not need to finance the whole purchase price through a loan from the bank." (My emphasis)
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> " 15
>
> These facts I have referred to above namely the fact that my application for a loan was approved in the full purchase amount. I should just mention that the agreed purchase price at all stages remained the same, i.e. N$1,680,000.00." (my emphasis)
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> " 16
>
> Subsequent to the signing of the written agreement … I performed in terms thereof and took possession of the property. I complied with all my obligations in terms thereof, paid my rental and have tendered to fulfil all my obligations relating to the purchase of the membership interest and herewith again tender to comply with all my obligations in terms thereof."

[7] In the replying affidavit the plaintiff said the following about 2nd defendant's answers to paragraphs 12 and 15 *supra*[3]:

> " 22.2
>
> "The contents of paragraphs 12 and 15 of the Founding Affidavit have not been denied in this regard. I reiterate what was stated therein." (My emphasis)

The Pleadings

[8] The plaintiff seeks an order that the 1st defendant be ordered to pass transfer to him of the disputed membership interest, on the basis that he fully complied with the terms of the written agreement of 24th August 2004. He alleges that the agreed purchase price was N$1 680 000 payable with an initial deposit of N$50 000, and the balance payable in cash on 31 January 2005. The plaintiff alleges that the agreement obliged him to deliver a suitable bank

[3] Vide the Replying Affidavit in the urgent application.

or building society guarantee as security for payment of the balance of the purchase price within 7 days of being requested to do so; and that the agreement was subject to the suspensive condition that he obtain by no later than 31 December 2004, a loan from a financial institution for the balance of the purchase price. The other terms of the agreement were that the plaintiff would take occupation of the property on 1st September 2004 and pay the amount of N$15 000 per month as occupational rent up to the date of registration. The written agreement also allowed the plaintiff to effect certain alterations to the property, which he did.

[9] The plaintiff alleges that **prior to 31st December 2004** he informed late Schneider that he had *waived* (being entitled to do so unilaterally) the condition that he had to obtain a loan from a financial institution for the balance of the purchase price, alleging that the condition was for his sole benefit **until 31 December 2004**.

The particulars allege further that:

> "7.4.2.2 The plaintiff advised and communicated to the said Schneider that the plaintiff would only rely on a loan by an institution for a portion of the balance price, and that the guarantee as referred to in paragraph 7.3.3 would be furnished when called for in terms of the contract.
>
> 7.4.2.3 The plaintiff obtained approval prior to 31 December 2004 for such a portion of the loan by an institution.

7.4.2.4 The plaintiff was subsequently and at all material times willing and able to deliver the guarantee as referred to in paragraph 7.3.3.

7.4.3 due to the prior demise of the said Schneider the plaintiff did not receive a request to deliver the guarantee as referred to in paragraph 7.3.3 above, but tendered such delivery and/or tenders delivery thereof herewith."

[10] The 2nd defendant filed a *conditional counterclaim* wherein he pleads that in the event of the plaintiff's claim based on the written agreement of 24th August 2004 not being dismissed, *his* own written contract dated 9th August 2004 is of full force and effect (all conditions having been complied with) and that the second defendant's rights as envisaged in the contract of 9th August 2004 visited prior to the rights of the plaintiff in terms of the contract of 24th August 2004. 2ND defendant also pleads that in the event of the plaintiff being unable to prove the written agreement there would be no need for him (2nd defendant) to obtain declaratory relief as the 1st defendant already indicated that transfer will be made to the 2nd defendant.

[11] The plaintiff's plea to the *conditional counterclaim* disputes that the 2nd defendant complied with the terms of the agreement of 9th August 2004 or that the written agreement relied on by 2nd defendant was binding between the parties thereto.

[12] The 2nd defendant asked for *absolution* from the instance at the end of the plaintiff's case, reserving the right to proceed with his *conditional counterclaim*

in the event that I find in favour of the plaintiff on his claim. The 2nd defendant closed his case at the end of the plaintiff's case without testifying personally or calling witnesses on his behalf. Mr Heathcote submitted on 2nd defendant's behalf that he will not lead any evidence even if the Court were to find in favour of the plaintiff. For all intends and purposes therefore, the 2nd defendant's case is to be treated as if it had been closed.

[13] For a better appreciation of the oral evidence I propose at this early stage to summarise the submissions by the parties' counsel made at the end of the plaintiff's case.

The Submissions

[14] Mr Heathcoat's stance is the plaintiff did not comply with the requirement in the written agreement that he should obtain loan finance for the amount of N$1630 000, 00 on or before 31st December 2004.

