IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO: 1361/02

IN THE MATTER BETWEEN:

PAUL CEDRIC VINCENT GRAHAM N.O.	**First Applicant**
MICHAEL ALEXANDER VINCENT GRAHAM N.O.	**Second Applicant**
KATHLEEN GRAHAM N.O.	**Third Applicant**
GRAYFAIR FARM (PROPRIETARY) LIMITED	**Fourth Applicant**

AND

TRACKSTAR TRADING 363 (PROPRIETARY) LIMITED	**Respondent**

JUDGMENT

KROON J:

A. INTRODUCTION

[1] This application concerns the enforceability of two agreements, copies of which are annexures "A" and "B", respectively, to the founding affidavit filed on behalf of the applicants.

[2] The first three applicants are the trustees of the G.C.V. GRAHAM WILL TRUST ("the trust"). The fourth applicant is a company and is represented in these proceedings by the second applicant, who is also one of its directors. The respondent

is a company.

[3] In terms of agreement "A" the fourth applicant sold to the respondent a certain farm property ("the farm"). In terms of agreement "B" the trust sold to the respondent as a going concern the business being conducted by the former on the farm (viz., an egg production and pullet rearing enterprise) together with its "stocks" (i.e., as defined in clause 1.2.9 of the agreement, viz., its stock-in-trade comprising poultry feed, poultry products (excluding eggs) packaging material (excluding packaging material for eggs), vaccines, raw materials and diesel).

[4] Occupation and possession of the *merces* sold in terms of the agreements were taken by the respondent. The respondent thereafter adopted the stance that the agreements were not binding on it and advised the applicants of their intention to vacate the farm.

[5] The applicants contend that the stance of the respondent constitutes an unlawful repudiation of the agreements, which they do not accept; hence, the launch of these proceedings.

[6] The proceedings were brought as a matter of urgency, an aspect to which I will return later in this judgment.

[7] The substantive relief sought in the applicants' notice of motion was an order:

> "2. That the Respondent is directed to do all things necessary:
>
> 2.1 to give effect to each of the agreements annexed to the Founding Affidavit (marked "A" and "B" respectively);

2.2 to take transfer of the immovable property described as Portion 8 of the Farm No. 337, known as Portion of Doornlaagte, Division of Uitenhage, (i.e., the farm) in accordance with the provisions of Annexure "A" to the Applicants' Founding Affidavit.

3. That the agreement (Annexure "B" to the Founding Affidavit) be rectified by the deletion of the words "not later than 15th March 2002 (or such later date as may be agreed in writing by the parties, which agreement will not be unreasonably withheld)" where those words appear in clause 2.4."

[8] During the course of the initial argument in the matter, heard on 8 July 2002, Mr *Stokes*, who appeared for the applicants, sought, and was granted, leave to amplify the notice of motion by the addition thereto of a further prayer (to serve as alternative relief to the substantive relief set out in para. [7] above), viz, for an order:

"(a) declaring that the agreements (annexures "A" and "B") have not lapsed in consequence of the [alleged] failure of the suspensive condition in paragraph 18.1 of annexure "A" or clause 2.1.3 of annexure "B";
(b) declaring the respondent's purported cancellation of the agreements unlawful."

It should be noted, however, that the amendment was only sought when Mr *Stokes* presented his argument in reply.

[9] Having heard the initial argument in the matter, I reserved judgment. I was, however, advised the following day that both parties intended seeking leave to file further papers and would request a further opportunity to address me in the light thereof. I acceded to these requests, and such further papers were filed. The hearing of the further argument was set down for 31 July 2002.

[10] Annexed to the applicants' further papers was an amended order, which, in addition to the prayer for rectification in paragraph 3 of the notice of motion, was the relief sought on behalf of the applicants during the further argument addressed to me.

Its substantive terms were as follows:

> "1. It is declared that all of the suspensive conditions upon which Annexures "A" and "B" to the founding affidavit are dependent, were fulfilled.
> 2. The Respondent is ordered to carry out all its obligations in terms of the said agreements.
> 3. Nothing in this order will affect the Respondent's right, if any, to cancel the agreements in consequence of any breach on the Applicants' part."

RELEVANT TERMS OF THE AGREEMENTS:

[11] Agreement "A" contained, *inter alia*, the following clauses:

> "2. PURCHASE PRICE
>
> The Purchase Price of the asset sold in terms of 1 (i.e., the farm) shall be the sum of R1 500 000,00 (ONE MILLION FIVE HUNDRED THOUSAND RAND)
>
> 11. SANCTIONS
>
> In the event of the PURCHASER failing to make payment of any amounts due in terms of this Agreement, or (sic) whatsoever nature or amount or otherwise failing to comply with any of the terms and conditions herein set out with which the PURCHASER is bound to comply, and in the event of the PURCHASER failing to rectify such breach or non-payment within a period of seven (7) days after having been called upon to do so in writing, the SELLER shall be entitled, but not obliged: (the various remedies open to the seller followed).
>
> 18. CONDITIONAL
>
> "This agreement of Purchase and Sale is conditional upon:
>
> 18.1 the **PURCHASER** being granted finance for the full purchase price by the Land Bank of South Africa:
>
> 18.2 18.2.1 Messrs Trackstar Trading 363 (Pty) Ltd (i.e., the respondent) and the Trustees of GCV Graham Will Trust (i.e., the trust) enter into an agreement of purchase and sale substantially on the terms and conditions set out in the draft agreement annexed hereto marked annex '1', and the Trustees of GCV Graham Will Trust enter into

an agreement of purchase and sale with Eggmark (Pty) Ltd substantially on the terms and conditions set out in the draft agreement annexed hereto marked Annex "2".

18.2.2 In the event of any one of the agreements referred to in clause [18.2.1] above failing for any reason whatsoever then this agreement shall ipso facto lapse and be of no force and effect."

[12] Agreement "B" contained, *inter alia*, the following clauses:

"1. INTERPRETATION

1.2.2 "**business assets"** means all the assets of the Seller used in or in connection with the business, comprising -

1.2.2.1 fixed assets;

1.2.2.2 goodwill;

1.2.2.3 poultry

1.2.3 **"effective date"** means 1 April 2002 and more particularly the commencement of business on that date:

1.2.4 **"fixed assets"** means all fixed assets of whatsoever nature or kind owned and used by the Seller in or in connection with the business on the effective date, which fixed assets are listed in Annex "1":

2. SUSPENSIVE CONDITIONS

2.1 This agreement is subject to the fulfilment of the following suspensive conditions, namely that –

2.1.1 Messrs the purchaser (i.e., the respondent) and Grayfair Farm (Pty) Ltd (i.e., the fourth applicant) enter into an agreement of purchase and sale substantially on the terms and conditions set out in the draft agreement annexed hereto marked Annex "4" and the seller (i.e., the trust) and Eggmark (Pty) Ltd enter into an agreement of purchase and sale substantially on the terms and conditions set out in the draft agreement annexed hereto marked Annex "5".

2.1.2 In the event of any one of the two agreements referred to in clause 2.1.1

above failing for any reason whatsoever then this agreement shall ipso facto lapse and be of no force and effect.

2.1.3 The Purchaser being granted finance by the Land Bank of South Africa for payment of the purchase consideration.

2.1.4 ……..

2.2 The parties will use their best endeavours to procure the fulfilment of the suspensive conditions as soon as reasonably possible after the signature date.

2.3 The suspensive conditions are inserted for the benefit of the Purchaser who is entitled to waive fulfilment of any of the conditions by written notice to the Seller.

2.4 Unless all the suspensive conditions are fulfilled or waived by not later than 15 March 2002 (or such later date as may be agreed in writing by the parties, which agreement will not be unreasonably withheld) the provisions of this agreement will be of no further force or effect, and neither party will have any claim against the other in terms of this agreement.

4. PURCHASE CONSIDERATION AND PAYMENT

4.1 The consideration payable for the business is the sum of R1 037 500.00 payable on the effective date, to be secured by the issue of a guarantee for payment by no later than 28 February 2002.

4.2 The consideration payable for the stocks as determined in paragraph 5 hereof shall be paid within 30 days of the effective date or within 7 days of such determination whichever date is the later date……..

4.3 ……..

4.4 In addition to the amount referred to in clause 4.1 above the Purchaser shall refund to the Seller by no later than the 7th day after the effective date 50% of the amount owed by the Seller to Stannic on the 1st April 2002 to secure the release of the assets referred to in clause 6 hereof from the encumberances which they are subject to and subject to the condition that the amounts paid do not include penalties which penalties will be borne by the Seller.

5. (This clause provided for a *modus operandi* for the determination of the

value of the stocks).

6. RELEASE OF ASSETS

It is recorded that the assets listed in Annex "2" are subject to the encumbrances referred to in that Annex. The Seller undertakes to procure the release of all such assets from their respective encumbrances on the effective date. (In fact, as I was advised by counsel, no "annex 2" was drafted and annexed to the agreement).

7. WARRANTIES

7.1 The Seller unconditionally gives to and in favour of the Purchaser the warranties set out in this agreement and in Annex "3". Each such warranty is –

7.1.1 a separate warranty and is in no way limited or restricted by inference from the terms of any other warranty.

7.1.2 continues and remains in force notwithstanding the completion of any or all the transactions contemplated in this agreement.

