

SOUTH AFRICA / JUDGMENT

Manavhela and Another v Illing (20111/13044) [2013] ZAGPJHC 188 (22 July 2013) [2013] ZAGPJHC 188

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

20111/13044

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SOUTH

GAUTENG HIGH COURT, JOHANNESBURG

CASE NO:

20111/13044

DATE:22/07/2013

In the matter between:

MANAVHELA,
KWASHI FREDDA

First

Applicant

MANAVHELA,
VHANHANGWELE

Second

Applicant

And

ILLING,
JAMIE KIM

Respondent

JUDGMENT

SPILG, J:

BACKGROUND

In mid-2008 the applicants, who are husband and wife concluded a written instalment sale of land agreement with the respondent through an estate agent. The agreement included addenda, the exact number of which is in issue between the parties.

In March 2011 the applicants brought an application seeking inter alia;

a declaratory order that the agreement they relied upon was of full force and effect; and

an order compelling the respondent to take all necessary steps to transfer the immovable property “unencumbered into the name of the First and Second Applicant in undivided half shares against the payment of R636 771.67” An ancillary order was also sought directing the Sheriff to take all steps to effect transfer in the name of the respondent should the latter fail to do so.

The most significant feature of the agreement is common cause; namely that the applicants were afforded 18 months to pay the purchase price and that against final payment they would be entitled to transfer of the property. This was facilitated by the following provisions;

the full purchase price of R 1.2 million was to be paid by way of a R90 000 deposit with the balance payable over 16 months in instalments of R15 000 per month;

The R90 000 deposit itself was payable in 5 tranches over a three month period commencing effectively from the date of the agreement; and

The full purchase price was to be paid by 1 December 2009, against which the respondent was obliged to effect transfer of the property into the applicants’ names.

In his answering affidavit the respondent admitted that an instalment sale agreement had been concluded but averred that the documents relied upon by the applicants did not constitute the final agreement between the parties. In particular he contended that clauses 1.12 and 13.1 of the main agreement in final form had been further amended and that an Addendum C had been added to the original two addenda. The documents he relied upon as constituting the final agreement all purported to bear each applicant’s initials (to the amended clauses of the main agreement) and signatures (to Addendum C).

The amended terms relied upon by the respondent would have the effect of requiring the applicants to pay a little more than 10% more than the R637 800 odd tendered in their application in order to obtain transfer. The nub of the dispute regarding the amount payable under the agreement relates to whether the interest factor, expressed in a monetary sum, and not as a percentage, was monthly or annual and, correspondingly, whether the monthly instalment

payable of R15 000 was to be appropriated in its entirety in reduction of the purchase price or whether it also included the alleged monthly interest component.

The respondent accepted that if his version of the agreement was correct then the capital component of the monthly instalments mentioned in the disputed Addendum C should have been stated as R12 610 and not R15 000. He averred that this was a patent error having regard to the contents of that addendum and the main agreement (upon which he relies) read as a whole and he would seek rectification if the applicants' disputed this.

The respondent also contended that the applicants' refusal to pay the interest component of the balance of the purchase price amounted to a repudiation of the agreement which he accepted. In the result the respondent submitted that the applicants were not entitled to specific performance and that the application falls to be dismissed. Finally the respondent sought to anticipate any attempt by the applicants in their replying affidavit to change their position by seeking cancellation instead of continuing to pursue their claim for specific performance. He did so by relying on an alleged repudiation of the agreement by the applicants on at one further occasion.

The replying affidavit was delivered in August 2011. In it the applicants denied that their initials or signatures to clause 1.12 or Addendum C respectively. They persisted in seeking specific performance on the agreement they relied upon, or failing which on that contended for by the respondent.

The contents of the replying affidavit prompted a round table conference between the parties at which it was agreed that the respondent would launch an application under Rule 6(5)(g) of the Uniform Rules of Court to refer to oral evidence the following issues which were identified to be in dispute on the papers;

which documents constitute the agreement between the parties;

If the correct agreement is the one relied upon by the respondent, then

whether he lawfully cancelled it; and

what amounts, if any, are payable as a result of the cancellation having regard to the provisions of section 28 of the Alienation of Land Act 68 of 1981 ("the Act").

The Rule 6(5) (g) application also sought directives that would cover procedural aspects such as the calling of witnesses, discovery and the like. These were in conformity with *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Company (Pty) Ltd* 1971 (2) SA 388 (W). The applicants supported the application and its costs are to be in the cause.

At the pre-trial conference held in September 2012 the applicants complained that they were not given access to the original sale agreement relied upon by the respondent. The respondent tendered inspection at his attorneys' offices where the documents could then be examined by the applicants' handwriting expert. The pre-trial minute records that the applicants accepted the duty to adduce evidence first. However the parties agreed that the respondent bore the onus to prove the agreement he relied upon since it amounted to an alleged amendment of the original

agreement between the parties. Finally the pre-trial minute noted that, save for the contested documents alleged to have been signed by the parties, it was agreed that the discovered documents were what they purported to be and could be admitted into evidence without formal proof.

It is apparent that both parties understood that the main issue in the case would be determined by a finding of whether the clause 1.12 and Addendum C contained the actual initials and signatures of the applicants or were forgeries. To this end the respondent gave notice that he would rely on the testimony of Lieutenant Colonel Cloete, a handwriting expert who, for reasons set out in a Rule 36(9) (b) notice, was satisfied that the disputed signatures were authentic. He however requested further specimen signatures. After they were provided he submitted a supplementary report which was somewhat less emphatic than the first. Nonetheless he concluded that on a balance of probabilities the contested handwriting appeared to be authentic and in addition that they were “very probably written with the same pen and ink”. The applicants also gave notice of their intention to call a handwriting expert, but no report was forthcoming nor did they seek leave to call their own expert but effectively relied on cross-examining the respondent’s expert.

THE DOCUMENTS

In their founding papers the applicants relied on a copy of the agreement they had signed and which they alleged was subsequently given to them by the estate agent. The agreement consists of a main document titled “Agreement of Sale on Instalments”, and two further typed documents, one headed “Addendum A” and the other “Addendum B”.