[15] Mr Heathcote submitted that absolution should be granted because the plaintiff failed to prove waiver and that even if waiver was proved; the suspensive condition in the contract was for the benefit of both the seller and purchaser and could not be waived unilaterally by the purchaser. He submitted that the fact that the contract specifically provides in clause 6.5 that if the suspensive condition is not met the contract lapses and shall be of no force and effect and the property be returned in the condition in which the

purchaser received it and that any alteration was at the purchaser's own risk, shows that the suspensive condition was inserted for the benefit of both parties and could thus not have been waived unilaterally by the plaintiff.

[16] Mr Heathcote also submitted that the letter of 19 July 2004 relied on by the plaintiff to prove waiver was written before the agreement of 24th August 2004 and that, in any event, despite knowing of Mudge's attitude in that letter that he intends to raise some of the money from own sources, Schneider proceeded nevertheless to include the suspensive condition in the contract. In other words, Mr Heathcote submits, Mudge could not have waived rights which had not yet anchored in law. He also submitted that in any event the plaintiff failed to prove waiver and its communication and that it is an afterthought because it was never raised in the urgent application. Mr Heathcote also urged me to discharge the rule nisi granted in Case No. A91/ 2005 in view of the fact that the evidence relied on to obtain it was a falsehood.

[17] Mr Sniijman retorts that Mudge did not need to comply with the suspensive condition because it was inserted for his sole benefit and that he had waived it and communicated the same to Schneider well before 24 August 2004. He also submitted that Mudge's evidence shows there was waiver after the agreement was concluded. He submitted that all the money to pay the balance of the purchase price was available on the due date and that on all the probabilities the guarantee would have been made good if requested. Mr

Sniijman sought to persuade me that contrary to the 2nd defendants claim, waiver was raised by the plaintiff in the urgent application. Mr Sniijman relied for this proposition on paragraph 7 of the founding affidavit in the urgent application where Mudge said the following:

> "As a result of our negotiations I made a written offer to Schneider in terms whereof I purchased his total members' interest in the corporation subject to a suspensive condition, namely a loan from a bank in respect of the total purchase amount. Mr. Jacobs Visagie delivered this offer to Schneider. I do not know whether Schneider signed it. Subsequent to forwarding the said agreement to him I met him and mentioned to him that *I would have preferred* to hire the property until *I would receive money from a building project I envisaged completing* as I would then not need a loan for the full purchase price of the property as I would have funds available and would then need a smaller loan. Schneider indicated to me that *he had no problem to accommodate my wishes in principle and that I must put it to him in writing for his consideration.* I unfortunately do not have a copy of the agreement referred to above but assume first respondent must have it in his possession". (My emphasis)

Mr Sniijman also submitted that there is an explanation given in the evidence that due to there having been no proper consultation with Mudge at the time the urgent application was prepared, material may have found its way in the affidavits which has since turned out to be false.

[18] What I am asked to decide is whether – and the parties are *ad idem* that is the test - the plaintiff has made out a *prima facie* case for the relief he seeks. The test suggested by counsel as the one I must apply means determining whether the plaintiff has led evidence not to establish what would finally be

required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff (as to which see *Gordon Lloyd Page & Associates v Rivera and another* 2001(1) SA 88 (SCA) at 92E-F.) That is the test one applies after the plaintiff has led his evidence and absolution is sought before the defendant leads his evidence. That is not the case here. Mr Heathcote has effectively closed the defendant's case and the test, in my view, ought to be whether the plaintiff has on balance of probabilities, established his case. Be that as it may I will proceed to consider the matter on the basis of the test agreed by the parties. I do so against the backdrop of the following critical considerations:

a) Jörn Schneider is deceased and consequently cannot confirm or gainsay the plaintiff's account of what had been allegedly discussed and agreed between them in so far as that may become relevant, but not recorded in writing anywhere. The significance of this is that I must apply the cautionary rule regarding evidence against a deceased person. In *Borcherds v Estate Naidoo* 1955 (3) SA 78 (A) at 79 A-B the rule was stated thus:

> "If the facts in issue are particularly within the knowledge of only one of the parties to a suit, that is a circumstance which the Court must take into consideration in weighing the probative effect of the evidence adduced. Here the one party to the alleged transaction of repayment is

> dead. The Court must therefore scrutinise with caution the evidence given by, and led on behalf of, the surviving party."

(This dictum was applied in *Cassel and Benedict NNO v Rheeder and Colin NNO* 1991 (2) SA 846 (A) at 851 F-H)

b) The second defendant has not testified or led evidence of witnesses to rebut the plaintiff's testimony in these proceedings and closed his case;

c) The defendant's plea does not rebut the specific allegations in the plaintiff's particulars of claim, but confines itself to asserting his right to enforce *his* contract. (In these proceedings though, I am not asked to decide which agreement must take precedence.)

