IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No.: 5031/2012

In the matter between:

CYNTHIA PHILPOTT	Applicant

and

GLEN VIVIAN USHER N.O.	First Respondent
NOMATHAMSANQA NONHLANHLA MABASO N.O.	Second Respondent
BURT SILVERSTON LAING N.O.	Third Respondent
WAKEFIELDS REAL ESTATE (PROPRIETARY) LIMITED	Fourth Respondent

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J U D G M E N T

KOEN J:

INTRODUCTION:

[1] The applicant applies for the following relief against the first to fourth respondents:

'1.1 That the Agreement of Sale dated 26 August 2011 and concluded between the Applicant and Sean Darren Kepko annexed to the Founding Affidavit as Annexure "FA7" (the 'Agreement') be declared to have lapsed, to be void *ab origine* and to be of no force and/or effect.

1.2 That the First to Third Respondent be Ordered to instruct Lynn & Main Attorneys to refund the Applicant's deposit in an amount of R500 000.00 (FIVE HUNDRED THOUSAND RAND ONLY), together with any interest accrued thereon in the interest bearing Trust Account of Lynn & Main Attorneys, to the Applicant forthwith and not later than five days after the granting of an Order herein.

1.3 That in the event of the First to Third Respondents failing to comply timeously with the Order in 1.2 above the Sheriff of the above Honourable Court is hereby authorised and Ordered to, in the stead of the First to Third Respondents issue an instruction to Lynn & Main Attorneys to refund the Applicant's deposit in an amount of R500 000.00 (FIVE HUNDRED THOUSAND RAND ONLY), together with any interest accrued thereon in the interest bearing Trust Account of Lynn & Main Attorneys, to the Applicant forthwith and to attach and remove such amount in order to pay same over to the Applicant forthwith, all such execution steps being for the account of the First to Third Respondents jointly and severally on the scale as between Attorney and Client.

1.4 THAT it be declared that the Fourth Respondent is not entitled to claim any estate agents' commission from the Applicant arising from the Agreement.

1.5 THAT the First to Fourth Respondents be ordered to pay the costs of this Application on the Attorney and Client scale jointly and severally, the one paying the other to be absolved.

1.6 THAT further and/or alternative relief be granted.'

[2] The fourth respondent counter applied for a declaratory order that it be entitled to payment of commission in the sum of R448 875.00 and ancillary relief and the costs of such counter application.

BACKGROUND:

[3] The applicant was at all material times the sole shareholder and director of RZT Zelpy 4094 (Pty) Ltd ('RZT'). RZT was the registered owner of the following immovable properties, namely:

(a) 509 Longdown Road, Cornwall Hill Estate, Irene, Centurion, Pretoria, Gauteng;

(b) 512 Longdown Road, Cornwall Hill Estate, Irene, Centurion Pretoria, Gauteng.

[4] On 5 July 2011 RZT, represented by the applicant, concluded two written agreements of sale in respect of the aforesaid properties with Niel Christo Basson ('Basson'). Only the sale of 509 Longdown Road is relevant to this application.

[5] In terms of the agreement relating to 509 Longdown Road, annexed as annexure 'FA4' to the founding affidavit:

(a) RZT sold the property at 509 Longdown Road to Basson;

(b) The provision dealing with the purchase price read:

> '1. THE PURCHASE PRICE AND OTHER COSTS
>
> The purchase price is R13, 500, 000 - (Thirteen Million five hundred thousand Rands) and is payable as follows:
>
> 1.1 (a) A deposit of R3, 500, 000 (Three Million five hundred thousand Rands) is to be paid by the Purchaser ('within' is deleted) subject to selling of LRDC shares on or before 31 August 2011 ('working days' are deleted) from acceptance of the agreement to the Transferring Attorney to be invested in an interest bearing trust account, until date of registration, such interest being for the credit of the Purchaser and on transfer this deposit will be paid to the seller.
>
> (b) The balance of the purchase price is payable in cash, free of bank costs to the Seller against registration of the property into the name of the Purchaser.
>
> 1.2 The purchaser is obliged to furnish the Transferring Attorney with guarantees or bank guarantees (approved by the Seller) ('within' is deleted) subject to the purchaser selling SMI shares on or before 31 October 2011...'