The respondent does not dispute the genuineness of these documents but contends that the main agreement was superseded by amendments to clause 1.12 after, according to his version, he had pointed out to the estate agent, Ms du Toit, the error in the reckoning of the stipulated interest payment (ie annually instead of monthly). The respondent relied on the original pro-forma printed main agreement that would have contained the initials of the parties and of the agent at the foot of each page and their full signatures at the end. He produced a copy of that document which he alleges contains subsequent amendments to two clauses (clause 1.12 and clause 13.1). These differ from the amendments found in the same clauses of the applicants’ document. In addition to the two addenda which the applicants produced and which are not in dispute, the respondent relies on a third addendum headed “Addendum C” which he contends also bears the signatures of both applicants in addition to his own. As indicated earlier, the applicants deny that they signed Addendum C.

A number of distinguishing features were identified between the main agreement titled, “Agreement of Sale on Instalments”, which the applicants contend they received from the estate agent and the one which the respondent claims to have received from her. However before identifying the differences it is useful to set out the contents of clause 1.12 of the original standardised instalment sale agreement used by the estate agent to record the transaction prior to any insertions. It provided;

“INTEREST RATE: __ % (_____ percent) per

annum from date of the contract until transfer

The interest shall be calculated not more often than monthly and not less often than quarterly on the outstanding balance of the purchase price then owing in terms of the contract and such interest shall not exceed the rate of interest prescribed by the Minister of Industries, Commerce and Tourism in terms of section 12(1) of the Act from time to time. The interest rate is at present _
__ %”

In clause 1.12 of the main agreement relied upon by the Applicants, the printed “%” symbol and the word “percent” were deleted. Moreover the amount “R2390” was inserted in the first blank space and within the parenthesis the words “Two thousand three hundred and ninety Rand only” were added. The figure “15.5” was inserted in the last blank space. Accordingly, and after deletions to the original printed text, the first paragraph of clause 1.12 to the applicants’ document reads;

“INTEREST RATE: R2390__ (Two thousand three hundred) and ninety Rand only per

annum from date of the contract until transfer”

There was insufficient space within the parenthesis of the pro forma document to complete the amount in words. Nothing turns on the omission to delete and move the closing parenthesis to the end of the amount as spelt, or the fact that the balance of the words are above the print that was crossed out from the standard form.

By contrast the first paragraph of clause 1.12 in the document relied upon by the Respondent has the entire printed phrase “per annum” deleted and the words “per month” added after the spelling of the amount. After deletions it therefore read;

“INTEREST RATE: R2390 (Two thousand three hundred) and ninety Rand only per month

from date of the contract until transfer

The balance of the clause is identical.

Another distinguishing feature regarding clause 1.12 is that the amendments on the applicants’ document are not initialled by any of the parties whereas the respondent’s document purports to bear their initials and that of the agent.

Furthermore the respondent’s document is a copy on which the insertions to clause 1.12 are in original script and the initials against the amendment are original while the initials at the foot of the page are clearly a copy.

The applicants contend that their initials were forged. The respondent asserts that they are genuine. However the bottom of the relevant page on both the applicants' and the respondent's document contains the same initials. It therefore appears that the printed word "per" was deleted in the applicants' document at a different time to when the words "per annum" were deleted from the respondent's document.

Clause 13.1 of the applicants' document is entirely crossed out and initialled by all the parties and the agent. In fact each of the three lines is crossed out with a neatly ruled horizontal line. The effect is to delete a provision that obliged the respondent not only to pay for but also to attend to recording the contract in terms of section 20 of the Act.

By contrast the respondent's document only has only the printed words "at his cost" and "at the cost of the SELLER" deleted from the clause (again neatly). The effect is to confirm that there is no cost involved in recording the transaction but preserves the respondent's obligation to attend to its recordal as required by the Act.

The parties agreed that this discrepancy between the two versions would not affect the agreement, although it may impact on their genuineness- or as later transpired, as the case evolved, which version was the final binding document.

In this regard it remains relevant that both the applicants' and the respondent's page on which the amendments to clause 13.1 bear the identical initials of the parties.

The main agreement recorded the purchase price as R1.2million, with a deposit of R90 000. Instead of simply inserting a date in the space provided for "The date for payment of the deposit" the following was written "See addendum A". The main agreement also recorded that the monthly instalments were R15 000 payable over 16 months commencing on 1 August 2008. They were payable directly to a designated bank account number. The final date of payment was recorded as 1 December 2009 with the proviso that the full "purchase price" must be paid by that date "even if no bank loan is obtained"

The date on which the applicants were to be given possession and occupation coincided with the date when the first instalment was to be paid, namely 1 August 2008. Moreover the incidence of risk passed on that date.

The agreement also contains a separate clause setting out how interest was to be calculated. It provides amongst other things that the purchase price would bear interest at the rate defined in clause 1.12 (ie; the clause in contention), such interest to be reckoned in terms of clause 9.1.2 as from 31 August 2008, namely;

".... Monthly in advance on the first day of each and every succeeding month and shall be calculated on the balance of the PURCHASE PRICE outstanding on the last day of the previous month."

In terms of clause 9.2 the interest calculated in terms of clause "9.11 shall thereafter be deemed to form part of the PURCHASE PRICE".

There is however no clause 9.11.

Clause 18 provided that transfer could only occur against fulfilment by the applicants of all their obligations, which would include payment of both the capital sum and interest. However transfer was to be effected by 1 December 2009 failing which the respondent could either arrange a loan for the applicants or obtain relief in terms of section 15(4) of the Act. The respondent, as seller, was also entitled to elect to cancel the contract under clause 30, provided written notice to first remedy the breach within a period of not less than 30 days was given.

It will be recalled that Addendum A was concerned with when the deposit was to be paid.

Addendum A bears the signature of the respondent and both applicants as well as that of Ms du Toit. Below the respondent's signature appears the date 1 July 2008. The date 3 July 2008 is recorded below the applicants' signatures. The agent signed as witness and dated it 1 July 2008.

Addendum A provides that;

"In the agreement of sale on instalments ... the deposit paid by the purchaser shall be paid as follows:

R30 000 by 05 July 2008

R30 000 from pension fund as soon as it becomes available, but before 05 October 2008

R10 000 by 05 August 2008

R10 000 by 05 September 2008

R10 000 by 05 October 2008

The total deposit paid is R90 000

Addendum B simply records various undertakings given by the respondent as seller to effect repairs and the like. It bears the same signatures as Addendum A and although the dates of signing are the same, the month that was initially inserted appears to have been overwritten. It is clear that the agent had initially inserted an 8 and superimposed a 7 under her signature, while it is unclear what month was initially being inserted for the date appearing under the applicants' signatures. It is as if the scribe had stopped half way.