[19] The plaintiff, Mr Mudge, testified on his own behalf. He is a property developer of 20 years standing and a leader of a political party and a member of the National Assembly.

[20] Mudge gave the background to the conclusion of the agreement between Schneider and himself on 24 August 2004, largely detailing events around an oral agreement which I found in the urgent application he was not entitled to rely on. I will summarise these but before I do so I propose to first set out the salient elements of the agreement.

The salient terms of the agreement

[21] The definitions clause defines the 'effective date' as 31st January 2005. In terms of clause 4.1.1 the amount of N$50 000 (being part-payment of the purchase prize) was payable by the plaintiff on the signing of the agreement, the balance of the purchase prize being payable on the effective date. The purchaser was under obligation to deliver a suitable bank or building society guarantee as security for the payment of the balance of the purchase consideration of N$1630 000, 00 within 7 days of being requested to do so. Before that he had to obtain bank approval for a loan to finance the balance purchase prize by no later than 31 December 2004 (clauses 4.1.1 and 4.1.2). The agreement also provides that '*should any suspensive condition contained in this Agreement not be timeously fulfilled the entire Agreement shall automatically lapse and be of no further force or effect' (clause 4.4).*

The seller was to give occupation of the property to the purchaser on 1st September 2004 at the occupation rent of N$15 000 per month. The agreement allowed the purchaser (clause 6.5), at his expense, to effect limited and defined alterations to the property having the effect of changing two separate rooms into one single room. The purchaser was specifically prohibited from making any alterations or additions to the property before the date of registration of transfer, and he was obliged, in the event of cancellation or lapse of the agreement, to forthwith vacate the property and to restore it to the seller in the same condition it was when he took occupation (clause 6.5).

The plaintiff's case

[22] The plaintiff testified that he first met late Schneider in April/May 2004 and expressed interest in the property and established that it was owned by a Close Corporation (the 3rd defendant) in which late Schneider was the 100% member. They agreed then he would purchase the disputed membership interest and in that way acquire the property. It was agreed that he would rent the property in the meantime until he takes transfer of the disputed membership interest. Mudge testified that he was also allowed to effect alternations to the property to fit his needs, but at his own expense. He testified that he was never under any impression that late Schneider was putting him under pressure to sign anything, or that he was planning to sell the disputed membership interest to someone else. (In my view to suggest that the plaintiff was allowed to effect alterations 'to fit' his 'needs' is, with respect, stretching it a bit far. The purchaser had very limited authorisation as I have shown).

[23] Mudge testified that around 25th June and before he left on holiday, late Schneider told him he would ask his lawyers to attend to the drafting of a contract which they would sign. Schneider then faxed through to him a written agreement which he duly signed and returned to Schneider. (The purchase price in that agreement is given as N$1 700 000.) Mudge testified that he was not aware that late Schneider never signed the document as it has since turned out to be the case.

[24] Mudge testified that upon his return from holiday he met Schneider and told him that he was busy with a 'development project' and would use some of the proceeds thereof to pay part of the purchase price. He testified that he did not mention a specific amount. He added that he informed late Schneider that the project was behind schedule and would be completed only around December 2004/January 2005, and Schneider said there 'is no pressure'. This implies that both Mudge and Schneider at that stage foresaw the possibility that the proceeds from the property development might only come to hand later than 31 December 2004. This is significant because it is a factor which could influence Schneider in deciding what to have included in the agreement.

[25] It is Mudge's testimony that late Schneider was quite happy for him to take occupation of the property, start with the alterations and that the transfer of the disputed membership interest take place at a later stage. According to Mudge they agreed that the initial agreement Schneider had not signed be changed to reflect this, Schneider offering to have his attorneys attend thereto. Mudge testified that the reason he wanted the transfer to take place much later was because he wanted to pay a 'substantial amount' of the purchase price from the earnings derived from the property development and that Schneider had no problem with this. Again, Mudge testified, he had to leave town on business and Schneider promised to deliver to him the new agreement reflecting the changes agreed. Schneider, however, later called to say that his attorneys had not completed the agreement. This was still in July 2004.

Mudge testified that he had also at that stage informed Schneider that his bank had approved loan finance for a part of the purchase price and that he would pay the balance in cash.