[6] The applicant was introduced to the property at 2A Noble Park, Paddock Road, Summerveld, KwaZulu-Natal ('the property') through the agency of the fourth respondent, represented by an estate agent, Wendy Ritchie ('Ritchie'). Pursuant to that introduction the applicant personally concluded a written agreement of sale with one Sean Darren Kepko, the latter represented by Marc Gregory Croxford of Nedbank

Limited, Cape Town, on 26 August 2011. That agreement is Annexure 'FA7' to the founding affidavit.

[7] The salient provisions of annexure 'FA7' are as follows:

(a) The seller sells the property to the applicant;

(b) The purchase price is R5 250 000;

(c) Payment to the seller is to occur in 'CASH AGAINST REGISTRATION OF TRANSFER …'

(d) The 'SECURING OF THE PURCHASE PRICE BY PURCHASER' reads:

'6.1	(A)	Cash deposit to Wakefields by then on acceptance of	R*500 000.00*
	(B)	Cash deposit to Wakefields by *30/01/2011*	R*3 000 000.00*
6.2		From proceeds of bond *or cash from*	
6.3		From sale of purchases property *proceeds*	R*1 750 000.00*
6.4		Guarantee for balance	R……..
6.5		Government Housing Subsidy Scheme	R……..
		Total purchase price	R*5 250 000.00*

(The portions above appearing in italics were inserted in the manuscript. Subparagraphs 6.2 and 6.3 were also conjoined with a bracket in manuscript encircling the two. Amounts were amended, deleted and new amounts inserted on lines, which would make absolutely no sense. Hence a previous total purchase price of R4 800 000 was deleted and the figure 'R5 250 000' inserted above it but in the line provided for '6.5 Government housing subsidy scheme'. No party referred to any portion of the purchase price emanating from that source and the amount, properly construed as the total of the individual amounts reflected, clearly was intended to be the total purchase price although it appears on the line providing for 'Government Housing Subsidy Scheme'. Why a fresh schedule could not have been prepared providing for the correct totals, particularly in this

electronic age where documents can be exchanged by fax or otherwise even to the agent of the seller in Cape Town, is simply not explained.)

(e) Paragraph 8 of the schedule to the agreement deals with 'PURCHASER'S PROPERTY TO BE SOLD AS CONDITION PRECEDENT'. It provides as follows:

'8.1 Address: *509 Longdown Street, Cornwall Hill*

8.2.1 To be sold by ... day of …….. 20 ...

8.2.2 Was sold on ...day of ……..... 20 ...

See copy of agreement.

(Next to both 8.2.1 and 8.2.2 is an instruction that the author must 'Delete not applicable').

8.3 Suspensive conditions to be fulfilled or waived by:

.....day of ..... 20 ..

(To the immediate right of paragraphs 8.1 to 8.3 in a separate vertical column is a reference to '5.1' and '5.2'. These refer to paragraphs in Annexure 'A' to the schedule to the agreement of sale, being "standard terms and conditions".)

(f) Paragraph 9 provides that the occupation date is 15 September 2011.

[8] The relevant standard terms and conditions contained in Annexure 'A' to annexure 'FA7' include the following:

(a) '5. RELATED TRANSACTIONS

If items 6.3 and/or 8 of THE SCHEDULE are applicable then this entire Agreement is subject to:

5.1 an agreement being concluded for the sale of the PURCHASER'S property situate at the address referred to in item 8.1 of THE SCHEDULE on or before the date in item 8.2 of THE SCHEDULE;

5.2 all suspensive conditions (if any) contained in the agreement referred to in sub clause 5.1 hereof being fulfilled or waived in writing by not later than the date in item 8.3 of THE SCHEDULE.'