7.1.3 is deemed to be material and to be a material representation inducing the Purchaser to enter into this agreement:

7.2 Save for those warranties and representations expressly given or made in this agreement or in Annex "3" no warranties or representations are given or made, whether express or implied.

10. BREACH

Should either party commit a material breach of this agreement and fail to remedy such breach within 14 (fourteen) days of written notice requiring the breach to be remedied, then the party giving the notice will be entitled, at its option, either to cancel this agreement and claim damages or to claim specific performance of all the defaulting party's obligations together with damages, if any, whether or not such obligations have fallen due for performance.

Annexure 3 (part 2): Warranties given by the Seller relating to the business assets as at the effective date and as at the completion

date.

2.5 The fixed assets forming part of the business assets are in good working order and condition, fair wear and tear alone excepted, have been properly maintained and are capable of carrying out the functions for which they are intended.

[13] The draft agreement, marked "annex 1", referred to in clause 18.2.1 of agreement "A", is in fact agreement "B", and the draft agreement marked "annex 4", referred to in clause 2.1.1 of agreement "B", is in fact agreement "A".

[14] Both agreements "A" and "B" were signed on behalf of the seller in question on 13 May 2002 and on behalf of the respondent on 23 May 2002.

[15] An agreement by the sellers with the entity styled Eggmark (Pty) Ltd, as envisaged in clause 18.2.1 of agreement "A" and clause 2.1.1 of agreement "B", was duly concluded.

THE PRAYER FOR RECTIFICATION:

[16] It was accepted during the hearing that the intention of the applicants was that the words to be deleted from agreement "B", as set out in prayer 3 of the notice of motion, should be preceded by, and include, the word "by", which appears in clause 2.4 of the agreement. This disposed of a somewhat technical objection to the rectification sought raised in the respondent's papers.

[17] It is unnecessary to canvass the grounds invoked by the applicants for the rectification. The respondent in fact agreed that the inclusion in clause 2.4 of agreement "B" of a reference to 15 March 2002 as a cut off date was an error; in fact, no cut-off date was agreed upon.

[18] The rectification sought must therefore be permitted.

OTHER RELEVANT HISTORY:

[19] By 23 April 2002 one of the respondent's directors, Mr Hayes, had moved onto the farm and occupation thereof was formally taken by the respondent on 1 May 2002 (the negotiations between the parties having taken place over some months prior thereto).

[20] The respondent made applications to the Land Bank ("the bank") for the grant of the finance envisaged in the two agreements. The date of such application has not been stated, but by letter dated 24 April 2002 the bank advised the respondent that the bank had granted it loans totalling R2 537 500,00 for the purchase of the farm as a going concern, on terms and conditions to be set out in the bank's formal letter of advice which was to follow. Those terms appear from a facsimile transmission dated

3 May 2002 sent by the bank, under the pen of a Mr Niewoudt, to the attorneys of the applicants who were to attend to the necessary conveyancing, which read as follows:

> "Kindly be informed that the following loans were approved by the Bank being:
>
> A. R1 500 000,00 for 25 years at 13% per annum for the purchase of
> Portion 8 (portion of Portion 1) (DOORN LAAGTE) of the farm KRUIS RIVIER NR 337.
> Measuring 118,4326 hectares, on the following conditions:
>
> (a) Proof must be furnished before registration of the Bank's bond that S T Bursey, P L A North and D P Hayes are the sole shareholders and directors of the applicant.
>
> (b) No change in the shareholding and directorship of the applicant shall be effected without the Bank's prior written consent.
>
> (c) The shareholders and directors must be bound as surety for the loan.

(d) A certified copy of the identity document of shareholder and director (3) must be furnished before registration of the Bank's bond.

(e) The buildings on the security are to be insured comprehensively as well as against political unrest and the policy must be ceded to the Bank.

(f) The instalment is to be provided for in advance on a monthly basis. Payments to be effected by stop order.

(g) The tractor, implements and layer houses on the security are to be hypothecated notarially as additional security for the loan.

(h) A proper Members Resolution must be obtained after the shareholder certificates have been issued, and the resolution must make provision for the taking up of the loan.

(i) The intensive facility must be insured comprehensively and against political unrest and the policy must be ceded to the Bank.

B. A loan of R1 037 500,00 for 3 and 8 years (sic) respectively at 13,25% per annum for the purchase of 130 000 layers and pullets and the purchase of the moveable assets.

<u>The following security is to be vested before the loans can be disbursed, namely:</u>

A First Bond over the property to be purchased and a Second Surety Bond over the property of the Directors S T Bursey and P L A North and a First Surety Bond over the property of Mrs M E Hayes.

This security will secure the purchase price of R1 500 000,00.

To secure the purchase price of the layers, pullets and moveable assets the Bank will register a Second Bond over the property to be purchased and a Third Surety Bond over the property of the Directors S T Bursey and P L North and a Second Surety Bond over the property of M E Hayes.

The documents are in the process of being drafted and the Directors must still comply with all the conditions of this loan."

[21] On 20 May 2002 Niewoudt, at the request of the fourth applicant, addressed the following letter on behalf of the bank to Messrs Standard Bank (which, according to Niewoudt's affidavit filed as part of the answering papers, he assumed were the bondholders over the property):

"RE: LOAN: TRACKSTAR TRADING 363 (PTY) LTD

At the request of the directors of the company of LAKESIDE POULTRY, P.O. Box 515, UITENHAGE we have to advise that the Bank holds at your disposal the sum of R1 500 000,00 (ONE MILLION FIVE HUNDRED THOUSAND RAND) for credit account Messrs Hutton & Cook (Account number 08 103 4873. Branch Code 05-04-19) which amount will be paid to you free of exchange by the Bank's branch office at EAST LONDON upon simultaneous registration of :

1. Transfer in the name of the company over:
   Portion 8 (portion of Portion 1) (DOORN LAAGTE) of the farm KRUIS RIVIER NO 337, in the Nelson Mandela Metropolitan Municipality, in the Division of Uitenhage, Eastern Cape Province
   MEASURING: 108,4326 hectares

2. Registration of a Notarial Surety Bond by S T Bursey and P L A North in favour of the Bank.
3. Registration of a Surety Bond by M E Hayes in favour of the Bank.
4. Registration of a Notarial Collateral Bond by the company in favour of the Bank.

Should registration for any reason not be effected, this letter will be cancelled.
This letter is not negotiable, nor transferable, and must be returned to the Branch Manager, Land Bank, P. O. Box 19297, TECOMA, 5214, upon notification that it has been cancelled, or upon payment of the aforementioned amount."

[22] On 1 July 2002 Niewoudt addressed the following communication to attorneys acting for the Mrs Hayes referred to in the letters quoted in paras [20] and [21] above:

"**TRACKSTAR TRADING 363 (EDMS) BPK**
BORGSTELLING DEUR MEV M E HAYES
(U VERWYSING : MAH / EVDW / T50L)

Ontvangs word erken van u skrywe gedateer 1 deser die inhoud waarvan kennis geneem is.

Graag wens ek te bevestig dat die oorspronklike Titelakte aan Mev Hayes oorhandig is en dat die Bank nie kan voortgaan met die registrasie van die verband nie aangesien Mev Hayes haar borgskap teruggetrek het. Die Bank se verband was onderhewig daaraan dat die Bank bereid was om 'n lening ten bedrae van R2 537 500-00 toestaan (sic) onderhewig daaraan dat die nodige sekuriteit gevestig word.

Aangesien Mev Hayes nie meer bereid is om haar eiendom aan te bied as sekuriteit nie, kom die sekuriteit posisie om die lening te verseker in gedrang en kan die Bank derhalwe nie voortgaan met die aangeleentheid nie"

[23] In the main answering affidavit filed on behalf of the respondent, deposed to by Mr North, one of its directors, the allegation on behalf of the applicants that all suspensive conditions contained in agreements "A" and "B" had been fulfilled, was denied. The denial referred to the suspensive condition relating to the grant of finance by the bank, and it was pointed out, *inter alia*, that one of the conditions stipulated by the bank for the grant of the finance for the purchase of the farm was that Mrs Hayes (the mother of one of the shareholders and directors of the respondent) was to furnish a first surety bond over her own immovable property. With reference to the letter

quoted in para. [22] above, it was pointed out that Mrs Hayes had withdrawn her security (i.e., the first surety bond over her immovable property) and that by reason thereof the bank was not prepared to proceed with its loan to the respondent: the suspensive condition relating to finance being granted by the bank as envisaged by agreement "A" had therefore had not been fulfilled. (It may be noted that, while the respondent raised another aspect in respect of the condition in agreement "B" relating to the grant of finance by the bank – as to which, see below – it did not make the averment that Mrs Hayes had not agreed to furnish the second surety bond referred to in the letter quoted in para. [20] above).

[24] In response to the respondent's contentions set out in para. [23] the second applicant, in a replying affidavit, referred to the bank having, on 4 July 2003, favoured the applicants with a copy of a power of attorney to pass a surety bond, to which was annexed a copy of a deed of surety bond to be registered by the Registrar of Deeds (annexures "B1" and "B2" to the affidavit). However, the bank, being of the view that it was not entitled to divulge information which it stamped as having been of a personal nature, had blocked out the name of the person who signed the power of attorney and a number of other details in both documents that would identify that person and the transaction involved. It was the allegation of that applicants that it was Mrs Hayes who signed the power of attorney and that the annexed surety bond document embodied a first surety bond over her property as envisaged in the communications referred to in paras [20] and [21] above.