[26] Upon Mudge's return from the business trip he learnt that late Schneider had concluded a written agreement with the 2nd defendant for the purchase of the disputed membership interest. Mudge testified that he protested to Schneider about that, reminding Schneider that the two of them had concluded an oral agreement in respect of the disputed membership interest. Schneider then said to him not to worry as the 'option' given to the 2nd defendant would run out in 10 days. Mudge testified that he chose not to do anything further because he was sure he had an agreement with Schneider.

[27] Mudge, however, on 13th August decided to write a letter to late Schneider insisting that they had a binding agreement and was told by Schneider that the 2nd defendant had not yet performed under his contract and that he was prepared to sign another agreement with Mudge. It was then they concluded the written agreement of 24th August 2004 after Mudge paid the deposit of N$50 000, Schneider first having refused to sign the agreement until he was paid the deposit.

[28] Mudge in evidence produced an application for a home loan on the letterhead of Bank Windhoek dated 22nd June 2004. There is no indication for

what amount and in respect of which subject matter the application was completed. He says the application pertained to the purchase of the disputed membership interest. Mudge was asked by his counsel for what amount the loan application was and he answered:

> "It was an amount that I mention to the Bank that I wanted an amount or they wanted to know from me for what amount and I said "well the best you can do" because I had in mind, as I said to pay a substantial amount in cash and I said to them you can do your evaluation of the property and you tell me what you can, are prepared to give on that property and then I could decide how much of that I will take up."

This implies that Mudge left it to the bank to decide how much to advance to him.

[29] Mudge next produced a letter dated 12th August 2004 from Bank Windhoek's 'Loan Administration' to him advising that his *'application for a Mortgage Loan to the value of N$1 213 200 has been approved and will be payable on the registration of a Covering Mortgage Bond in favour of Bank Windhoek Limited'.* Mudge also produced another application, again on a Bank Windhoek letterhead, with a loan amount of N$1 700 000 in respect of No. 6 Hügel Street as property to be mortgaged and the seller being Jörn Schneider. This document is undated.

[30] Mudge testified that he applied for an amount *'as high as possible and then I have the opportunity to decide what I need and what I don't need. What I*

didn't want to happen was to be prepared to pay five hundred thousand of the purchase price and that Bank only agreed to give a loan of eight hundred thousand (800 000)…" (What is clear to me is that whatever amount he applied for, Mudge was authorised a loan of N$1213 200 only by Bank Windhoek and that it was the 'best' the bank could do.)

[31] Mudge testified that at some stage during the month of September, the 2nd defendant came to the property and laid claim to it and enquired what Mudge's people were doing there. Mudge said he raised this issue with Schneider who promised to look into the matter. Schneider later came back to him and said he was 'in trouble' as the 2nd defendant threatened to sue him for damages for selling the disputed membership interest to Mudge. Mudge then offered Schneider to write a letter recording what had transpired in respect of the transaction and, if Schneider agreed, to take same to his lawyer, presumably to enable Schneider's lawyers to counter 2nd defendant's threats of litigation and to demonstrate that Schneider was not in a position, when he did, to sell the disputed membership interest to 2nd defendant. Mudge wrote such a letter on 17th September 2004. This letter makes no mention of the loan already secured by Mudge at that stage and that he does not wish to secure the entire balance of the purchase price by way of a loan since some of the money will come from his own pocket.

[32] Mudge testified that Schneider then by letter confirmed the contents of his letter. The alleged confirmation is contained in a terse letter dated 21 September 2004 which states:

> "Dear Mr Mudge,
>
> I can confirm that we **had** an agreement as described in your letter.
>
> The reason why I gave an option to Mr Maritz for ten days is that **I was not sure of how serious you were with regard to the purchase** of the Hügel STR 6CC because we could not get hold of each other and I did not want to lose a buyer again. (My emphasis)

Mudge in a letter dated 10 February 2005 to legal practitioners Behrens & Pfeiffer who were then acting as executors of the estate of late Schneider asserted his right to the transfer of the disputed membership interest. Mudge testified about the **extensive** renovations he effected to the property, totalling N$128 000. Mudge is conspicuously silent about whether these alterations were allowed by the agreement. Mudge remains in occupation of the property since September 2004, and is paying occupational rent of N$15 000 per month.

[33] Mudge denied the correctness of the averments he made in paragraphs 12 and 15 of the founding affidavit for the urgent application and to which I already referred. He attributes this to possible misunderstanding between him and his legal advisors which, in turn, was attributable to the fact that he was under a lot of pressure when the urgent application was brought.

[34] Mudge also testified that on 19th July 2004 he had informed Schneider by letter that he no longer wished to apply for loan finance in respect of the full balance of the purchase price. By reference to a loan application submitted to Bank Windhoek, Mudge testified that he had at the time informed Bank Windhoek that his own contribution towards the purchase price would be N$500 000.