(b) '17. COMMISSION

The SELLER shall pay commission at the rate of 7.5% calculated on the purchase price, together with VAT thereon to Wakefields. The commission plus VAT thereon shall be earned upon fulfilment of the conditions referred to herein and payable not later than upon registration of transfer...'

(c) '24. MISCELLANEOUS

24.1 This document shall form the whole and only contract between the SELLER and the PURCHASER and any representations made by or on behalf of the SELLER or Wakefields shall not affect it unless set out herein.

24.2 No agreement of variation of the terms and conditions of this Agreement or consensual cancellation of same shall be binding upon the parties unless contained in writing and signed by the parties.

24.3 No relaxation or indulgence which either party may show the other shall in any way prejudice or be deemed to be a waiver of such parties rights hereunder….'

[9] Mr Kepko's estate was sequestrated on 20 September 2011 and finally sequestrated on 3 November 2011.

DISCUSSION – PRELIMINARY ISSUES::

[10] The agreement, annexure 'FA7', in respect of which the fourth respondent claims a commission of R448 875.00, was completed in a shabbily manner with little attention to detail. It is a standard agreement of sale with printed terms, on which Ritchie inserted particulars of the seller, purchaser, property and the purchase price and sought to modify and adapt it by making deletions and insertions, in the most cryptic of terms, purportedly to give expression to the common intention of the parties. The product of her efforts is however a confusing document, with some ambiguity. This is extremely unfortunate, as it can safely be concluded that but for the unsatisfactory manner in which the document was completed, there probably would have been no need for this application.

[11] Evidence of what the parties intended in their written agreement would ordinarily[1] be inadmissible in interpreting the provisions of an agreement. The intention of the parties must be construed from the language they employed rather than what either may have had in mind.[2] In the event inter alia of ambiguity, regard may in certain instances however be had to the surrounding circumstances prevailing at the time, as a secondary aid and guide to ascertain the common intention of the parties.[3] The only secondary evidence before me in that regard was that of the applicant and Ritchie. The first to third respondents, the trustees of Mr Kepco's insolvent estate have elected to abide by the agreement, annexure 'FA7'. Obviously, they have no direct personal knowledge as to the circumstances prevailing and surrounding the conclusion of the agreement of sale.

[12] One potential ambiguity arising from the agreement relates to the 'condition precedent' that the 'purchaser's property' be sold. Although the schedule identified the address of the property as '509 Longdown Street Cornwall Hill' and a copy of annexure 'FA4' was annexed to the sale agreement, that property was of course technically not owned by the applicant but by RZT. An amount of R1 750 000.00 was also to come from the sale of the 'purchaser's property'.

[13] The reality is that the applicant was not selling a property of her own, but 509 Longdown Street. Argument was addressed to me by the respondents that in the absence of a claim for rectification of the agreement, the present application could not succeed. To me that would be an unduly technical approach to the matter. It proceeds from assigning an unduly restrictive interpretation to the phrase 'Purchaser's Property'. Clearly what was intended was that the applicant, as a condition precedent, had a property to sell, being the property at '509 Longdown Street, Cornwall Hill', owned by RZT of which the applicant was the sole shareholder and director. The provision did not

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[1] The golden rule of interpretation is that if the language of the contract is clear and unambiguous, effect must be given to the ordinary everyday meaning of the words used unless this would lead to an absurdity or something which the parties obviously never envisaged.

[2] Eg *Van der Merwe v Jumpers Deep Ltd* 1902 TS 201 207.

[3] See ADJ van Rensburg, JE Lotz and TAR van Rhijn (updated by RD Sharrock) In the title 'Contract' in 5(1) *LAWSA* 2ed (replacement volume) (2010) para 426.

refer, in terms, to the condition precedent entailing the sale of a property registered in the purchaser's name. In my view the phrase 'purchaser's property' referred to the property the parties intended to be sold as a condition precedent to this agreement coming into effect and from the proceeds of which part of the purchase price would be paid. This property was expressly identified by name and with reference to the copy of the sale agreement annexed, as 509 Longdown Street. Clearly, the condition precedent was intended to relate to the sale of that property