[25] The initial argument in the matter proceeded on the basis, *inter alia,* of what has been set out in paras. [22] to [24] above. However, in a further affidavit filed subsequently on behalf of the applicants, deposed to by Mr Shaw, the applicants' Port Elizabeth attorney, it was recorded that the bank had been prevailed upon – the details are not important – to make available copies of what proved to be (a) a power of attorney to pass a surety bond duly executed and signed by Mrs Hayes, and witnessed by Niewoudt and another person, on 14 May 2002, to which was annexed a deed of surety bond, intended for submission to the Registrar of Deeds, initialled by Mrs Hayes, Niewoudt and the other witness, the terms of which reflected that it was to be the first surety bond stipulated for by the bank, and (b) a second power of attorney to

pass a surety bond to which was annexed an intended deed of surety bond, to which the comments made above apply *mutatis mutandis* save that the bond was intended to be the second surety bond stipulated for by the bank.

[26] In the light of what is recorded in the preceding paragraph, it was in the result not contested that in fact Mrs Hayes had duly bound herself, in terms of an enforceable legal obligation, to permit the two surety bonds in question to be passed

over her immovable property.

[27] Directors of the respondent delivered cheques to the applicants' conveyancing attorneys sufficient to cover the transfer duty payable on the transfer of the farm to the respondent. One of the cheques was a personal one of one of the respondent's directors (it is not in dispute that he agreed to advance the amount of the cheque to the respondent). Payment of that cheque was subsequently stopped. One reason proffered therefor, as will appear below, is that the respondent adopted the stance that the two agreements were not binding and that the transactions envisaged therein were not to proceed.

[28] According to the affidavit of Niewoudt Mrs Hayes subsequently advised him that she was no longer prepared to agree to the registration of a surety bond over her property. For that reason, Niewoudt records, the bank "is unable to continue with the loan as insufficient security exists"

[29] The affidavit of Niewoudt continued as follows:

> "6. In addition to the above the undertaking is also conditional upon the registration of a Notarial Collateral Bond by the company, Trackstar Trading 363 (Proprietary) Limited, in favour of the Land Bank. In order for such a Notarial Collateral Bond to be registered the Bank's officials are required to make an inventory of the movable property of the company and also to establish the value thereof to ascertain whether the registration of the Notarial Collateral Bond will provide security to the satisfaction of the Land Bank.
>
> 7. In addition to the other forms of security the Land Bank will be required to find security to the value of R2 100 000,00 in respect of the movables encumbered by the Notarial Collateral Bond.
>
> 8. The officials of the Land Bank have yet to make an inspection or inventory of the movable property of the company and I am unable to say whether or not sufficient security will exist to the satisfaction of the Land Bank. However, this requirement is

superfluous in view of the position taken by the intended surety, Mrs Hayes.

9. Apart from the request to grant a loan to the company in the amount of R2 537 500,00 the Bank has received a further request from the Directors of the company to grant a further loan in the amount of R480 000,00 which loan will be used for the purchase of stock from the company. The Land Bank is in the process of considering this further loan which has not yet been approved.

10. Although the Land Bank approved a loan in principle for the amount of R2 537 500,00 in April 2002 I have at all times advised the sellers' Conveyancers that the loan is subject to a host of formal requirements of the Land Bank. I have also advised Mr Mike Graham, representing the seller, that all the requirements of the Land Bank are not yet in place and the sellers would be at risk to allow the purchaser to take occupation of the farm and the business."

[30] The applicants' conveyancing attorneys were advised by two directors of the respondent that the latter would no longer proceed with the transactions in the two agreements (the alleged reasons being, so North averred, that the respondent had discovered defects in certain of the goods purchased in terms of agreement "B" and that the respondent had been unable to secure a loan from the bank to cover the full purchase consideration provided for in the agreements). The applicants' attorneys thereupon addressed two letters, both dated 25 June 2002, to the respondent. The first letter, written on behalf of the fourth applicant, contended, *inter alia*, that all suspensive conditions in agreement "A" had been fulfilled, that the fourth applicant had complied with all its obligations under that agreement, that the transfer and bond documents had all been signed and were with conveyancers in Cape Town in anticipation of their being lodged with the deeds registry, and that payment of the costs of transfer and of the transfer duty payable had been effected by the respondent. It recorded, however, that payment of a cheque tendered towards payment of the

transfer duty had been stopped (stamped as a repudiation of the agreement which was not accepted), and that the respondent had intimidated that it had no intention of proceeding with the transfer. Demand was made on the respondent for payment of the outstanding transfer duty and for written confirmation that the respondent would

proceed with the transaction, failing which, it was stated, an approach would be made to the court for appropriate relief. The second letter, written on behalf of the trust, similarly contended that all suspensive conditions in agreement "B" had been fulfilled and that the trust had carried out all its obligations in terms of the agreement. Demand was made for payment of the sums allegedly due by the respondent in terms of the agreement, failing which, it was stated, the court would be approached for appropriate relief.

[31] The letters evoked the following response, dated 27 June 2002, from the respondent's East London attorneys:

> "RE: PURCHASE: GRAYFAIR FARM (PTY) LIMITED/G C V GRAHAM WILL TRUST
>
> We refer to the above and advise that we act for Trackstar Trading 363 (Pty) Limited and the Directors, Peter North, Stephen Bursey and Desmond Hayes.
>
> Your letters, both dated the 25th June 2002, have been handed to ourselves for attention and reply.
>
> It is not our intention to debate every aspect raised in your letters, suffice to say the following:
>
> 1. We cannot agree that all the suspensive conditions pertaining to both agreements have been fulfilled. In particular finance has not yet been granted for the purchase of the business.
>
> 2. As the two agreements are dependent upon each other and finance is not granted in respect of the business then both agreements fall away.
>
> 3. The guarantee which has been provided to you is conditional upon certain events. The conditions pertaining to the guarantee have not been met and as such the guarantee is null
>
> and void. We understand that the Land Bank has formally withdrawn the guarantee for the purchase of the farm.

4. Apart from the above it has become apparent to our clients that some of the equipment sold with the business which has been warranted to be in good order is derelict.

5. The payment of the transfer duty and other transfer costs by the Directors of the purchasing entity represents a loan made by the Directors to the purchasing entity. The Directors are now of the opinion that the company will never be in a position to repay them the loan and accordingly have withdrawn the loan to the company.

We suggest that immediate arrangements are made for your clients to take repossession of the property and business to protect their interests. We understand that there is stock on the farm which needs to be fed and cared for. Our clients will remain on the farm until Friday the 5th July 2002 whereafter your clients must make appropriate arrangements."

[32] The applicants thereupon instituted these proceedings.

POINTS *IN LIMINE*:

[33] The respondent's papers invoked four *points in limine*.

[34] The first point related to the issue whether the applicants had permissibly and properly invoked the provisions of the Rules of Court relating to the launching of applications as a matter of urgency.

[35] In this regard the following requires to be recorded:

(1) The application, launched on 1 July 2002, was brought on notice to the respondent and to the Registrar, who issued the process, but it went no further than to advise that the application would be moved at 11.15am on 2 July 2002;

(2) The notice of motion and the supporting papers were served on the respondent (apparently by arrangement between the parties) by way of

facsimile transmission to its East London attorneys at approximately 9.30a.m.

on 1 July 2002 (i.e., some 26 hours before the matter was to be called in court);

(3) The matter was called at the appointed time. By agreement between the parties the matter was postponed to 8 July 2002 in order to afford the respondent an opportunity to file answering papers, and, if necessary, for the applicants to file replying papers. The costs were reserved.

(4) The respondent, however, gave an undertaking to the applicants to remain on the farm until 12 July 2002, obviously for the purpose of caring for the poultry thereon. Indeed, in its answering papers the respondent recorded that it is also prepared to remain on the farm for a further, but short, period thereafter, should this be required. In fact, in view of the request of the parties for leave to file further papers and address further argument to me, granted by me, the respondent agreed to remain on the farm for a further period. I was further advised after judgment was reserved on 31 July 2002 that a further agreement on this score would be reached by the parties.

[36] In seeking to support the point *in limine* Mr *Schubart,* who appeared for the respondent at the initial hearing, relied heavily on the judgment given by me in the matter of *Caledon Street Restaurants CC v D'Aviera* (unreported, SECLD case no. 2656/97, dated 9 November 1997). In that matter I had occasion to consider the principles applicable to the bringing of applications as a matter of urgency (a repetition of which discussion would be an act of supererogation). In the result, I non-suited the applicant in that matter on the basis that it had abused the urgency provisions in the Rules of Court. That applicant, utilising a notice of motion in similar form as that used by the applicants in the present matter, had required the respondent to appear before the court some 22 hours after service of the notice of motion and founding papers on her, with the inevitable result (in the light of the respondent's intention to oppose the proceedings, which opposition was to be expected) that the matter had to be postponed to afford the respondent an opportunity to file opposing papers. My decision flowed from my finding that the urgency

invoked by the applicant had been wholly insufficient to justify the extent to which the procedure adopted by it deviated from the usual practice of the court.

[37] *In casu*, two comments cannot be avoided:

(1) In the event of opposition by the respondent to the application, a postponement of the hearing on 2 July 2002 to enable the respondent to pursue such opposition, was inevitable.

(2) Such opposition, in fact forthcoming, was to be anticipated.

[38] Do the circumstances of the matter require the application to be visited with the same fate as befell the application in *Caledon Street Restaurants*?