[35] On cross-examination, Mudge did not give a satisfactory explanation for why the averment was made in the affidavit in support of the urgent relief that he had secured the full balance of the purchase price by way of loan from a financial institution. This when regard is had to the fact that he reiterated those allegations in the replying papers. When Mr Heathcote put to him that he approached Court to obtain urgent interdictory relief on the basis of falsehoods in papers he had on his own admission not read, Mudge testified:

> "My Lord I'm not a legal person and I've got a legal team and I rely on them to do the whatever necessary and if there are mistakes been made then that can be rectified. I've got no problem to admit that if anything has been said or written it is not correct to say that it is not correct."

[36] Mudge maintained on cross-examination that the clause in the agreement that he should obtain loan finance for the balance of the purchase price was for his (buyer's) benefit and that he could have waived that **whenever** he wanted – as indeed he did. He was, however, unable to give any satisfactory explanation

for the absence of this averment in the urgent application, considering that this is now the main pillar of his case. 'Whenever' is, in light of the state of the law as I will presently demonstrate, untenable.

[37] The plaintiff made a very poor impression on me as a witness. He was very evasive in the answers he gave when confronted with statements he made under oath in the urgent application in support of the relief he sought in those proceedings, but which have now turned out, on his own admission, to be falsehoods. He even chose the rather suspect and risky approach of placing the blame on his legal advisors as the possible source of these falsehoods, but was unable to explain how his legal advisors could have come to the information which has now turned out to be false – the very information which he, by signing the affidavits, accepted as emanating from him. Waiver was not the basis for the urgent application, contrary to Mr Sniijman's submission. Paragraph 7 which I quoted above in any event is very ambiguous and tentative at best. Waiver requires clear evidence. Mudge could not in any event have relied in the urgent application on the allegation that he complied with the suspensive condition while relying on a waiver. The two are mutually exclusive. It was really one or the other. In the unreported judgment of this Court in L O *Rall Scrap Dealers CC and Anor v Oosthuizen & 2 Others* (P) A 162/2000 delivered on 11.08.2004 I said (at p14): "The rule nisi obtained by the applicants ... was in all probability on the basis of perjured testimony ... . It surely must offend judicial

conscience and sensibilities to confirm a *rule nisi* that was granted, albeit with hindsight , on the strength of such testimony ..." For that reason I discharged the rule in that case.

[38] Mudge testified on cross-examination that it was when he returned in January 2005 that he learnt that Schneider had died. He then called the executors to inform them that he was ready to proceed with the transaction and that he was in a position to perform. He is not specific as to when in January he returned and the date on which he called the executors or what proof he provided that he was in a position to perform.

[39] In cross-examination of Mudge Mr Heathcote established two things: (a) that late Schneider was not prepared to sign the agreement of 24th August 2004 with Mudge before he had been paid the deposit of N$50 000 and (b) late Schneider, despite Mudge's version that he, with Schneider's knowledge, intended to source a substantial part of the purchase consideration from the property development he was then busy with , proceeded to instruct his lawyers to settle the agreement of 24 August containing the suspensive condition requiring Mudge to obtain loan finance by 31st December 2004 ; and Mudge then signed that document as presented. The only conclusion that I can come to, if Mudge's assertion that he told Schneider that the property development would be completed in December 2004/January 2005 is to be accepted, is that Schneider did not accept that and wanted to make sure – by inserting the suspensive condition- that the remainder of the money to

consummate the transaction should be available no later than 31st December 2004 from a more reliable source, being a loan from a financial institution. That in law - as regards the source of the money - his intention was irrelevant is a separate issue; it certainly is significant in the evaluation of the truth of Mudge's version that Schneider was unconcerned where the money came from.

[40] At the conclusion of the cross-examination Mr Heathcote put to Mudge the following question:

> "Question: Well you never said to any lawyer that drafted the affidavits, that you have waived a suspensive condition, is that correct?
> Answer: No I cannot recall by having said it or not saying that?"

[41] The next witness in support of the plaintiff's case was Willem Adrianes Hartog from Bank Windhoek's Property Finance Branch, Windhoek. He was, in his capacity as credit manager, involved in Mudge's loan application. He had known Mudge as a client for 5-6 years at the time. Hartog's evidence established that his bank on 5th August 2004 approved a loan application of Mudge in the amount of N$1 213 200 towards the purchase price of N$1 680 000 subject to Mudge's own contribution of N$500 000. Mudge was, according to Hartog, to pay his own contribution 'up front'. The fact of the approval was communicated to Mudge on 12th August 2004. To Hartog's knowledge the Bank Windhoek was never asked to provide any guarantee towards the purchase price.