[14] Mr Combrink, on behalf of the first to third respondents, also placed particular emphasis on the confusing manner in which particulars were inserted in this block on the schedule dealing with 'SECURING OF PURCHASE PRICE BY PURCHASER' and suggested that there was such ambiguity, that the matter cannot be dealt with on affidavit. I disagree. The only sensible construction of this part of the agreement, giving purpose and business efficacy to the agreement, is that R1 750 000.00 was to come from the proceeds of the sale of 509 Longdown Street. In so far as there might be any ambiguity, I should point out that it is the version of the applicant that the balance of the purchase price in the sum of R1 750 000.00 would come from the sale of that property. Slightly different, but partly supportive of the applicant's version in this regard, are the allegations by Ritchie that 'the balance' of the purchase price was to come 'either from the sale of 509 Longdown or a loan from a financial institution'. It is significant however, if the balance was to be on a loan from a financial institution, that the part of the schedule dealing with securing a bond, provided that it was 'to be obtained within 21days of acceptance hereof'.[4]

[15] The fourth respondent contends that on the day that the agreement of sale, 'FA7' was concluded, 509 Longdown had already been sold. That conclusion is probably correct as the agreement had already been concluded, the issue simply being whether it

[4] The copy of the agreement of sale which was annexed is difficult to read in this regard but it appears that the time limit was 21 days. There was never any suggestion that such a bond was applied for, or secured, nor what the effect would be if this was a condition of the agreement, what the effect of non fulfilment would be.

contains suspensive conditions and whether those conditions were fulfilled timeously. It is trite law that an agreement concluded subject to a suspensive condition gives rise to the conclusion of an agreement, but that the exigible content thereof is merely suspended pending fulfilment of any suspensive conditions.[5] But nothing turns on whether the agreement had been concluded or was to be concluded. Item 8 on the Schedule to the sale agreement Annexure FA7 however did not only contemplate a situation where the property was still 'to be sold' but also where property 'was sold'.

[16] The crucial provisions requiring scrutiny and proper construction and being decisive of the present application are, in my view, items 8 of the schedule, paragraph 5 of the standard terms and conditions, and the proper interpretation of the payment provisions in annexure 'FA4'.

WAS ANNEXURE 'FA4 SUBJECT TO SUSPENSIVE CONDITIONS?

[17] It is the applicant's case that in providing that the payment of the deposit and the furnishing of guarantees were 'subject to' the sale of certain shares by 31 October 2011, that annexure 'FA4' was subject to suspensive conditions and that Basson failed to comply with these conditions. Not surprisingly, the first respondent in his answering affidavit on behalf of the first to third respondents records that he has no personal knowledge of what occurred between the applicant, Basson and RZT in regard to annexure 'FA4'. However, taking the agreement at face value, the first to third respondents contend that the relevant provisions of annexure 'FA4' are not suspensive conditions, and accordingly that non fulfilment with those provisions did not cause the agreement to lapse on 31 October 2011. The fourth respondent denies the applicant's allegation that Basson failed to comply with the suspensive conditions contained in annexure 'FA4' and the further allegations contained in paragraph 29 of the Founding Affidavit, but such denial must be understood in the explanation which follows thereon, namely that the fourth respondent likewise contends that the relevant provisions of annexure 'FA4' do not constitute suspensive conditions, but rather are obligations of

[5] *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O) 665-667.

Basson rendering annexure 'FA4' unconditional. Accordingly, the agreement of sale, annexure 'FA7', also was unconditional.

[18] The proper construction of the provisions in annexures 'FA4' and 'FA7' became obfuscated by terminology employed somewhat loosely by the transferring attorney, Vorster Incorporated in a letter of 30 November 2011. Initially, the failure by Basson to have sold the share and to have paid the purchase price to the applicant pursuant to annexure 'FA4', is categorized as a 'breach of contract'. That would suggest that the relevant provisions are terms of the agreement. However, later in the same letter it is recorded that 'should the selling of shares by the purchaser materialize, the parties involved in our transaction will have to enter into a new agreement of sale'. This suggests not a situation of a breach where an aggrieved party's remedy would be to enforce performance, but one where the initial agreement lapsed or otherwise terminated requiring a 'new agreement of sale' to be entered into, as one would have with an agreement lapsing due to non-fulfilment of a suspensive condition. Ultimately these opinions, and they are no more than that, expressed in the exchange of correspondence, are irrelevant.