[39] The allegations of urgency made in the founding affidavit deposed to by the second applicant, read as follows:

"37.

As can be seen from annexure "F", (i.e., the letter from the respondent's attorneys referred to in para. [31] above), the Respondent is intent on vacating the farm on 5 July 2002. I earlier pointed out that the farm houses in excess of ninety thousand chickens that must be fed on a daily basis. If the Respondent leaves the farm, the results would be catastrophic. There would be large scale mortalities.

38.

The Respondent, apart from the rights and acquisitions referred to in annexures "A" and "B" to this affidavit, has no other assets, apart from some debts owing to it for sales of eggs over the period of its occupation. If this application were not heard as a matter of utmost urgency, every possibility exists that the guarantees from the LANDBANK could be revoked or withdrawn, and that much is clear from the contents of annexure "F". As at 28 June 2002, the conveyancers have not received any indication that the guarantees from the LANDBANK have been withdrawn or revoked. On 24 June 2002, however, a representative of the LANDBANK informed a member of the conveyancer's staff that the transactions were "not being proceeded with".

39.

Should the Respondent not utilise the loans, I believe that it will not be able to pay for business or for the farm, and any action for damages will obviously be of little value.

40.

I therefore submit that this application is urgent, and I respectfully pray that it be heard as such."

[40] The respondent's counter thereto, contained in the affidavit of North, was as follows:

"6. Insofar as urgency is based on the fact that it was stated that the Respondent intended to vacate the farm on the 5th July 2002, I respectfully submit that this is a date that could have been discussed and negotiated with the Respondent. As it is the Respondent has undertaken to the Applicants to remain on the farm until at least the 12th July 2002 and is also prepared to stay on for a short period thereafter should that be required.

7. The other reason for urgency given is that guarantees from the Land Bank coud be revoked or withdrawn. The Applicants knew however prior to launching the Application that it had already been stated that the Land Bank had withdrawn their guarantee and I refer to Annexure "F" to the Founding Affidavit in that regard. Mr Graham further states that a representative of the Land Bank had told a member of the Conveyancing Attorneys' staff on the 24th June 2002 that the transactions were not being proceeded with.

8. In the circumstances I respectfully submit that the reasons given for bringing this Application as one of urgency are not valid.

9. The form in which the Application was brought was also not in accordance with Form 2 (a) of the Uniform Rules of Court.

10. The Applicants sought a final Order on very short notice to the Respondent. They knew or must have known that the Respondent would want to oppose the Application and that it would need time to do so. The Application had no prospect of proceeding

at 11h15 on the 2nd July 2002. I respectfully submit that the Application ought to be dismissed for this reason alone."

(A further contention by North, that the applicants were themselves the author of the urgency in this matter, was not supported during argument by Mr *Schubart*, and nothing further need be said thereanent).

[41] The second applicant's response was as follows:

"3.

AD PARAGRAPHS 5 TO 11 (INCLUSIVE):

The Respondent threatened to vacate the farm on 5 July 2002. In the light of that fact it was urgent that the parties' respective rights and obligations were clarified. It was only after the application was served and the Respondent requested that it be adjourned in order to allow more time for the delivery of answering affidavits, that the Respondent tendered to stay on until 12 July 2002. On that basis it was agreed that the application be adjourned.

4.

The Applicants did not accept that the LANDBANK had withdrawn its guarantee. The letter (annexure "F") also does not say so as a fact. It is the Applicants' case that a delay in finalisation of the application could result in practical difficulties of (sic) enforcing the order which it seeks."

[42] I deem it necessary to consider only the applicants' reliance on the respondent's intimation (see para. [31] above) that it would vacate the farm on 5 July 2002. I am persuaded that that threat did clothe the matter with a significant measure of urgency, having regard to the acceptable allegation by the second applicant (not denied by the respondent) that catastrophic results would ensue if the poultry on the farm (some 90 000 birds) were left uncared for.

[43] It is true that it was open to the applicants to approach the respondent with a view to securing its undertaking to stay longer on the farm to care for the poultry, and to review its proposed course of action in the light of the response it received. However, sight should not be lost thereof that despite the fact that the applicants had

threatened legal action, the respondent had clearly signified its intention to leave the farm on 5 July 2002. Whether, absent the institution of proceedings by the applicants, the respondent would have been prepared to revise its stance, is, in my view, an entirely moot question. I consider that there is merit in Mr *Stokes*'s submission that it was prudent for the applicants to have armed themselves with the circumstance of the institution of proceedings so as to secure some order or undertaking to safeguard the position.

[44] It is also true that it may not have been necessary for the applicants to nominate the advanced time of 11.15a.m. on 2 July 2002 for the hearing of the matter instead of, say, a day or two later. But the difference would not have been all that material – as it is, the respondent registered the complainant that even with the postponement granted on 2 July 2002 it was under pressure and hard pressed to file its answering papers – and the result, a postponement to 8 June 2002 and an undertaking by the respondent to remain on the farm, would, as a matter of probability, not have been any different.

[45] The failure of the applicants to utilise a notice of motion that accorded with form 2 (a) of the Rules of Court appears, in the circumstance of this case, to be a technicality of no avail to the respondent.

[46] I accordingly hold, in the exercise of the discretion I have in the matter, that the present is not a case where the applicants should be non-suited on the basis of an impermissible or improper utilisation of the urgency provisions contained in the Rules of Court.

[47] The second point *in limine* taken in the respondent's papers was the contention that the proceedings had been prematurely instituted. In essence, it was said that the applicants ought first to have ascertained whether the suspensive conditions had in fact been fulfilled and whether the bank had withdrawn guarantees furnished to the respondent; had they done so, they ought to have appreciated that they were not entitled to the orders sought (i.e., in the notice of motion). Suffice it to say that the contention (save insofar as it might have related to the aspect of the grant of finance

by the bank to cover the purchase consideration for the stocks – an aspect dealt with below) is not understood, and it was not pursued in argument.

[48] A further contention in this regard was, however, raised at the second hearing of the matter, at which stage Mr *Mouton* had been engaged to lead Mr *Schubart* in the matter. In short, the contention was that the applicants had been required first to comply with the provisions of clause 11 in agreement "A" and clause 10 in agreement "B" as a preparatory step to launching the proceedings. (As will appear below, a similar point, in another context, was taken by Mr *Stokes*). However, whatever other counters to the point might be raised, the short answer thereto is that if the respondent repudiated the contracts it must be taken to have thereby waived the benefit of the two clauses. *Edengeorge Ltd v Chamamu Property Investments* 1981 (3) SA 460 (T). Despite Mr *Mouton*'s valiant submissions to the contrary, I cannot but stamp the letter from the respondent's attorneys of 27 June 2002, quoted in para [31] above, as a repudiation of the agreements; in short, the respondent intimated in that letter that it was treating the agreements as having come to an end.

[49] The third point *in limine* invoked the contention that the bank's rights would be affected by the orders sought (i.e., in the notice of motion) in that the grant of same would presuppose that the bank must proceed to furnish the guarantees in question (i.e., the loans envisaged) and effect payment in terms thereof to the applicants; accordingly, as an interested party, the bank ought to have been joined as a respondent in the proceedings, and its non-joinder was a fatal defect.

[50] I do not think that I do Mr *Schubart* an injustice if I record that it was but faintly that he sought to pursue this point. Suffice it to say that I am not persuaded that any order given in this matter in favour of the applicants would have the effect of obliging the bank as contended for or affect any other interest it may have. The point was accordingly not well-taken.

[51] The final point *in limine*, that the Registrar of Deeds was an interested party and that the non-joinder of that official, was a fatal fefect, was not pursued by counsel during argument. Suffice it to say that that attitude was correct.

THE ESSENCE OF THE RESPONDENT'S CASE ON THE MERITS AS CONTAINED IN ITS INITIAL ANSWERING PAPERS:

[52] The bases on which the respondent took the stance that the transactions were not to proceed, as these were elucidated in the respondent's initial answering papers, alternatively, the basis on which the respondent contended that the agreements had not yet become enforceable, appear from the paragraphs that follow.

[53] In the first place it was contended that the suspensive condition in agreement "A" relating to the grant of finance by the bank to the respondent to cover the purchase price of the farm, had failed, with the result that not only that agreement, but also agreement "B", each agreement being dependent on the existence of the other, had *ipso facto* lapsed. The alleged failure was sought to be founded solely on the basis that, consequent upon, as was alleged, the absence of the consent of Mrs Hayes that any surety bond be passed over her property, the bank had withdrawn its grant of finance to the respondent. (It was not suggested that any other conditions, on the fulfilment of which the grant of finance by the bank was dependent, had failed, as opposed, in respect of certain of those conditions, to their fulfilment still being pending – as to which, see para. [55] below).

[54] In the second place, the respondent contended that the trust, the seller in terms of agreement "B", had breached the warranty provided for in clause 2.5 of part 2 of

annexure 3 to the agreement, quoted in para. [12] above. The basis of the contention was the allegation that quite a number of the assets in question were materially defective, details of which were set out in the respondent's answering papers, the concomitant of which was that the trust had breached a material warranty in agreement "B". The respondent therefore contended that it was entitled to cancel the agreement, and, accordingly, also agreement "A".