Addendum C bears the respondent's signature and purports to bear both applicants' signatures which they dispute is theirs. It is evident that this document was prepared by someone other than the person responsible for the previous two addenda; it adopts the terms "buyers" and "sellers" whereas the other addenda use the terms "purchaser" and "seller". Unlike the earlier addenda there is also no provision for a witness.

Addendum C is significant because if it was signed by the applicants then it clearly demonstrates that they had agreed that the interest was payable monthly and not annually. The document reads;

“In the agreement of sale on instalments ... the buyers and sellers agree on the following:

Monthly instalment R15 000

Breakdown of monthly instalments as follows:

Capital R 12 313.00

Interest R 2 390.00

Insurance R

TOTAL R 15 000.00

The monthly instalment will increase or decrease according to the interest rate. This increase or decrease will be equal to the

difference shown on the monthly statement.”

The amounts in the underscored blank spaces were inserted by hand onto an otherwise typewritten document. The amount of R15 000 against the “Monthly instalment” was typed, indicating that the amount had been fixed but its actual breakdown, as between capital and interest or insurance, if

applicable, remained either unclear or unknown. As with the other two addenda the place for signatures appeared at the foot of the page. The date against the applicants’ signatures was inserted as 1 July 2008 while for the respondent it was 3 July 2008.

COMMON CAUSE FACTS

It was common cause from the evidence that the respondent had appointed Re/max One (“Re/max”) as the estate agent to find a buyer for his residential property. At that time the respondent was struggling to service his bond.

Ms du Toit was Re/max’s appointed agent to place the property on the market. The applicants showed interest and completed an agreement of sale addressed to the respondent in terms of which they offered to buy the property for R1.2 million. At that stage the applicants did not have sufficient funds for the deposit and the offer was subject to them raising a 100% bond. It was to be a straight forward sale of immovable property. However the applicants’ bankers declined to approve the bond. The reasons appear to be that the applicants were still committed to servicing a bond on their Duiwelskloof property and the fact that the first applicant had only recently taken up new employment as a coordinator for a non-profit organisation providing technical, professional and organisational skills and assistance to communities and government in order to effect local development for the poor. The second respondent had also recently taken up employment in Gauteng in a managerial position with an NGO. The bank apparently advised them that they could re-submit their bond application after a period of 6 to 12 months.

Further discussions then ensued with the agent. It was evident that whereas the respondent could not afford to service his bond over the property, the applicants would be able to do so. From this arose negotiations between the parties around delaying transfer until the applicants could resubmit their bond application, which they were confident of obtaining within the year, while enabling them to take occupation in the interim and paying the respondent an amount that, aside from interest, would at least allow him to cover his monthly bond repayments until transfer could eventually take place.

It is also evident that Ms du Toit was unfamiliar with instalments sales where transfer was delayed. However she was given a standard

printed instalment sale agreement by her principal. This is the document she used to reduce the sale of land agreement between the parties to writing.

Accordingly it is common cause that the purchase price of R1.2 million represented the amount payable on a conventional sale of the property whereby transfer would be secured by guarantees from the bank in the ordinary course. It also follows that the amount of R1.2 million did not include any interest but was the agreed market value of the property as between the parties. It follows that unless there is evidence that the agreed purchase price was subsequently negotiated downwards or there is some other relevant fact one would expect as an inherent probability that deferring payment of the major portion of the purchase price for up to a year and a half would attract interest.

The first issue to be decided is whether the parties agreed that R2 390 per annum represented the interest payable over the 18 month period on the balance of the purchase price or whether they agreed to an amount of R2390 per month. If the sum was R2 390 per annum then it would represent interest of R200 per month on an initial outstanding amount, excluding the deposit, of R1. 110 million- even half way through the period (ie at 9 months) this would represent an infinitesimal percentage. On the other hand if interest was agreed at R2390 per month then the capital sum payable on the amount outstanding would not reduce by the full R15 000 per month, but by the amount reflected in Addendum C of R12 313 per month.

This also meant that the respondent would have to find the settlement figure at 1 December 2009 in order to pay up the bond, bearing in mind that the respondent would not be receiving the full R1.2 million but R90 000 less which was the amount he was liable to pay as agents commission out of purchase price. Accordingly the respondent would have to make up any shortfall if he was to be able to pass transfer when the applicants made final payment.

The facts of the case reveal that the parties did not fully appreciated the ramifications of the agreement and when each in turn did, that party attempted to delay its consequences as best as he or she could while still needing to keep the contract alive. However that is a far cry from there not being agreement in law as to the terms of the sale.

It is necessary therefore to weigh the evidence presented in order to determine whether the agreement signed by the parties is the one which provided for interest at R 2390 per month or R2390 per annum.

the words “per annum”

THE EVIDENCE

The applicants called Mr Rhodes, an employee of Standard Bank which is the respondent’s bankers. The purpose of his testimony was twofold. First, it was to demonstrate that the copy of the main agreement (ie excluding the addenda) which the respondent’s

bankers held was identical to the one relied upon by the applicants. Secondly it was to show that the respondent was not entitled to repudiate the agreement because he had breached its terms and was incapable of effecting transfer against a tender of the balance of the purchase price; more particularly because he had applied in April 2012 for, and by 14 May 2012 had obtained, a further loan of R300 000 against the security of the existing bond over the property. The effect would be to increase the amount that the respondent was obliged to pay in before the bond, commonly termed an access type bond, could be cancelled and transfer of the property passed to the applicants. It however cannot be shown that the bank obtain its copy of the agreement from the respondent. It is also undisputed that copy possessed by the bank had circulated in the offices of Re/Max and the original conveyancers.

The second applicant then took the stand. She had approached the estate agent, Ms du Toit, and together with her husband submitted a written offer to buy the respondent’s home for R1.2 million. The offer did not provide for a deposit as the applicants intended to obtain a bond to cover the full purchase price. While it is more correct to say that they intended to obtain a loan secured by a bond for the full purchase price, everyday parlance will continue to be adopted.

The applicants had relocated from Limpopo and were in rented accommodation. Although they had put their property on the market it had not yet been sold and remained encumbered with a bond that they were still servicing. This fact combined with the first applicant commencing new employment resulted in the bank declining to grant a bond and suggesting that they again apply in six months to a year’s time.