[19] The relevant provisions in annexure 'FA4' made the payment of the deposit and the providing of guarantees 'subject to' the sale of certain shares. Similarly paragraph 5 of the standard terms and conditions to annexure 'FA7' made that agreement 'subject to' all suspensive conditions contained in annexure 'FA4' being fulfilled timeously.

[20] The phrase 'subject to' has no *a priori* meaning. In a contractual context, especially in insurance contracts, it is usually used to create a suspensive condition. In appropriate instances it might also suggest a resolutive condition or used to introduce a term of a contract.[6]

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[6] *Pangbourne Properties v Gill and Ramsden* 1996 (1) SA 1182 (A) at 1187 – 1188 and *Parsons Transport v Global Insurance* 2006 (1) SA 488 (SCA) at para 12.

[21] In construing an agreement the grammatical and ordinary sense of the words used must be adhered to unless that would read to some absurdity, repugnance or inconsistency.[7] It is the language which is used in the contract which expresses the parties' intention.

[22] It is clear from annexure 'FA4' that when the provision requiring payment of the deposit 'within ...working days' was deleted and the payment of the deposit made 'subject to selling of LRDC shares on or before 31 August 2011' (which time subsequently was extended to 31 October 2011), and the requirement of the guarantees having to be provided 'within …. working days' was deleted and substituted with 'subject to the purchaser selling SMI shares on or before 31 October 2011', that properly construed, these were suspensive conditions, not resolutive conditions, and not terms of the agreement. To construe them as term with the date simply being the date for performance would render the words 'subject to' and the reference to the sale of the specific shares superfluous. That would offend against the very basic rule of interpretation that every word is to be given a meaning. In the context in which the words 'subject to' were used, it would also be incorrect to interpret that phrase as bearing different meanings depending on whether they appeared in annexure 'FA4' or 'FA7'. I am mindful of the fact that the parties to these two agreements were different, but the agreements were interrelated. Indeed annexure 'FA4' was annexed to and became part of annexure 'FA7'. It was never seriously disputed that the words 'subject to' in paragraph 5 of the standard terms and conditions to annexure 'FA7' introduced anything other than suspensive conditions. If that construction is correct then it is difficult to envisage those same words meaning anything different where used in annexure 'FA4'. Non fulfilment of these conditions by 31 October 2011 would have the effect that the agreement, annexure 'FA4' lapsed and was of no further force and effect.

[23] There is nothing to gainsay the repeated allegations by the applicant that Basson failed to comply with these suspensive conditions, allegations also supported by the contents of Annexure GBU2 to the answering affidavit which explains that by 30

[7] RH Christie *The Law of Contract* 6ed (2011) 214.

November 2011 the selling of the shares by Basson had not yet materialised. There has been no suggestion that these conditions should be considered to have been fictionally fulfilled.

[24] Accordingly, all the suspensive conditions in annexure 'FA4', being the agreement identified in paragraph 8 of the schedule to annexure 'FA7', not having been fulfilled by not later than the date provided for their fulfilment, as contemplated by clause 5.2 of the Standard Terms and Conditions, annexure 'FA7' would in the ordinary course lapse on 31 October 2011.

[25] Similarly, insofar as the fourth respondent's claim for commission is concerned, because the condition precedent requiring fulfilment of the suspensive conditions contained in annexure 'FA4' was not fulfilled on or before the date specified in the agreement annexure 'FA4', the commission was not earned.