[42] Mudge was recalled in an attempt to show that after the agreement was concluded with Schneider on 24th August 2004, the two parties discussed Mudge's waiver of the right to secure loan finance for the balance of the purchase price, and he specifically stated that he informed Schneider that he was going to pay N$500 000 in cash upon transfer. He also added that he also briefed Schneider about the good progress he was making with the property development and that he would be able to fulfil his obligations. This is what Mudge added:

> "Mr Schneider and myself both understood that it was not really necessary for me to tell him were the money will be coming from, it was just the matter that on the date when I was going to be requested to supply guarantees for the Attorneys to effect the transfer that I will be in a position to do that as that stage but he was, I did it just as according to sign a goodwill or good business just to keep him informed about the fact that the progress was going well and that the agreement that I will, that I will pay a certain amount of money is, is still standing." (My emphasis)

In terms of the agreement, Mudge's obligation was to have loan finance arranged for the balance of the purchase price on 31st December 2004, not on the day that a request was made for him to produce the guarantee as is suggested in the passage quoted above. I find it most improbable that Schneider would have been unconcerned about where the N$ 500 000 would come from if regard is had to the fact that he made sure of the inclusion of the suspensive condition when, as alleged, he had already been told in July that some of the money would come from a property development Mudge was engaged in. Apart from Mudge's say-so, I find no independent corroboration

for Mudge's version. In fact, there is, as I have shown, very clear evidence of Schneider's conduct which undermines Mudge's claim.

[43] When asked by Mr Heathcote why he did not mention the alleged communication of waiver after 24 August when he first testified in-chief, Mudge asserted that he had mentioned it *'most definitely on number of occasions yesterday that it was discussed with the deceased?'* (Why he chose to return to the witness box to repeat the same thing then begs for an answer!). When asked by Mr Heathcote whether he had any bank statement proving he had N$500 000, Mudge answered:

> "I don't need to pay from my bank account I can pay it from various other or through various other means."

When pressed if he has N$500 000 available now, Mudge gave an incomprehensible explanation which left me wondering why he was recalled in the first place. Mudge did not present any proof whatsoever that he had N$500 000 available to meet his obligations under the agreement in order to top-up the loan he received from Bank Windhoek either on 31st December or on any other date subsequent thereto.

[44] The next plaintiff's witness was Edbert Bonzaaier who was an employee of Bank Windhoek's Credit Department. He too knows Mudge and was involved in his loan application which is the subject of dispute in these proceedings. He

confirmed Hartog's evidence about the bank granting Mudge a loan and also added that had Mudge applied for the full purchase price he would have been granted same. Bonzaaier confirmed that the loan granted to Mudge is still available today. When cross-examined how he could be sure that the full purchase price could have been loaned to Mudge, Bonzaaier said although the decision would have had to be taken by the Credit Committee – of which he is not a member - he is sure it would be approved on the ground Mudge is a reputable client who always met his liabilities. This, clearly, is the witnesses' opinion only which cannot count for much.

[45] The next witness for the plaintiff was Marcell Bonzaaier. She is Bank Windhoek's loan's consultant. She assisted in the completion of Mudge's application. She did so on 22nd June 2004.

[46] The next witness was Christiaan Louw Van Der Westhuizen who is Mudge's son in law. He did the renovations on the property for Mudge. Nothing turns on his evidence.

[47] The final witness for the plaintiff was the instructing attorney Charmaine Else Van Der Westhuizen who was called to buttress Mudge's version that the papers for the urgent application were prepared under pressure and in some haste and that misunderstandings may have crept in. Her evidence does not, in my respectful view, add much to the plaintiff's case. She specifically testified

on cross-examination that Mudge did not inform his legal team about the 'waiver' until the day before the Rule 37 conference which, as the record shows, was held on 5 July 2006. The allegation that Mudge had complied by securing the full balance of the purchase price by way of a loan is so prominent in the affidavits in the urgent application and indeed formed the basis for the relief that was sought there in that it gave him the necessary locus that I cannot accept that it crept in mistakenly. I reject the version that it did and I do find that Mudge knowingly relied on it for the relief that he sought in the urgent application.