[55] In the third place, and as an alternative to the contentions referred to in the preceding two paragraphs, the respondent contended that the agreements were still inchoate in that fulfilment of certain outstanding conditions was still pending. Those conditions bore on the passing of a notarial collateral bond over the movable property

and to the grant of finance by the bank to cover the purchase consideration for the stocks, aspects referred to in the paragraphs of Niewoudt's affidavit quoted in para. [29] above. In a subsequent affidavit by North introduced on the day of the second hearing (as to which, see below), the respondent also raised the aspect of the requirement that the bank also grant finance to cover the respondent's liability in respect of 50% of the amount owing to Stannic as provided for in clause 4.4 of agreement "B".

THE RESPONDENT'S RELIANCE IN ITS INITIAL ANSWERING PAPERS ON ALLEGED DEFECTS IN THE FIXED ASSETS SOLD IN TERMS OF AGREEMENT "B" AS CONSTITUTING A MATERIAL BREACH OF A WARRANTY ENTITLING IT TO CANCEL THE AGREEMENTS:

[56] As already recorded, the respondent alleged that a number of the assets in question were defective in material respects. In respect of one asset, a certain motor vehicle, it was alleged that although warranted to be on the farm as part of the assets sold to the respondent, it had in fact been sold by the trust prior to the respondent's taking possession of the farm, i.e., the trust's delivery of the *merx* was to that extent defective. The total sum required to remedy the defects, as alleged by the respondent, constitutes a considerable sum; hence, its cancellation of the agreements.

[57] Various counters to these allegations were raised in the applicants' replying papers including not only a denial of some of the allegations, but also the averments that the respondent's directors had inspected the defective assets and had observed the defects and accepted same on the basis that the purchase price agreed upon was arrived at after making allowance for the costs of remedying the defects and that to the knowledge of the respondent the motor vehicle had previously been sold to a third party and had been included in the list of assets by mistake.

[58] It is, however, unnecessary to give further attention to these counters. The short answer to the respondent's attempt to invoke the alleged breach of the warranty in question is that provided by Mr *Stokes* during argument, viz., that by virtue of the

provisions of clause 10 of agreement "B", quoted in para. [12] above, the respondent was not entitled to rely on any breach of the agreement, however serious it might be, to found a cancellation of the agreement unless and until those provisions were first complied with. See *van Zyl v Rossouw* 1976 (1) SA 773 (NC), a decision to which counsel referred me. The respondent did not comply with the prescription laid down in the clause, and accordingly its purported cancellation of the agreements on the grounds of the alleged breach had no legal effect.

THE RESPONDENT'S MODIFIED RELIANCE ON THE ALLEGED BREACH AS CONTAINED IN ITS FURTHER ANSWERING PAPERS:

[59] In a further answering affidavit filed subsequent to the first hearing, North referred to his earlier averments that the answering papers had been prepared under pressure, commented that the respondent had believed that its other defences to the application would prevail and added that the respondent had intended to put the trust on terms as envisaged in clause 10 of agreement "B" to remedy the alleged breach, but that there had been insufficient time to do so. The respondent had, however, subsequent to the earlier hearing, placed the trust on such terms by way of a letter

dated 11 July 2002 addressed by its attorneys to the trust. That letter annexed a copy of the portions of North's earlier affidavit in which the alleged defects in the goods delivered were detailed and the trust was called upon to remedy the alleged breach within a period of 14 days after receipt of the letter, failing which the respondent reserved the right to cancel the agreement. North placed on record that it was the respondent's intention to cancel agreement "B" in the event of the trust failing to comply with the demand contained in the letter. He accordingly recorded a request that the application be postponed until it be determined whether the respondent has the right to cancel the contract on the ground of the alleged breach. In the alternative, and in the event of my not being prepared to stay the finalisation of the proceedings, and because of the disputes pertaining to the alleged breach of warranty, North requested that any order made on the application not be so framed as to have the result that the respondent be dispossessed of the right to invoke the alleged breach of warranty.

[60] North contended that it had become necessary to seek the relief set out above because (a) it had not had sufficient time to attend to the aspect of the alleged breach prior to the initial hearing of the application, (b) the trust had now waived its right to obtain payment of the purchase consideration due in respect of the stocks (as to which, see below) and (c) the contents of the affidavit made by Mr Shaw, referred to in para. [23] above, had come to light.

[61] The second and third of these considerations will receiver attention later in the context of the issue of the costs of the application. The first contention, that of insufficient time to attend to the aspect of the alleged breach of warranty, however, simply does not wash. Quite apart from the fact that having regard to the nature of some of the defects alleged the inference is inescapable that they would substantially have manifested themselves at an early date, North had stated in his initial affidavit that as early as 13 and 14 June 2002, at a meeting of the directors of the respondent, the full impact of the alleged defects and the alleged cost of rectifying same was discussed and discovered, and a decision taken to cancel the agreements on the basis

thereof.

[62] At this stage it is necessary to record that at the commencement of the second hearing of the matter Mr *Mouton* sought leave to hand up a further affidavit by North. In the main the affidavit recorded that the trust had not complied with the demand to remedy the alleged defects, referred to in para. [59] above, within the 14 day period stipulated, and that the respondent had, through its attorneys, accordingly addressed a letter of cancellation of the agreements to the applicants. (The letter also dealt with a notification from the trust that it was waiving its claim for payment of the amount referred to in clause 4.4 of agreement "B". This aspect will be dealt with later).

[63] Mr *Stokes* objected to my receiving the affidavit. At the time I ruled that I would hear the argument on the contents of the affidavit and decide later whether the affidavit should be received. My decision is that the interests of justice do require the affidavit to be received, dealing as it does with events that occurred after the earlier papers in the matter had been filed. I record that Mr *Stokes* advised me that should I be disposed to admit the affidavit, he would not seek an opportunity to reply thereto.

[64] In response to North's further answering affidavit, referred to in para. [59] above, another replying affidavit, deposed to by the first applicant, was filed on behalf of the applicants. Therein the applicants' counter to the respondent's allegations as to alleged defects in certain items and an alleged consequent breach of a warranty, was amplified. In addition to further denials of certain of the alleged defects reference was made, *inter alia*, to the following: the absence of any mention of an intention to cancel the agreements on the grounds of the alleged breach in the letter of 27 June 2002 addressed by the respondent's attorneys to the applicants; that the three directors of the respondent had been on the farm on a number of occasions and inspected the assets in question and, by the time occupation of the farm was formally taken, had acknowledged that the assets were in a condition acceptable to them; that notwithstanding such occupation the agreements were signed on behalf of the respondent more than three weeks later; that the condition of the assets was the result of fair wear and tear as envisaged in clause 2.5 of the warranty; that the respondent

had not sought to join issue with the applicants' allegation that the inclusion of a reference to the motor vehicle was an error and the respondent's letter of demand had in fact not referred thereto (and, to the extent that it proved necessary, agreement "B" should be rectified by the deletion of a reference to the vehicle); that the respondent had failed to allege that the defects were present either on the effective date or on the date when occupation was taken by the respondent; that, as was alleged, the respondent had waived reliance on the alleged breach, alternatively, that, as was contended, the respondent was now to be stopped from relying on the alleged breach. A further counter was added by Mr *Stokes* during argument, viz., the contention that, on analysis, of the many items adverted to in North's affidavit as allegedly defective only two items (one of which was the motor vehicle referred to above) fell within the ambit of the warranty, and that all the other items were covered by a *voetstoots* clause in agreement "A".

[65] While protest was registered against the request of the respondent that the decision on the application should be stayed pending the resolution of the dispute between the parties on the issue of the alleged breach of warranty, it was accepted on behalf of the applicants that the respondent's right to cancel the agreements, if such right exists or comes into being by reason of any contractual breach by the applicants,

should be preserved; hence, the alternative relief now sought by the applicants, as set out in para. [10] above.

[66] The comment that immediately falls to be made is that the dispute between the parties relating to the alleged breach of warranty by the trust is manifestly one that cannot be resolved on the papers; the issue would have to be referred for the hearing of oral evidence.

[67] I am not persuaded that it would be appropriate to stay the decision on the application pending the outcome of that course. My reasons for that conclusion are as follows:

(1) The delay that would be occasioned by that course would be substantial;

(2) Despite the fact that the respondent did in fact have time prior to the first hearing to invoke the provisions of clause 10 of agreement "B", it failed to do so and only sought to invoke the provisions after the first hearing and judgment on the application had been reserved;

(3) In the letter of 27 June 2002 addressed by its attorneys to the applicants' attorneys the essential stance of the respondent was that the agreements had lapsed for want of compliance with the suspensive condition relating to the grant to it of finance by the bank, and it was only *en passant*, as it were, that some reference to the alleged defects in certain of the assets was made without any suggestion that it would seek to cancel the agreements on that ground;

(4) It was to meet the respondent's reliance on the allegation that the agreements had lapsed that the proceedings were launched by the applicants;

(5) It would in the circumstances be unfair to the applicants to delay the decision on the issue on which it approached the court, an issue which is properly the subject of a separate decision.

[68] However, I am also persuaded that, as the applicants have in fact conceded, an order on the application in favour of the applicants, if such is to be issued, should not have the effect of closing the door to the respondent's invoking the alleged breach of warranty to found a cancellation of the agreements, if it is so advised.

THE RESPONDENT'S RELIANCE ON THE AVERMENT THAT PENDING THE

FULFILMENT OF CERTAIN ALLEGED OUTSTANDING SUSPENSIVE CONDITIONS THE AGREEMENTS WERE INCHOATE AND NOT YET ENFORCEABLE.