The applicants were still eager to buy the property and the agent indicated that there was another way of structuring the purchase.

Since the applicants intended to sell their existing property in Tzaneen and the bank was amenable to reconsider their application

within the year, the agent indicated that the offer to buy could be structured in the form of what the second applicant termed a “Deed of Sale” but which is better referred to as an instalment sale. The second applicant confirmed that she had not previously been aware of this method of buying property.

The agent then explained the basics of an instalment sale agreement to the second applicant; she understood that an amount would be paid each month to the purchaser in reduction of the purchase price and that in the meantime they could live in the house prior to transfer. The second applicant said that she clearly understood this as different from paying an amount just to rent a house. Different scenarios were explored until the applicants decided that they could afford a maximum amount of R15 000 per month. They also offered a deposit of only R15 000. A short while later and still during the negotiations the applicants were informed by the agent that a deposit of R90 000 was still required.

The applicants wished to take occupation on 1 August 2008 and negotiations continued with Ms du Toit acting as the go-between.

According to the second applicant, she understood that the entire R15 000 would go towards reducing the purchase price until the bond was obtained within the stipulated time. She however conceded that in terms of the agreement she relied upon, transfer would only have to occur some one and a half years later, by 1 December 2009. The second applicant also indicated that the date of transfer was selected because it would take into account the further time needed for transfer to be finalised after re-submitting their bond application.

The second applicant contended that she and her husband had signed the instalment sale agreement on which they rely immediately before signing the two addenda. The document bearing their original signatures was produced and led in evidence as Exhibit C.

Initially the second applicant could not say whether the changes to clause 1.12 of the agreement she relies upon were in original form or not. Nor could she say whether the date appearing on the last page immediately after their signatures was already inserted when she signed.

The date, which purports to be the date when the applicants signed the instalment sale, is 30 June 2008. It appears within a section

concerned exclusively with the signatures of the applicants as purchasers and which includes, below the 30 June 2008 date, a

suretyship by the “purchaser’s spouse”.

The second applicant claimed that this document had been signed during a weekday, in the presence of Ms du Toit, at a popular coffee shop below the Greenstone Mall in Edenvale. She indicated that there had been very little discussion at the meeting as the issues in the document had been discussed earlier and the purpose of the meeting was to finalise the agreement. The second applicant however recalls that the respondent’s signature was already on the document. The agent went through the agreement explaining, page by page, as she passed it across for the applicants to sign. The second applicant contended that addenda A and B were similarly passed around but that it was unnecessary for their contents to be explained since they reflected proposals previously initiated by the applicants themselves. She also confirmed that the date of 3 July 2012 which appears on each addendum was inserted by the first applicant.

It is convenient to note that the first applicant confirmed this and also testified that a number of discussions had been held with the agent before he attended the restaurant with his wife and met Ms du Toit to sign the agreement. He recalls that the agent would explain every page and hand it over for initialling. It was put to each applicant that the agent when called would testify that the respondent had not yet signed at that time.

The second applicant claimed that she did not subsequently sign any other document recording the agreement that the parties had

concluded. Moreover she did not recall ever initialling against clause 1.12 as would be the case in the agreement relied upon by the respondent. The applicants later received from Ms du Toit a copy of the documents they had signed. When asked whether the agent might subsequently have asked her to initial against that clause the second applicant responded that she would have asked why it was necessary to again sign the same document.

The second applicant was adamant that they had not signed any document prior to Thursday 3 July 2008 and pointed out that addendum C (which splits the monthly R15 000 instalment into a capital component and an interest portion) was dated two days earlier on 1 July 2008. She denied that it bore her or her husband's genuine signatures. A further facet of the original addendum C document which had been examined by the expert revealed that the original capital sum and the interest figure as appeared in the instalment calculation portion of the document relied upon by the respondent in his answering affidavit had been tipexed out and replaced with the figures of R12 313 (instead of R15 000), R2 427 (instead of R 2390) and an amount of R 260 was added against "Insurance". Compare para 21 above. Moreover the second applicant testified in chief that she never had a discussion in relation to the amounts that were subsequently inserted (ie the R2 427 and R260). She also claimed that they never received a statement from the respondent, as required in the agreement.

The first applicant's evidenced generally mirrored that of his wife. He confirmed that the second applicant had been involved in negotiating on their behalf with the agent.

Under cross examination Mr Verster elicited from the second applicant that Ms du Toit had explained how the instalment would be deducted against the balance of the purchase price. It was also apparent from another pro forma agreement which preceded the instalment sale agreement that aside from the purchase price being R1.2 million based on a standard sale transaction, an amount of R15 000 was identified in clause 4 as occupational rental payable from 1 August 2008, being the date when occupation was to be given. This pro-forma agreement was signed by all the parties but was undated.

Since both applicants are qualified people it would have necessitated some representation on the part of the agent to have misled them into believing that despite the re-financing of the deal which would allow payment over 18 months and despite being able to take immediate occupation (ie on 1 August 2008) there would be no occupational interest and that a mere R3 780 extra would be payable over and above the R1.2 million to secure what amounts to both extended credit and the benefits of occupation for 17 of the 18 months.

As the inconsistencies between the applicants' alleged understanding of the agreement and other terms of the agreement could not be satisfactorily answered, it became evident that the applicants were in effect "snatching at a bargain" which arose from a clear mistake on the part of the agent in not crossing out the printed words "per annum" on the standard document they were given at some stage. Even clause 9 of the agreement relied upon by the applicants referred to interest being calculated monthly from the date of occupation. The second applicant was driven to contend that their occupation of the property was for free throughout the 17 month period and that the delayed payment of the purchase price was also basically interest free. However they could not refer to one discussion with the agent in support.

If the applicants were correct then one would have expected a positive assertion being made to them by the agent that they would

effectively pay a nominal amount of interest (just under R200 per month [R2390 per annum for 18 months]) or have occupation rent free or that the full amount of each instalment would be appropriated exclusively in reduction of the purchase price. By the end of the evidence of both applicants it was evident that they did not allege that the agent had verbally, either directly or indirectly, represented to them or otherwise led them to believe by silence that the agreement was as they alleged. All they could pin their case on was the wording contained in clause 1.12 of the document they had and to deny that they had subsequently placed their initials against a revised clause 1.12 or had signed addendum C. The second applicant was also forced to concede that initially they had received statements from the respondent.