The Law

[48] The seller's interest lies in being certain that the purchase consideration will be available to consummate the transaction. The purchaser's interest, on the other hand, lies in being able to meet the obligation to pay on the due date, and also not to be required to proceed with the transaction when he may not have the financial means to proceed with the transaction and possibly face a claim for damages. These two interests are ordinarily addressed by providing, for the benefit of the seller, for a time period within which payment must take place (usually the date of transfer) and, in respect of the purchaser who does not have the cash readily available but is reasonably certain of securing loan finance, by providing that the transaction is subject to the purchaser obtaining a loan from a financial institution and to provide the guarantee for payment within a defined period. The purchaser may, of course, in the meantime win

the jackpot or inherit a fortune from a rich uncle and may no longer need loan finance and thus be able to meet his obligation to pay on the due date. In that event the seller cannot be heard to say that since the purchase consideration was not secured by means of a loan from a financial institution as provided in the agreement, he/she can resile from the transaction.

[49] Dealing with a suspensive condition in a contract of sale of immovable property making an 'offer' "subject to the successful sale of property situated at 75 Eros Road within 30 days as from date of acceptance of this offer", Muller AJ (as he then was) said in *Hill v Hildebrandt* 1994 NR 84 at 96 G-J:

> "The purchaser is the only party that can take advantage of this provision and implement it by fulfilling this suspensive condition. Where a time limit has been included, he must do so before expiring of that time limit.
> …
> While the purchaser … can implement the particular condition by fulfilling it in the way it is worded, the seller cannot take advantage of that clause or do anything to implement or prevent fulfilment of the condition before the expiry of the time limit. Consequently on the clear and unambiguous wording of clause 12 in this particular contract I find that it has been inserted … for the sole benefit of the purchaser …. Only the applicant as purchaser can fulfil the suspensive condition but he must do so within 30 days of the date of acceptance of the offer."

[50] The learned judge went on to deal with the issue of waiver of the suspensive condition by the party for whose benefit it was inserted and said:

> "[W]hen there was no 'waiver' of the benefit for the purchaser contained in such a suspensive condition … within the time limit the contract is *void ab initio*. It is therefore important that the party for whose benefit such a suspensive condition has been inserted and who does not intend to fulfil it, shall clearly and unambiguously communicate this intention to the other party before expiry of the time limit."

[51] His Lordship held that such a waiver must comply with the strict requirements of a waiver (at 99C) as contemplated in *Bortslap v Spangenberg & Andere* 1974 (3) SA 695 (A)[4].

[52] These themes were picked up by Hannah J in *Deventer v Engelbrecht* 1995 NR 257. He said:

> "There was a time when judicial opinion in South Africa was to the effect that the non-fulfilment of a suspensive condition in a contract of sale inserted solely for the benefit of the buyer could not be relied upon by the seller in order to avoid his obligations under the contract: *Wacks v Goldman* 1965 (4) SA 386 (W); *Lashey v Steadmet (Edms) Bpk h/a Wessel de Villiers Agentskap 1976 (3) SA 696 (T); Allessandrello v Hewitt* 1981 (4) SA 97 (W). The first of these cases also decided that, in an appropriate case, the purchaser could unilaterally waive such a condition after the stipulated date for fulfilment. However, beginning with the case of *Phillips v Townsend* 1983 (3) SA 404 (C), judicial opinion changed and the courts in South Africa declined to follow this series of cases … The reason for this change in judicial opinion was summed up by Van Schalkwyk J in the *Ning-Chieh Shen* case … [1992 (3) SA 496 (W)] The learned judge pointed out that a condition precedent suspends the operation of the contract and the non-fulfilment of the condition renders the contract *void ab initio.* It is not a question of the seller relying upon the failure of the contract as a result of the non-fulfilment of the condition. However … the judges … recognised that where the suspensive condition is inserted solely for the benefit of the purchaser then the purchaser can waive it unilaterally. But to be effective such waiver must occur within

[4] Where Corbett AJA said: "It has been repeatedly emphasized by our Courts that clear proof of an alleged waiver is required, especially where a tacit waiver is relied upon. It must be clear that the particular party acted with full knowledge of his rights and that his action was contrary to the continued existence of such rights or the intention to enforce them.''

> the time stipulated by the condition and must be communicated to the other party within that period, failing which the inchoate contract will be rendered *void ab initio* by the failure of the condition" (at 261 I-J at 262 A-F).

[53] This is the approach enunciated by Muller, AJ in *Hildebrandt* supra (at 95 E) and followed by Hannah J in *Engelbrecht* (at 262 F). It represents the law in Namibia and I find it unnecessary to consider the South African cases referred to by counsel in argument.