[69] The first of these alleged conditions related to the passing of a notarial collateral bond over the movable assets in favour of the bank and was elucidated follows. As set out in the affidavit of Niewoudt (see para. [29] above), the bank would require to compile an inventory of the assets in question and to value same before it would be satisfied that the additional security it required for the purposes of the grant of finance to the respondent for the purchase of the farm would be constituted by a notarial collateral bond over the assets; those steps had not yet been taken and, accordingly, fulfilment of a condition bearing on the grant of finance, and therefore of the condition that finance be granted for the agreements to became of force, was still outstanding.

[70] In my view, however, the above interpretation of the stipulation by the bank that certain movables were to be notarially hypothecated as additional security for the finance to be advanced (see para. [20] above), is a misconstruction. I agree with the submissions of Mr S*tokes* that the stipulation, although referred to as one of the conditions of the grant of finance for the purchase of the farm, was in fact a term thereof, and that compliance therewith would merely require the passing of the bond, as additional security for the finance to be advanced, whatever the value of those movables might in fact be. Obtaining some satisfaction as to the extent of that value,

as the bank apparently now desires, might be the source of some comfort to it, but in fact a requirement that the movables command a certain value was not part of the stipulation stated at the time, and cannot now be engrafted thereon by the bank.

[71] The second of the conditions which the respondent contended still awaited fulfilment is the provision of finance by the bank for payment by the respondent of the consideration due in respect of the stocks, as provided for in clause 4.2 of agreement “B”.

[72] Mr *Stokes's* initial argument was that the words "*purchase consideration*" in clause 2.1.3 of agreement "B" did not include the price payable for stocks, but only that payable for the business. He put forward this argument despite the fact that clause 3.1 of the agreement provided that the business *and the stocks* were being purchased as a going concern, that clauses 4.1. and 4.2, albeit separately, provided for the consideration payable in respect of both the business and the stocks, and that clause 2.1.3 contained the phrase "*purchase consideration*" without any qualification or restriction thereof. The essence of counsel's submission was that when the agreement was signed on behalf of the respondent, not only had it taken possession of the assets to be acquired in terms of both agreements, but the grant of the finance by the bank embraced in the letter quoted in para. [20] above (which, in terms, did not include finance for the price of the stocks) was already in place. These events indicated, so it was argued, that the parties had not intended that the grant of finance for the acquisition of the stocks was to form part of the suspensive condition.

[73] The features invoked by counsel cannot, however, affect the meaning to be ascribed to the relevant provisions in agreement"B". That meaning, in my judgment, is unequivocally that the grant of finance by the bank in respect of the purchase consideration for the acquisition of the stocks was included within the suspensive condition in question – see the clauses referred to in the preceding paragraph. To that extent the suspensive condition had not been fulfilled and binding agreements had therefore not yet come into force.

[74] A short adjournment followed on the completion by Mr *Stokes* of his initial argument. On the resumption of the hearing counsel advised me that, pursuant to instructions he had received, he was formally placing on record a waiver by the trust of the claim for payment of the consideration due in respect of the stocks. In the light of that waiver the question of the fulfilment of the relevant part of the suspensive condition in question was no longer an issue between the parties as far as the merits of

the application were concerned. How the waiver impacts on the issue of the costs to be awarded in this matter will receive consideration in due course.

[75] A third aspect under this head was adverted to by Mr *Mouton* when the further argument in the matter was presented. Although the issue in question had not featured in the earlier papers filed on behalf of the respondent, the further affidavit of North, which was tendered at the resumed hearing and which I have ruled is receivable, recorded that in terms of a letter, dated 26 July 2002, received from the applicant's attorneys, the trust waived its claim for payment by the respondent of its half-share of the amount due to Stannic, as provided for in clause 4.4 of agreement "B".

[76] What was debated at the Bar was the question whether the suspensive condition stipulated in clause 2.1.3 of agreement "B" also embraced the grant of finance by the bank to the respondent in respect of the respondent's liability for half of the amount due to Stannic in terms of clause 4.4. The reason for the debate was the contention of Mr *Mouton* that, on the premise that the grant of such finance was embraced in the suspensive condition, the fulfilment or no of that part of the suspensive condition had a bearing on the nature of the relief which the applicants were, or remained, entitled to claim in these proceedings, or, at least, the costs thereof.

[77] The waiver, however, like the earlier waiver referred to above, had the effect of removing the issue of fulfilment of that part of the suspensive condition, if such it was, as a question that was in dispute between the parties on the merits.

[78] The issue remains relevant on the question of costs, however. I will later return to its impact on that question in the general discussion that follows later in this

judgment. It would, however, be convenient at this stage to record my finding that the finance to be granted by the bank to the respondent for payment of the purchase consideration as envisaged in clause 2.1.3 of agreement "B" also embraced finance for the discharge by the respondent of its liability in respect of 50% of the amount due

to Stannic as provided for in clause 4.4. In brief, my reasons for that conclusion are as follows: clause 4.4 in terms states that the liability of the respondent provided for therein shall be in addition to the liability to be discharged by the respondent in respect of the purchase consideration for the business. The business includes the assets in annex "1". The assets in annex "2" (so it must be assumed – the contrary was not suggested) are all assets reflected in annex "1" and are therefore part of the business. As a matter of common sense, the liability in clause 4.4, relating to a payment that was necessary to secure the release of the assets from encumbrances and thus enable the respondent to acquire the assets in an unencumbered state, was part of its *quid pro quo* for the acquisition of the business, i.e., part of the purchase consideration. And, again, the concept of "purchase consideration" in clause 2.1.3 was not qualified or circumscribed in any manner.

THE SUSPENSIVE CONDITIONS RELATING TO THE LAND BANK GRANTING FINANCE FOR PAYMENT OF THE CONSIDERATION DUE IN RESPECT OF THE PURCHASE OF THE FARM AND OF THE BUSINESS.

[79] As to the meaning of the word "*grant"* Mr *Stokes* referred me to the following:

(1) the definition of the word in the Oxford dictionary, viz:

> "promise, what is agreed to, promised, etc; the action of according (a request, etc); an authoritative bestowal or conferring of a right, etc.";

(2) the following passage in *Dharsey v Shelly* 1995 (2) SA 58 (C) (where the grant of a loan by a financial institution was the subject of the suspensive condition of a sale and a bank had written to the purchaser advising that "the above bond had been approved subject to the bank's normal conditions) at 63 C – E:

> "Mr Lloyd (i.e., an employee of the bank) sought to draw a distinction between the approval of the loan as signified in the letter of 2 April 1992

> and the grant of the loan. According to him the approved loan is not granted until the conditions of approval are fulfilled; *in casu* until the valuation of the property proved satisfactory. He said that when such conditions were fulfilled, a letter of grant, detailing the full terms of the agreement, was sent to the applicant for signature. He accepted, however, that the signature of the letter of grant was not a precondition of the grant, but a confirmation thereof.
>
> Mr *McDougall* accordingly argued that the approval of the loan communicated to plaintiff on 2 April 1992 was not the grant of a loan. He referred me to various dictionary definitions of the words 'approve' and 'grant'. In the context in which the words are used in the letter and the deed of sale, I can find no distinction in meaning. According to the *Collins English Dictionary*, 'approve' means, *inter alia*, 'to authorise or sanction', while 'grant' means, *inter alia*, 'to bestow, especially in a formal manner', Similarly, according to *The Shorter Oxford Dictionary*, 'approve' means 'to confirm authoritatively', while 'grant' means 'an authoritative bestowal or conferring of a right, etc'. "

[80] Counsel drew a distinction between the "grant" and the actual acquisition of the funds in question, as was the requirement in *de Wet v Zeeman* 1982 (2) SA 433 (NC) ("*die verkryging deur die koper van 'n verband").* The distinction was validly drawn.

[81] A further case cited by counsel was *Remini v Basson* 1993 (3) SA 204 (N). There the purchase in question was subject to the suspensive condition that the purchaser "is able to raise a loan upon the security of a first mortgage bond" in a stated sum, upon certain terms and with a stated building society. It was further provided that "(s)hould such loan not be procured by 15 December 1990 …. this sale shall be automatically cancelled and of no force and effect". It was the conclusion of *Mclaren* J (at 210G) that, properly construed, the condition required the conclusion of a loan agreement between the purchaser and the building society by 15 December 1990. *Thirion* J (with whom *Levinsohn* J concurred) stated (at 213G) that he wished to guard himself against assenting to the proposition that the provisions in question required that a loan agreement had actually to be concluded by the stated date. Pointing to the fact that

what the condition required was that the purchaser be "able to raise a loan" by the stated date and that the term "procure" had to be understood in that sense, he commented that the condition may well have been complied with if the building society had communicated to the purchaser by no later than the stated date an offer to grant the purchaser a loan in the amount and on the terms stated in the condition, and in such form that acceptance thereof would have created a binding loan agreement between them, even if the purchaser had not signified his acceptance of the offer by the stated date. With respect, I align myself with this latter approach.