It was put pertinently to the first applicant that in their replying affidavit both applicants claimed that the instalment sale agreement together with the two addenda had been brought to their house by the agent and it was there that they had signed in her presence whereas in evidence they said these documents had been signed in a coffee shop at the Greenstone Mall. The first applicant did however acknowledge that the agent had met with them on several occasions, although he did not recall signing on more than one occasion.

It was put that the agent subsequently returned to the applicants with a revised instalment sale agreement amending clause 1.12 to reflect that the interest sum of R2390 was payable monthly and that they were requested to and did initial the amendment. It was also put that this occurred because the respondent had noticed that the amount of R2390 in clause 1.12 was not stipulated to be per month and that the agent had then inserted this, that the respondent initialled against it and that the agent then brought the agreement so amended to the applicants for their counter initials to clause 1.12. This was all denied.

Both applicants were tested regarding why they contended that the contested signatures and initials were not theirs. In most instances

the distinguishing feature that was identified to show that the signature or initial was not genuine did however appear in other

genuine specimen signatures and initials of theirs. Both applicants disputed the conclusions drawn by the handwriting expert

and persisted that the contested signatures and initials were not theirs.

The second applicant also failed to give a direct answer when it was put to her that the agent, when called, would testify that all their initials and signatures were effected in her presence and that the basis of the transaction had been explained, particularly that there would be an interest factor of R2390 per month built into the R15 000 instalment payment. Her response was to ask why she would have signed a copy and not an original. The answer is plain to anyone who has bought or sold property; agents cannot be expected to, nor do they, write up a fresh agreement every time one of the parties wishes to add to or alter the document containing the terms inserted by the other or recorded by the agent.

The generally short time imposed by a party requiring the other to accept an offer or counter-offer and the fact that agents may have to travel some distance between the parties to obtain signatures, or on occasion leaving the original for consideration, results in the use of copies or faxed transmissions which may already bear one of the party's signatures, or even both in all relevant spaces barring where a further amendment has been inserted and initialled by only the counter-offeror. This is common place and a court cannot be expected to close its eyes to the reality of the way in which everyday house sales through estate agents are conducted, and for sound and obvious commercial reasons (which need not be dwelt upon in this judgment). In any given sale of a residential home there may be a number of agreements in circulation which only cumulatively will contain all original signatures and initials to amendments; but not necessarily singly. This occurred in the present case as is evident from the number of copies of the instalment sale agreement handed up in evidence not one of which contained an entire set of

original signatures. The actual reason however was revealed in Ms du Toit's testimony. Again the second applicant was driven to claim that she only signed one set of original documents, which clearly was not the case.

It was also put to the applicants that the final date for payment was 1 December 2009 which meant that the guarantees had to be in place before then so as to meet the deadline date for transfer. The applicants conceded that they were shopping around for the best bond finance deal they could obtain. In a material way the applicants were also guilty of deliberately not complying with the agreement because it suited them at the time to do so.

The second applicant was questioned about the different dates appearing on the instalment sale agreement and the addenda she admitted

signing. Once more her answers were unconvincing; she could not satisfactorily explain why the addenda bore different dates or were different to the only signature date provided for in the main agreement, despite her assertion initially that they were all signed on the same day. Under re-examination it appeared that the applicants had received their copy of the instalment sale agreement prior to moving into the house, which would have been on or before 28 July 2008. As appears later, the final signed recordal of the agreement took place between 29 July and 1 August 2008 when the applicants were already in occupation of the house.

It will be convenient to deal with the respondent's case in respect of the signatures to the agreements before considering

subsequent events. The respondent first called Ms du Toit, the estate agent who negotiated the sale between the parties.

Ms du Toit confirmed that she introduced each of the parties to the concept of an instalment sale agreement as this would address their respective needs and their difficulties. She had first taken the instalment sale agreement to the respondent and explained it to him. He was satisfied with the explanation and, as is the usual case, she then proceeded to the applicants, as would be purchasers, to have them sign first if they were agreeable. She had inserted the amount in clause 1.12. Ms Toit then obtained the initials and signatures of the applicants after explaining the agreement to them. She said in chief that the applicants signed it on the date appearing in the main agreement, ie 30 June 2008, at the same coffee shop mentioned by the applicants.

According to her recollection in chief she testified that the documents were then taken to the respondent for his signature. She then gave the signed original documents to Re/max who sent them to its attorneys, Stock & Steyn. The agent recalled that Addendum C had not yet come into existence. The attorneys noticed a number of errors that required rectification and informed an employee at Re/max who in turn advised du Toit of the details. Ms du Toit only had a copy of the original and effected the requisite changes on it, including deleting the printed words "per annum" in clause 1.12 and writing in the words "per month". She also said that she took this document together with addendum C, which she was given, to each of the parties separately. She claimed to have explained the changes to each party in turn and obtained their initials alongside the amended clause. The different dates appended to the other addenda was as a result of her initially overlooking that they needed to be dated and on returning to the parties having the dates inserted while addendum C was backdated.

In chief the agent also revealed that she had attended on each of the parties several times after the agreement was initially signed and most significantly said that "I had to go back to them (ie; the applicants) to sign amendments and they had already moved house". This is significant because the applicants confirmed that they had only moved into the house two days before the occupation date of 1 August

2008. If her testimony is accepted it means that final signatures or initials to one or other documents constituting the final agreement between the parties were placed as later than 28 July 2008.

The agent was adamant that the tipexed changes to Addendum C were not in her hand, were unknown to her and did not exist when the agreement was signed. On this score I am satisfied.

In my view the significance of the agent's testimony is that there was no doubt in her mind that all the parties had negotiated

and agreed the interest at R2 390 per month and that this was factored into the R15 000 monthly instalment being the maximum that the applicants said they could pay per month. Moreover she was adamant that the applicants' initials against the amendment to clause 1.12 and their signatures to Addendum C were effected by them in her presence.

Nonetheless during her evidence in chief it also appeared that Ms du Toit was attempting to reconstruct events around certain specific milestones which she could recall, thereby putting into question her actual recollection of events. Indeed at the commencement of her cross examination when asked whether there was any part of her testimony that she wished to reconsider Ms du Toit readily conceded that her recollection of the dates when events occurred or what occurred at every meeting may not be accurate. She was then tested by reference to the contents of an affidavit she had made in the earlier motion proceedings.