WAIVER:

[26] In the event of me concluding that these were suspensive conditions, all the respondents contended that the applicant had waived her right to rely upon compliance with the suspensive conditions, inter alia in view of:

(a) Archer Attorneys on behalf of the applicant on 6 October 2011 having demanded from the first respondent to indicate whether the insolvent estate of Kepko elected to abide by the sale agreement in respect of the property or not;

(b) The applicant's husband in an email dated 10 October 2011, having demanded of the first respondent that he and the applicant be given occupation of the property.

(c) The first respondent in a letter dated 27 October 2011 having communicated the election of the insolvent estate to abide by the sale agreement in terms of section 35 of the Insolvency Act and calling upon the applicant to perform her obligations in terms of the agreement.

(d) The transferring attorneys on 10 November 2011 having demanded from Basson that he remedy his breach of contract within 10 days failing which the applicant would be entitled to enforce her rights as stipulated in the agreement.

(e) Subsequent correspondence during November 2011 whether the insolvent estate would abide by the agreement or not.

(f) Correspondence emanating from the transferring attorneys during November 2011.

[27] The letters in subparagraphs (a) to (c) of paragraph [26] above, all precede the date for fulfilment of the suspensive condition and therefore do not in my view assist the respondents' case. They certainly do not amount to an express or even an unequivocal waiver of the applicant's rights. The applicant was entitled to enquire whether the insolvent estate intended abiding by the agreement or not.

[28] The incorrect choice of terminology employed in the transferring attorney's correspondence has been alluded to earlier. The 'breach of contract' referred to was the sale of Mr Basson's shares and the issue of a guarantee for the purchase price on or before 31 October 2011. In view of my conclusion that the clauses properly construed contains suspensive conditions which had to be fulfilled by the sale of the shares on or before 31 October 2011, and there being no suggestion that the fulfilment of these conditions should be considered to have occurred fictionally, the reference to remedying a 'breach' was clearly incorrect and based on a wrong conclusion of law.[8]

[29] In the light of the first respondent's letter dated 27 October 2011 that the insolvent estate elected to abide by the agreement, it is not quite clear what gave rise to

[8] The obvious confusion in categorising the non-fulfilment of the relevant provisions in annexure FA4 as a 'breach of contract' is apparent in the subsequent letter from the transferring attorneys dated 30 November 2011 which again referred to an alleged 'breach of contract' and the demand to remedy such breach, i.e. the failure to sell the shares timeously, but which then did not state that, in the light of the 'breach', the applicant would elect to enforce the agreement, but that 'should the selling of (the) shares by the purchaser materialise, the parties involved in our transaction, will have to enter into a new agreement of sale', which could only follow if the original agreement had lapsed, as it would upon non fulfilment of a suspensive condition.

first respondent's email dated 17 November 2011 requesting an extension of time until the 24 November 2011 to make such election. I would have thought that the election had already been communicated to the applicant on 27 October 2011. A letter identical in terms to the letter of 27 October 2011 was subsequently addressed by the first respondent to Archer Attorneys on the 17 November 2011. This would appear to have been an unnecessary duplication. It does not establish any waiver.

[30] The initial inquiry to the first respondent regarding whether the insolvent estate elected to abide by the agreement, preceded the date for fulfilment of the suspensive conditions. Even if the enquiry thereafter resulting in the letter of 17 November 2011 was to be construed as an indication of the applicant's intention to abide by the agreement post 31 October 2011, the question still arises as to whether the applicant had waived the benefits of the suspensive conditions.

[31] The same question needs to be answered in respect of statements as to the legal position contained in letters from Foster Incorporated Attorneys on 10 and 30 November 2011. These letters are equivocal in their content and with respect to the author, confusing. Even construing the letters as possibly indicating some intention on the part of the applicant to continue with the agreement, if possible, the issue still remains as to whether she had consciously and deliberately waived the benefit of the suspensive conditions.

[32] It is firstly of some doubt as to whether she had waived the fulfilment of the suspensive conditions at all, and secondly whether they were waived in writing by not later than the 31st of October 2011, being the date fixed for their fulfilment in the agreement to which reference was made in item 8 to the schedule.