[82] *In casu*, the letters by the bank, referred to in para. [20] above, constituted an offer which, if accepted by the respondent would have brought a binding agreement into being, at least in the sense (and depending on the fulfilment of any suspensive conditions attached thereto – as to which, see below) that a *vinculum iuris* existed between them. It was therefore a document such as was referred to in the majority judgment in *Remini*. In fact, however, the offer was accepted. That is the only inference to be drawn from the fact that the binding consent of Mrs Hayes was procured for the two surety bonds to be passed over her property (an aspect dealt with more fully below), the furnishing of a guarantee by the bank to the fourth applicant's bankers, referred to in para. [21] above, the furnishing by the directors of the respondent of the amount payable in respect of the transfer duty and, lastly, the fact that the respondent took possession and occupation of the farm and commenced conducting business thereon. Indeed, conspicuous by its absence in the respondent's papers was any suggestion that the bank's offer had not been accepted.

[83] Was the grant of the finance conditional, and specifically, was it conditional on Mrs Hayes agreeing to permit her property to serve as collateral security by way of the two surety bonds stipulated in the bank's offer (the only alleged condition invoked by the respondent in respect of the question presently under discussion)?

[84] This question was the subject of much debate at the first hearing. The reason therefor was that it was then in issue whether the applicants had proved that Mrs Hayes had furnished the required consent in a manner that bound her. That proof has

now been forthcoming. On the merits, therefore, the question is an academic one. I will, however, briefly deal with Mr *Stokes'* submissions on this question.

[85] In essence, the argument was that the stipulations in the bank's offer relating to security being furnished by Mrs Hayes were *terms*, as opposed to *suspensive conditions*, of the grant of finance by the bank to the respondent. The offer therefore constituted fulfilment of the suspensive conditions provided for in agreements "A" and "B", and later non-compliance with the terms of the grant was a risk undertaken by the respondent. He sought support for his submission in the decision in *Dharsay* that the letter of approval of the grant of the loan at issue in that case, constituted compliance with the suspensive condition in question. He also invoked a further passage in that case, at 63H – 64C:

> "I am reinforced in my view that the letter of 2 April 1992 constituted fulfilment of the suspensive condition of the deed of sale by the further similarity between the wording of the agreement and the wording of the letter. Clause 14 of the agreement requires the grant of a loan on the 'normal terms and conditions' of the financial institution concerned. The letter records the approval of the loan 'subject to the bank's normal conditions'. Mr Lloyd's evidence was that the requirement of a valuation of the property was indeed a normal condition.
>
> Even if I am wrong [in] the conclusion to which I have come, it seems to me that the loan was in fact 'granted' within the meaning for which Mr *McDougall* contended. The only condition which had to be fulfilled was an adequate valuation of the property. This, according to Mr Lloyd, was obtained but only communicated to the bank after 3 April 1992. The imposition of this condition by the bank was, in my opinion, a suspensive condition of the 'grant' of the loan. The effect of fulfilment of a suspensive condition (with certain exceptions relating to risk and fruits which are not relevant to this issue) is that the contract becomes enforceable retrospectively to the date of conclusion thereof, Christie *The Law of Contract in South Africa* 2nd ed at 168-9. Put otherwise, 'the obligation has its full effect as if it were unconditional from the start' Joubert *General Principles of the Law of Contract* at 177. See also *Tuckers Land and Development Corporation (Pty) Ltd v Strydom* 1984 (1) SA 1 (A) at 22G-H."

Counsel stressed that the second portion of this extract did not reflect a finding in fact

that a suspensive condition was involved.

[86] Counsel's argument cannot prevail. With respect, I cannot align myself with the reasoning in the first portion of the passage in *Dharsay* quoted above. It may well be that the terms of the grant of the loan in that case, to the extent that they referred to the lender's usual terms and conditions of such loans, coincided substantially with the wording of the suspensive condition in question. However, the approval of the loan was subject to the further requirement that the property be valued by a valuer appointed by the lender in an amount in excess of the loan to be granted. It may well be that such a valuation was a standard or normal condition of the lender for the grant of a loan. That does not mean, however, that the grant of a loan subject to that requirement constituted a loan as envisaged in the contract in question, i.e., prior to fulfilment of the requirement. The proper interpretation is that set out in the second portion of the passage from *Dharsay*, viz., that the approval of the loan was itself subject to the suspensive condition that the property be valued at the stipulated value, and only when, and if, that condition was satisfied would the grant have become effective and the suspensive condition in the contract have been satisfied. These remarks apply *mutatis mutandis* to the bank's offer in the present matter, the requirement that Mrs Hayes bind herself to furnish the security in question and the suspensive conditions in agreements "A" and "B".

[87] What is the effect of the purported subsequent withdrawal by Mrs Hayes of her consent and, pursuant thereto, the withdrawal by the bank of its grants of finance to the respondent? The short answer is: nothing. Counsel were in agreement, correctly, that if, consequent upon Mrs Hayes legally binding herself to encumber her property as collateral security by way of the surety bonds envisaged in the two agreements (the only requirement invoked by the respondent as rendering, by reason of its alleged non-fulfilment, the grant of finance by the bank ineffective), the bank's grant of finance had in fact become effective (as in fact occurred; indeed, as recorded earlier, not only did the bank's offer become effective, but it was also in fact

accepted), fulfilment of the suspensive conditions in the two agreements would have been in place. Any purported withdrawal by Mrs Hayes of her binding consent, and any consequent purported withdrawal by the bank of its grant of finance, could not in law have the effect of undoing that fulfilment. See *Dharsay* at 64F-H where the following appears:

> "Finally, it is necessary to consider whether the fact that plaintiff's tax assessments were issued before the grant of the loan but were not brought to the notice of the bank affects the position. Mr Lloyd testified that, had the bank been aware of this substantial liability, it would not have granted the loan. Mr *McDou*gall conceded that, if the loan was granted within the meaning of clause 14, then any subsequently occurring event which might render plaintiff unable to take up the loan would not affect the position of the seller, but would constitute a risk which plaintiff bore. I think that this concession was rightly made. Similarly the seller would, in my opinion, be entitled to rely upon the fulfilment of the condition if the purchaser had, in order to obtain finance, concealed his true financial position from the proposed lender. Put otherwise, the purchaser would not be able to claim that the condition was not fulfilled by revealing his true financial position after approval of the loan and thereby procuring that the lender withdrew from the transaction."

The comment may also be made that a person, having once legally bound himself to do something, cannot unilaterally validly withdraw from that obligation.

TO WHAT SUBSTANTIVE RELIEF ARE THE APPLICANTS ENTITLED?

[88] Mr *Mouton* submitted that whatever the contents of all the papers finally filed in the matter, and even taking into account the drastically altered relief sought by the applicants at the end of the day, the application nevertheless fell to be dismissed. The bases of the submission were four-fold in nature viz (a) the applicants had at no stage made out a case for relief in the form of specific performance; (b) the applicants had failed to make out any case in their founding papers and had only done so, in part, thereafter; (c) the applicants should not have proceeded by way of notice of motion to seek an order for specific performance since serious disputes of fact as to whether all suspensive conditions had been fulfilled and as to whether breaches of warranty had occurred were clearly forseeable and had in fact arisen; (d) the applicants had become

obliged to abandon a portion of their claim and seek radically altered relief, and even that now sought remained contradictory and mutually destructive. Accordingly, I should exercise a discretion against coming to the applicants' assistance in any manner.

[89] I will deal below with the question whether on the papers the applicants have made out a case for any relief. Leaving that question aside, I am unable to uphold Mr

Mouton's submissions (but the factors relied upon by him, or some of them, may have a bearing on the question of costs). The question of what relief, if any, is to be granted to the applicants must, in the light of developments, be decided on all the papers finally filed in the matter and the nature of the relief pressed for by counsel for the applicants in final argument. In this latter regard, there was no objection voiced at any stage on behalf of the respondent to the applicants' amplifying or amending the notice of motion (which the altered relief sought amounted to) and the question whether the applicant's founding papers made out a case must have reference to the relief finally sought (an aspect dealt with below). The conflicts of fact have either been resolved or, insofar as they remain, do not, as was accepted by counsel on both sides, need to be resolved in the present proceedings. As will appear below, the relief finally sought by the applicants is not contradictory or mutually destructive.

[90] The nature of the relief finally sought by the applicants was that detailed in para. [10] above. Three preliminary observations may be made:

> (1) Paragraph 1 of the proposed order is in part a restatement of the relief referred to in paragraph (a) of the amplification of the notice of motion referred to in para. [8] above.
>
> (2) During argument I raised with Mr *Stokes* the question whether, in order to avoid any possibility of confusion, ambiguity or contradiction in the orders contained in paragraphs 2 and 3 of the proposed order, the words "subject to paragraph 3" should not be inserted at the commencement of paragraph 2 (a suggestion which found favour with both counsel). On analysis, however, it

seems to me, the wording of the paragraphs, as set out in para. [10] above, are in fact to be interpreted as if paragraph 2 were prefaced by the additional words referred to, and the words in question would merely spell out the existing situation. The prayers are therefore not contradictory or mutually destructive as counsel contended.

(3) If the papers otherwise founded the grant of relief in terms of paragraph 1 of the proposed order, it was, correctly, not suggested that the declarator sought would not properly be issued in terms of s 19 (1) (a) (iii) of

the Supreme Court Act, No 59 of 1959, even if no consequential relief were, or could be, added thereto.