As cross examination continued two features became evident; firstly at that stage she had only one set of documents as a frame of reference. And secondly, as more and more apparent anomalies in the sequence of events were raised and additional documents were put to her, the more confident she became in the sequence of events. In a most fundamental way, the earlier reconstruction based on a few documents gave way, as the dimension of the applicants' version together with other documentation and events raised in cross-examination were introduced, to positive recollections of what did occur and they formed a totally logical and coherent narrative. Her ready concession to errors bears testimony not only to their being based on reconstruction through assumptions but also that she was throughout an honest witness. In my view the reliability of her recollection grew as she verbalised how she was piecing together events both from the additional objective informative she was given and when the version of events as put by the applicants' counsel triggered her memory, by reference to other objective events, and allowed her to explain why their version could not have occurred. She readily conceded where she remained unsure, but sufficient was recalled for the court to weigh the evidence and the probabilities.

I consider the following statements by her during cross examination significant: "At that time I had little recollection of events. The more I thought about it the clearer it was ... my memory was affected by the scenario (given) and I was outside the industry (at the time)". The time referred to on each occasion was when the affidavit had been prepared by the respondent's attorney for her to sign. Not only was this three years after the events but also when she did not have access to the important correspondence from Re/max to attorneys Stock and Steyn referred to below and

certain other relevant objective

facts.

At the end of her testimony, and save for the anomaly regarding clause 13.1, she satisfactory wove together the events which led to clause 1.12 being altered, when addendum C was created and these documents being initialled and signed respectively. I am satisfied that she is an honest and reliable witness. This is based on her demeanour, her open verbalisation of the process of reasoning she adopted in piecing together what occurred through careful explanation including the logical elimination of other possibilities and accepting and explaining how the earlier errors in her testimony had arisen. I have already indicated how they arose.

The agent's evidence was that there had been a verbal agreement for interest to be paid at R2390 per month. This represented the difference between the maximum the applicants indicated they could afford of R15 000 and the monthly bond repayments the respondent was still committed to pay until transfer could take place in the extended period agreed upon having regard to when the applicants could resubmit their bond application. It was the respondent who required the interest to be expressed in a fixed determined amount rather as a percentage.

While the applicants would have initially signing the original instalment sale agreement Ms du Toit could not be certain of the subsequent to-ing and fro-ing when amendments were effected. She readily acknowledged that she had overlooked the contents of clause 1.12 which contained the printed words 'per annum' with reference to the calculation of the percentage interest. However she was certain that addendum C was signed when the applicants had taken occupation of the premises. This was reinforced by an original letter from Re/max to Stock and Steyn indicating that by mid-July they had only been given the main agreement together with addenda A and B and by a subsequent telefax from Re/Max to them dated 1 August 2008 which expressly attached "Page 2 and page 8 and Addendum C of the original Agreement of Sale on Instalments" to the transmission.

It is therefore evident that it was considered necessary to have the rectifications effected and Addendum C signed considering the applicants were already implementing the agreement by taking occupation, albeit two days early. Ms du Toit readily confirmed that the dates to Addendum C were inserted after the event. The fact that there was an overwrite of the month from an "8" to a "7" to addendum B reinforces both the back-dating as well as the fact that the applicants were already in occupation of the house when they signed some of the documents. If the applicants' signatures were genuine then the back-dating would have been with the blessing of all the parties particularly bearing in mind that occupation had already occurred.

Perhaps one of the most telling aspects of the agent's cross examination is that it was never put to her that either she had forged the applicants' initials and signatures or was privy to such an event, especially considering that her initials also appear against the insertion in the own hand of the words "per month" in clause 1.12. In my view the reason for not doing so arises from the manner in which she gave her evidence; there was no room for raising such a contention.

Accordingly if there was any tampering it could only have arisen elsewhere; a most improbable scenario bearing in mind the two communications from Re/max to Stock and Steyn.

The next witness to testify was Lt. Col Cloete, the handwriting expert. I will be brief with his evidence. It will be recalled that not only the signatures of the applicants were contested (in respect of addendum C) but also their initials to clause 1.12 of the main agreement relied upon by the respondent. Cloete testified that the variations to the admitted signatures of the first applicant were very wide and his disputed signature and initials on the contested documents fell within this range. The variations in the second applicant's signatures were more limited and fell into the category of normal to rather wide. The expert testified that the general appearance of the disputed writing strongly resembled known specimens and there were no fundamental differences between them. He however drew attention to the fact that the signatures of both applicants were of straightforward (ie non-intricate) construction and did not contain many unique writing characteristics. In the result a definite finding simply based on these observations could not be made. Lt Col Cloete therefore expanding his examination to include the inks and pens used. It appeared that the words added to cl 1.12 and the initials against it were written with the same pen and that the disputed signatures on addendum C were written using a different pen to that used in signing addendums A and B. Of importance was that apparent anomalies in the individual disputed writings were adequately accounted for in the expert's testimony by a defective pen being used resulting in uneven ink distribution and more than the usual pressure being exerted by the scribe. There were enough exemplars to satisfy the court that the felt tipped pen used was indeed defective.

The respondent's testimony regarding the signing of the agreements does not take the matter much further. However the following aspects of his testimony should be mentioned. Firstly he confirmed that he was in a difficult financial position and had numerous unsuccessful show days for the house. He also referred to how Ms du Toit explained the instalment sale transaction which deferred payment and transfer while there would be an interest component added which would be payable monthly and that after discussion the monthly instalment would include the interest component. He denied any knowledge of the tipexed version of Addendum C and said that he only signed the one on which he relied. The respondent also said that it was his then fiancé (now wife), who had legal experience, who noticed that the printed words "per annum" had been overlooked and that this was brought to the agent's attention. Finally the respondent also said that he initialled against clause 1.12 changes and signed Addendum C first, these documents having been brought to him at the same time and after the mistake had been pointed out.

The difficulty with the respondent's overall testimony revolves around his subsequent actions to extract a better deal, which he does not adequately explain. Accordingly his overall testimony must be treated with caution. It is also evident that much of his evidence is characterised more by reconstruction than actual recall.

The events from the time the applicants were obliged to procure the bond and taken transfer under the agreement are relevant mainly in relation to the case made out by the respondent of the applicants having repudiated the contract. I proceed to deal with this aspect of the case.