The Law to the facts

[54] The reason, in my view, why Mudge relies on a waiver is recognition of the fact that the strict letter of the agreement of 24 August *a propos* the suspensive condition had not been complied with. Whether or not a clause such as the present is intended for both parties, or only the purchaser, involves an interpretation of the contract. Schneider's interest lay in being assured of payment on the effective date. On a proper construction of the agreement, the parties intended that the balance of the purchase consideration should be available on the 31st December 2004. The transfer process could really only be commenced with when there was certainty that the money was available. On a proper construction of the agreement therefore, the parties intended the suspensive condition obliging the purchaser to obtain a loan from a financial institution not later than the 31st December 2004 to operate for the sole benefit of the purchaser. The parties also intended that the purchaser should have had available by that date the balance of the purchase consideration and only

after that date could demand have been made for the delivery of the guarantee to be made good within 7 days of such demand.

[55] It follows that Mudge could, before the 31st December 2004, have sourced the balance of the purchase consideration through own sources; in other words to waive the clause requiring him to obtain a loan from a financial institution. He was, however, required to actually waive the right and to communicate such waiver to Schneider before the 31st December 2004.

[56] It is obvious from all that I have said so far that by the 31st December 2004, the only proven finance raised by Mudge from a financial institution was N$1213 200. As I said, on a proper construction, the agreement required him to have the entire balance of the purchase price available on 31st December 2004. Although he could waive how to source the funds, he was not entitled to waive the requirement that he should have had the balance of the purchase price by 31st December 2004. The loan approved by Bank Windhoek before the agreement was concluded, was for the amount of N$1213,200,00 and was, on plaintiff's own case, subject to Mudge paying up front the amount of N$500 000. The bank could therefore never have issued a guarantee for the full purchase balance of the purchase consideration as suggested by Mr. Sniijman. Mudge could therefore not have relied on the bank's loan for the assertion that he fully complied without also providing proof that he had sufficient means to top-up the bank loan to make up the balance of the purchase price. As I have

shown he failed to prove that he had the funds available as at 31st December 2004, or any other day for that matter.

[57] I cannot accept as constituting waiver that which occurred prior to the agreement of 24th August 2004 – more so when late Schneider, notwithstanding Mudge's alleged statements to that effect, proceeded to have had included in the agreement the very suspensive condition which Mudge says he waived and communicated to Schneider.

[58] I have not been shown anything in writing after 24th August 2004 between Mudge and Schneider that supports the allegation of waiver and its communication to Schneider before 31st December 2004. In the letter of 17th September 2004 there is no reference to Mudge waiving his right to secure a loan through a financial institution. In his reply to that letter, not only does Schneider make no reference to the suspensive condition, but he makes clear that he had concluded the agreement of 9th August because he was not sure if Mudge was serious. Mudge's assertion that Schneider had always maintained that he was not bothered by Mudge's ability to perform is thus not supported by this letter. In fact it points to the contrary.

[59] When he launched the urgent application to interdict the transfer of the disputed membership interest, Mudge did not rely on a waiver. He, *au contre*, relied on the fact that he fully complied with the terms of the agreement by

having secured all the money through loan finance. That, and the fact that in the urgent application false testimony was presented to the court at his behest, irredeemably undermines the credibility of the plaintiff's version there was waiver after 24th August, duly communicated to Schneider, of the suspensive condition.

[60] Mudge was, in any event, required to communicate any waiver to Schneider before 31 December 2004. I have no hesitation in finding that the alleged communication of the waiver to Schneider is an afterthought. No satisfactory explanation exists for why it was never raised as the basis of his case in the urgent application. Schneider is not there to meet the allegation and I find it improbable having in the first place specifically demanded for its inclusion, that he would, in view of all the circumstances that I have described, have noted a waiver without protest as suggested by Mudge.

[61] I am accordingly satisfied that the plaintiff, even on the lower threshold agreed by the parties , failed to establish a *prima facie* case that he had waived his right to secure a bank loan to finance the balance of the purchase price before 31st December 2004 and duly communicated the same to Schneider before that date. Accordingly the contract between Schneider and Mudge is void *ab initio* on account of Mudge's failure to waive and or to communicate the same to Schneider before 31 December 2004.

[62] In view of the conclusion to which I have come, I do not think it is necessary to specifically make an order to discharge the rule nisi I granted in Case no. A 91/2005 as asked for by Mr. Heathcote as my judgment today achieves that result.

[63] In the result:

The plaintiff's claim is dismissed with costs, including the costs of one instructed counsel.

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DAMASEB, JP

ON BEHALF OF THE APPLICANT:		**Mr Snijmann, SC**
	Assisted by:	**Mr L C Botes**
Instructed By:		**Stern & Barnard**
ON BEHALF OF THE 2ND RESPONDENT:		**Mr R Heathcote**
Instructed By:		**LorentzAngula Inc.**