[91] As recorded earlier, the only suspensive conditions that the respondent raised as having failed or as not having been fulfilled were those relating to the grant of finance by the bank to the respondent. It was not part of the respondent's case that any other suspensive conditions failed or have not been fulfilled (and, save as set out above, the respondent did not join issue with the applicants' averment in its founding papers that all suspensive conditions had been fulfilled). In terms of the findings recorded earlier:

(1) the suspensive conditions relating to the grant of finance by the bank to the respondent to cover payment of the consideration due in respect the purchase price of the farm (clause 18.1 read with clause 2 of agreement "A") and in respect of the purchase price for the business itself (clause 2.1.3 read with clause 4.1 of agreement "B"), were in fact fulfilled;

(2) the need for the remaining portion of the suspensive conditions relating to the grant of finance by the bank to the respondent, i.e., in respect of the purchase price of the stocks (clause 2.1.3 read with clause 4.2 of agreement "B") and in respect of the payment of 50% of the amount due to Stannic to secure the release of certain assets (clause 2.1.3 read

with clause 4.4 of agreement "B"), has fallen away in the light of the trust's waiver of the entitlement to receive such payment.

[92] Did the applicants' founding papers make out a case for the grant to it of the relief in question? Subject to what follows later, this question falls to be answered in the affirmative. The founding papers of the applicants record:

(1) the grant of the finance, referred to in para. [91] (1) above, by the bank to the respondent (the allegations in question being covered by the facts set out in the first two sentences in para. [20] above);

(2) that the respondent's representatives had signed all documents necessary to pass transfer of the farm to the respondent; that the documentation required by the Registrar of Deeds (save for the transfer duty receipt) was complete, that the applicants' conveyancers had been advised by the bank that all the necessary guarantees to secure the purchase price in respect of both the business and the farm had been dispatched to the conveyancers; that the directors of the respondent had delivered cheques sufficient to cover the transfer duty necessary to effect transfer; that all that was required was for the documentation to be lodged with the Deeds Office;

(3) that the applicants had complied with all their obligations in terms of the two agreements;

(4) that the respondent (through its attorneys) contended that the suspensive condition relating to the grant of finance by the bank had not been fulfilled, and that the respondent was repudiating both agreements (the reference being to the contents of the letter quoted in para [31] above);

(5) the applicants' counter-contention that all the suspensive conditions, including the one in question had been fulfilled, and that the repudiation was invalid.

The above allegations, in my judgment, constitute a sufficient case for the grant of the

relief in question.

[93] It is true that in the subsequent papers filed further evidence of the fulfilment of the suspensive conditions in question was forthcoming, viz.,

(1) (in the respondent's own answering papers) the letters quoted in paras [21] and [22] above;
(2) (in the applicants' replying papers, as amplified) the powers of attorney and surety bonds executed by Mrs Hayes (see paras. [24] and [25] above).

It was not, however, a case of the applicants, for the first time in their replying papers seeking to make out a case that the suspensive conditions in question had been fulfilled; that had already been done in the founding papers, and the applicants'

further papers merely adduced further evidence in support of what had already been alleged and also, specifically, to counter the contention in the respondent's answering papers (part of the basis on which it contended that the suspensive conditions had not been fulfilled) that Mrs Hayes was not prepared to furnish a surety bond, as opposed to a withdrawal of a binding consent thereto, and that the bank had purported to withdraw its guarantees.

[94] I consider, however, that paragraph 1 of the proposed order should be reworded as set out below. Mr *Stokes* voiced no objection thereto. The reworded order, while having the same practical effect as the order sought by the applicants, would be a more accurate reflection of the facts and would read as follows:

> "It is declared that the agreements, annexures "A" and "B" to the founding affidavit have not lapsed for alleged want of compliance with any operative suspensive conditions".

[95] An objection raised by Mr *Mouton* to the grant of an order in terms of paragraph 2 of the proposed order, even as qualified by the terms of paragraph 3, was that there would then be in existence a court order and that non-compliance therewith

could render the respondent being in contempt of court. He submitted that I should not make an order in advance, as it were, and that there was in fact no need for it. I am unable to agree. The parties are no doubt desirous of attaining certainty in this matter. On the findings I have made Mr *Mouton* found himself unable to suggest any reason, leaving aside the disputed question whether the agreements are liable to be cancelled by reason of a material breach thereof on the part of the applicants, why implementation of the agreements should not take last place. If the respondent were not ordered to carry out the contracts and it failed to do so, the applicants would be obliged to return to the court to seek that very order.

[96] I am therefore persuaded that it would be proper to issue an order in terms of paragraph 2 of the proposed order qualified as discussd earlier in this judgment.

[97] As indicated earlier, counsel were agreed that, in order to leave the door open for the respondent to invoke any alleged breach of the agreements on the part of the

applicants, to found a claim for cancellation of the agreements, it would be proper to make an order in terms of paragraph 3 of the proposed order. In fact, the order should be amplified to cater for any claim for damages by the respondent.

COSTS:

[98] It cannot be gainsaid that, as Mr *Stokes* argued, the applicants have in the result sustained some success in this matter which legitimately attracts the epithet of substantial. In short, it has secured relief in terms of which, contrary to the stance taken by the respondent, the agreements continue in existence and, subject to the qualification referred to above, the respondent has to comply therewith. It would, however, be too simplistic to say that therefore the applicants are entitled to an order for their costs in the matter. The course that the litigation took also requires to be looked at.

[99] The original order the applicants sought was one for specific performance

which was not qualified in any way, i.e., the respondent was to take transfer of the farm and pay the amounts due in terms of both agreements. It has not succeeded in securing such an order. Mr *Stokes* sought to argue that the applicants had throughout been entitled to an order in terms of prater 2.1 of the notice of motion. He contended that that prayer was designed to keep the contracts alive and to ensure, e.g., that the respondent do everything necessary to see that the suspensive conditions operating on both contracts were fulfilled or to continue to pay occupational rental (there were clauses in the agreements providing therefor). The submission cannot be upheld. Prayer 2.1 of the notice of motion must be seen in the context of its being joined with prayer 2.2; the plain meaning of the two prayers is that the respondent should take transfer and pay. The founding affidavit in fact stated in terms that the application sought to compel specific performance of the respondent's obligations in terms of the agreements, without any qualification of that obligation. Counsel also in terms echoed that that was the purpose of the application. An intention to keep the contracts alive whether for the purposes set out above or for any other purpose than specific performance in the form of taking transfer and paying the purchase considerations,

was nowhere averred in the applicants' papers. It was only at the late stage when the applicants filed their final additional replying papers containing the orders that they would be seeking at the resumed hearing, that the applicants intimated that an order for specific performance, unqualified, was no longer being sought – and the earlier stance was taken despite the relevant factors raised in the respondent's papers against the grant of that order.

[100] The main success of the applicants is, on analysis, that relating to the issue of the suspensive conditions. But that observation requires to be qualified. It is so that the applicants succeeded in respect of the important matter of showing that the suspensive conditions, insofar as they related to the grant of finance by the bank to the respondent to cover the purchase prices of the farm and the business. In this regard, the statement by North that he had understood from Niewoudt that Mrs Hayes had not signed a power of attorney to pass a surety bond is of no assistance to the respondent.

Factually, this statement is a difficult pill to swallow: there is no confirmatory affidavit by Niewoudt to support the allegation and in the light of what the true facts have been shown to be, he could hardly have conveyed to North what the latter alleges; moreover, Mrs Hayes is the mother of one of North's co-directors and as a matter of compelling inference the true course of events would have come to the knowledge we of North. Be that as it may, any wrong impression that North may have laboured under by reason of what a third party told him, cannot affect the applicants' entitlement to costs on the basis that in fact they proved their case and refuted the respondent's resistance thereto. That resistance, persisted in on the basis that Mrs Hayes had withdrawn her security, continued to the end. However, it would be incorrect to say that the applicants attained success in respect of that portion of the suspensive condition requiring that the bank grant the respondent finance that related to finance for the stocks and the respondent's share of the liability to Stannic. On the contrary, the stance of the respondent was that finance for the latter items was not embraced in the suspensive condition, a contention which has been rejected. The issue constituted an effective bar to the relief sought by the applicants. Authority need not be quoted for the proposition that the onus was on the applicants to prove fulfilment of a suspensive condition, and fulfilment in its entirety. The waiver by the trust of the claim for payment of the consideration due in respect of the

stocks, which took place during the initial argument in the matter, and which only then removed the issue in question from the merits of the matter, in fact constituted a success for the respondent, and the same applies to the waiver by the trust, at a late stage, of the claim for payment of the amount owing by the respondent in respect of the liability to Stannic. On the other hand, it is also relevant that it was only at a late stage that the respondent raised the issue that the suspensive condition embraced the grant of finance for the respondent's share of the latter liability.

[101] In the exercise of my discretion in the matter of costs I consider that it would be fair to both parties if I ordered the respondent to pay half of the applicants' costs.

ORDER:

[102] The following order will issue:

(1) Agreement "B" to the applicants' founding affidavit is rectified by the deletion in clause 2.4 thereof of the words "by no later than 15 March 2002 (or such later date as may be agreed in writing by the parties which agreement will not be unreasonably withheld".

(2) It is declared that the agreements, annexures "A" and "B" to the applicants' founding affidavit have not lapsed for alleged want of compliance with any operative suspensive conditions.

(3) Subject to the provisions of (4) below, the respondent is ordered to carry out its obligations in terms of the said agreements.

(4) Nothing in this order will affect the respondent's right, if any, to cancel the agreements and/or to claim damages in consequence of any breach of the agreements on the applicants' part.

(5) The respondent will pay one-half of the applicants' costs.

F. KROON
Judge of the High Court