Sometime in October 2008 the applicants came to learn that the appointed conveyancing attorneys, Stock & Steyn had ceased practicing. They became obliged to engage their present attorneys when it was alleged that an amount paid over to Stock & Steyn had been misappropriated. This turned out to be incorrect. The same attorneys were again consulted in October 2009 to assist in obtaining the bond necessary to take transfer of the property in terms of the instalment sale. Since the conveyancers named in the agreement no longer were in practice on 15 October 2009 the applicants' attorney advised the respondent by email that they had received instructions to apply for the bond and requested details of the transferring attorneys. A week later on 22 October, the applicants' attorneys again emailed the respondent and noted that there had not been a response to the earlier email and repeated the request for details of the transferring attorneys.

Despite these events it is evident that the applicants were not in a position to pay the outstanding balance in order for the respondent to receive the full purchase price within the time provided for in the agreement. At that time the respondent was servicing a second bond over the new residential property he had acquired and was living in. The reason is that the applicants had not secured bond financing timeously to meet the 1 December 2009. Moreover on their version they were claiming that the entire R15 000 per month instalments were in reduction of the purchase price and that they would only need to pay separately the R2390 per annum interest. The applicants could have been under no misconception that the respondent was committed to funding another home, since he had left the property they had purchased and which they occupied from the end of July 2008. The excuse given by the applicants in not obtaining bond finance timeously does not hold water. They claimed that they were shopping around for a better rate from the banks and therefore did not just take the first approval they could, and did, allegedly obtain. The reality is that the applicants had a contractual commitment to secure the bond and were given ample time to do so. The applicants clearly breached this obligation.

In the meantime the respondent, who had been recommended by Re/max to deal with Stock and Steyn as the conveyancing attorneys also discovered that they had dissolved. I should add that this firm was not chosen by the respondent but was recommended to him by Re/max, which appears to have been part of that branch's policy at the time if the seller did not have his own attorney. The respondent eventually found a Mr Kruger who had been a partner at that firm to represent him when the applicants delayed in procuring the bond.

Irrespective of whose version of subsequent events is to be believed, the respondent then sought to enforce the sale and require transfer to be implemented, thereby electing specific performance and divesting himself of any right to cancel based on the alleged repudiations.

But therein lies the rub. At a meeting with Kruger on 8 April 2010 attended by the parties, the applicants were informed by Kruger that it was necessary to renegotiate the terms of the agreement. According to the applicants, Kruger advised them that the agreement

made no economic sense and that the estate agent did not know what she was doing. He contended that the interest clause was nonsensical

and attempted to persuade the applicants to pay an additional amount as occupational interest for the period they were in the property. The second applicant recalled that the respondent said that he had entered the contract without properly understanding its effect. According to the applicants Kruger indicated that he would calculate the figures to ascertain what amount would represent fair compensation in lieu of interest and what portion of the instalments paid should be regarded as capital redemption payments. The second applicant contended that they responded by indicating that they were not amenable to the proposed variation and insisted on enforcing the agreement. The meeting ended with Kruger advising that he would revert. While the respondent denied that the applicants were not amenable to reconsidering the deal it is evident that he associated himself with the position adopted by Kruger.

It is abundantly clear that by this time the respondent appreciated that the deposit of R90 000, while reducing the purchase price payable, did not go to reduce the outstanding bond but went to Re/max as their agent's commission in terms of the contract. He was therefore already short of R90 000. It also appears that he had not transferred to his bond account the full R15 000 per month that the applicants had deposited into his current account. This resulted in a further shortfall that he would have to fund in order to cancel the bond. While it is not evident that by December 2009 the respondent would not have been able to raise the shortfall if compelled to, it is clear that by April 2010 he was financially not in a position to cancel the bond and give transfer, irrespective of whether the applicants would have been amenable to accepting that interest was payable at R2390 per month as opposed to per annum.

On 24 May 2010 Kruger addressed an email to which two documents were attached. They contained his calculations of the interest and capital portions of the monthly payments, which he contended in the body of the email "at least makes economic sense". The email and its attachments are significant. Although the email was only sent to the applicants, Kruger states in the email that the calculations were based on a request made by the respondent to him. The net effect of the calculations was to effectively reduce the capital component of the instalment to just less than half; at that stage the applicants had paid 20 instalments totalling R300 000 and according to Kruger's calculations the capital portion paid was only R125 882. The respondent in evidence sought to distance himself from Kruger's statement. The court however does not accept that Kruger acted without the respondent's approval or knowledge.

By way of comparison, it will be recalled that in terms of the agreement contended for by the respondent, which incorporated addendum C, the capital portion of 20 instalments would have amounted to R 252 200; effectively double the amount the respondent, according to Kruger was prepared to credit towards the purchase price.

Kruger's email concluded by requesting to proceed with the transfer on this basis, which would require the applicants' to find bond financing for some R 1 047 500.

After consulting with their attorneys the applicants were satisfied that there was no merit to Kruger's contention that the instalment agreement was not legally binding. After a number of fruitless efforts, the applicants' attorneys managed to contact Kruger. Kruger persisted with the view that the agreement was invalid, that the parties had failed to reach consensus in that the respondent, who was referred to as his client, had misunderstood the implications of clause 1.12. Subsequently attempts were made to set up a further meeting between the parties and their legal representatives. While the initial reasons for the meeting not materialising are in dispute, it is evident that from late September 2010 the applicants' attorneys were constantly attempting to set up a meeting. Messages were left and on the occasions when Kruger did revert, he claimed that the respondent had failed to respond to his own communications.

This state of affairs persisted into December 2010. No meeting materialised and the last known position of the respondent was that he insisted that the applicants pay the balance on his outstanding mortgage loan, despite the fact that the applicants' attorneys had informed Kruger that the applicants' bankers were threatening to withdraw the loan due to the lapse of time. Until then the applicants continued to make monthly payments of the R15 000 instalments.

Nothing further materialised despite further emails from the applicants' attorneys to Kruger and attempts to contact him telephonically, which included leaving messages for him during December, January and the second week of February 2011 requesting an update of the respondent's position in writing (as Kruger had undertaken to do as far back as mid-November). As a result, the applicants instructed their attorneys to launch the present application which founds the basis of this hearing. The applicants had by then, ie March 2011, decided, on advice received, not to continue paying over the sum of R15 000 per month but to pay it into their attorneys' trust account.

This elicited a reaction from the respondent. By way of an email sent on 10 March 2011, and copied to Kruger, he said that he would be prepared to receive the actual amount outstanding on his bond, plus all costs including legal costs failing which he would instruct his bankers to repossess the property as he could not afford finance the two bonds in his name. He also informed Kruger in a letter copied to the applicants that he would be taking immediate steps to evict the applicants.