[33] It is unnecessary to answer all the aforesaid questions. According to clause 24.3 of the Standard Terms and Conditions to annexure 'FA7', no relaxation or indulgence which the applicant might have shown, for example by enquiring whether the insolvent estate was electing to abide by the agreement, or demanding fulfilment of the

suspensive conditions, 'shall in any prejudice or be deemed to be a waiver of such parties rights ...' in terms of the agreement.

[34] Even assuming the correspondence referred to aforesaid to amount to a waiver by the applicant in writing, no such waiver had occurred before the date for fulfilment of the suspensive conditions in the agreement annexure 'FA4',[9] being 31 October 2011. After that date there was no right to waive.[10] There can only be a waiver of a right which is still extant. Accordingly, if a suspensive condition is not fulfilled by the time stipulated for its performance, it is not possible to revive the agreement thereafter by waiver.[11]

[35] The onus to prove waiver would be on the party alleging the waiver, namely the respondents.[12] They must prove that when the alleged waiver took place, the applicant had full knowledge of the right which she decided to abandon.[13] The respondents have failed to discharge that onus.

[36] Accordingly, the applicant is entitled to the relief claimed, save a declaration that the agreement, annexure 'FA7' was void *ab origine*. No basis was advanced to justify a declaration that the agreement was void.

COSTS:

[37] The applicant has asked that the respondents be ordered to pay the costs of the application on the attorney and client scale jointly and severally, the one paying the

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[9] In my view the contents of annexure 'FA4' was incorporated into item 8.3 of the schedule to the agreement by that agreement being identified in that paragraph of the schedule and the copy relating to the sale of 509 Longdown Street, Cornwall Estate being annexed to annexure 'FA7'.

[10] Compare *Desai v Mohamed* 1976 (2) SA 709 (N); *Thomas v Henry* 1985 (3) SA 889 (A).

[11] *Phillips v Townsend* 1983 (3) SA 403 (C) at 409A-C.

[12] *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A); *Borstlap v Spnagenberg en andere* 1974 (3) SA 695 (A).

[13] *Netlon Ltd v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) at 873-874.

other to be absolved, on the basis that the opposition to the application was unreasonable.

[38] The first to third respondents were in somewhat of an invidious position, being representatives of the insolvent estate of the seller. Their stance relating to the non fulfilment of the conditions, which they readily accepted they were not able to dispute, was a reasonable one and I do not consider their opposition to the application inter alia on the grounds that the relevant provisions properly construed were not suspensive conditions or that the agreement was in many respects ambiguous, to have been unreasonable. It is not an instance where the insolvent estate should in my view be mulcted in costs on a punitive scale.

[39] The position of the fourth respondent is possibly different. I have already alluded to the fact that had the fourth respondent's agent discharged her duties diligently and properly, as one would expect where a claim for commission of R448 875 is pursued, the need for this application would probably never have arisen. That criticism of the fourth respondent's conduct however relates to the pre litigation stage and not to any conduct of the fourth respondent during litigation. Whatever criticisms there might be of Ritchie's performance of her duties given the imperfections of the agreement, the fourth respondent was entitled to raise the defences it did and its conduct during the litigation, even although its opposition turned out to be unsuccessful, is not such as would in my view justify the grant of costs on the attorney and client scale. I had found the argument by fourth respondent's counsel Mr Finnigan to have been fair and reasonable and of assistance.

ORDER:

[40] The order I grant as follows:

1. An order is granted in terms of paragraphs 1.1 (with the words 'to be void *ab origine'* deleted), 1.2, 1.3 and 1.4 of the applicant's Notice of Motion .

2. The first to fourth respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.
3. The fourth respondent's counter application is dismissed with costs.

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DATE OF HEARING: 14 December 2012.
DATE OF DELIVERY: 16 January 2013.

APPLICANT'S COUNSEL: Adv. J van Rooyen
APPLICANT'S ATTORNEYS: DONN E BRUWER ATTORNEY
C/O SHEPSTONE WYLIE ATTORNEYS

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