This was responded to on the following day by Mr Botha of the applicants' attorneys who demanded transfer of the property into the applicants' names and recorded that the respondent had frustrated the process. The respondent was notified that an application was being brought to effect transfer.

Kruger then replied on 16 March and recorded that;

“Jamie Illing is not refusing/failing or neglecting to transfer the property. In fact he can not wait to have it transferred. However, as I explained to you before, there is no consensus as to how the final outstanding portion of the purchase price should be calculated. The agent or person who drafted the deed of sale, clearly had no idea what he or she was doing and obviously did not foresee the

consequences of the terms recorded in the contract.

Jamie Illing has not frustrated the process. We arranged a meeting with the purchasers in April 2010 to resolve the matter but they wanted to stick to the terms of the contract as recorded, which were not acceptable, as neither the terms or the consequences thereof were properly conveyed to Jamie Illing by the agent or anyone else for that matter. In our opinion there was no “meeting of the minds” when this agreement was entered into and the agreement is therefore voidable”

I should digress and mention that this court cannot be satisfied as to whether, at the April 2010 meeting, the applicants had full sight of the contract relied upon by the respondents. The court however accepts that Kruger had in his possession the set of documents relied upon by the respondent as constituting the agreement between the parties.

FINDINGS- THE AGREEMENT BETWEEN THE PARTIES

In my view the inferences to be drawn from the handwriting expert’s findings when considered with those background facts which were undisputed in the evidence of the applicants are overwhelming that there would have been no opportunity to forge that number of signatures and initials in such a convincing manner within such a short space of time before the final signed (and initialled) version of the agreement was forwarded by Re/max to Stock & Steyn on 1 August 2008, nor would it make any sense to forge initials against clause 1.12 when the first amended version of that clause bore none. Moreover such forgeries would have required the collusion of Ms du Toit, either as the scribe or as the individual who had passed it on to the forger since it is common cause that the documents relied upon by the respondent bearing the disputed writing would have passed through her hands.

Finally the inherent probabilities of a contract of this nature, where interest is admittedly payable on an already agreed market price in order to obtain extended credit for some 18 months, are that the parties would not negotiate for the nominal amount as contended for by the applicants, particularly where occupation would be given for 17 of those months. Since this conclusion involves a finding that Ms du Toit made a mistake when initially presenting the amended clause 1.12 to the parties and for them not to have noticed the error it is necessary to consider whether such likelihood itself is against the probabilities. It is not. On the contrary it is readily understandable that where parties have already negotiated the terms to be inserted into an agreement and where the amount they have negotiated (for interest) has been written in by hand that the eye may not have taken in that the standardised document used by the parties had printed the words “per annum” after the space provided.

Conversely, if it was so intended and the parties and agent had read the balance of the document with the same care then one would have expected the balance of clause 1.12, which stipulated that the calculation of interest was to be monthly, and clause 9 which dealt expressly with interest being reckoned monthly (see above), to have been suitably amended by deleting such references. They were not. The fact that they remain intact adds grist to the mill that the agreement as initially signed was ambiguous and that this would have been picked up by the conveyancing attorneys when they first perused the document, which supports Ms du Toit's evidence. That the respondent's fiancé may also have picked this up and raised her own concerns does not diminish from the fact that Addendum C was drawn by the attorneys in response to a concern that, in one way or another, had ultimately been addressed by them and remedied by 1 August 2010 when the final version of the agreement, as relied upon by the respondent, was returned to them under cover of Re/max's letter of that date.

There is also the patent error contained in Addendum C which records the capital sum as R15 000 instead of R12 610. The document would otherwise be ambiguous and therefore extrinsic evidence was permissible. It is advisable to formally direct that the document be rectified.

I accordingly find that the final agreement between the parties is the one relied upon by the respondent. I am also satisfied that no reasonable person with the experience that both applicants undoubtedly possess could have believed that the interest sum was to be reckoned annually and not monthly, even if their recollection of only signing one set of documents and then in original form only may have been faulty considering the time that had elapsed.

FINDINGS- BALANCE OF PURCHASE PRICE PAYABLE TO SECURE TRANSFER

It follows that the monthly instalment of R15 000 could not be appropriated exclusively towards reducing the balance outstanding on the purchase price. Only R12 610 could, as the balance of R2390 represented the monthly interest that was payable.

Accordingly the applicants are entitled to be credited with 32 instalments of only R12 610 each, which totals R403 520, in reduction of the outstanding amount of R1.11 million (ie; the purchase price of R1.2 million less the R90 000 deposit).

The shortfall and amount which the applicants are obliged to pay on the outstanding capital sum is therefore R706 480.

I should add that the applicants effectively paid 32 instalments of R15 000 each totalling R480 000. However the instalments

from about March 2011 were paid into the trust account of the applicants' attorneys. On the basis that it is an interest

bearing account all interest accrues to the respondent. The exact date from which instalments were so paid is not clear. In any event it is not material as the attorneys were holding the amount effectively as stakeholder and therefore it is the applicants'

attorneys who are obliged to pay over any interest to the respondent and this need not form part of the order as there is no reason to doubt that they will provide an accounting of any interest or pay the amount over to the respondent.

FINDINGS- ALLEGED RESCISSION

I have already dealt with the first alleged act of repudiation. In short the respondent did not elect to cancel but insisted on

specific performance.

As to the subsequent acts of repudiation relied upon; irrespective of the applicants stand on how interest was reckoned, the facts reveal that by April 2010 the respondent was not prepared to comply with his obligations to transfer the property and insisted on renegotiating the agreement before being prepared to effect transfer. It appears that his reason for doing so was as a consequence of his financial position- he did not have the financial wherewithal to pay up the shortfall between the outstanding amount on his bond and the balance payable by the applicants on the purchase price, even if his version of the contract was accepted.

Moreover by May 2012 the respondent had obtained a further advance of R300 000 against security of the bond which meant that he again had liquidity problems and this was before making for the first time an unequivocal election to cancel. While in part his predicament may have been brought about as a consequence of the applicants' refusal to pay over the instalments, in turn this would have been in response to the respondent's earlier insistence that the applicants pay more than provided for in the agreement upon which he relied.

It is unnecessary to delve into the niceties of the arguments advanced. In my view the issue is resolved on ordinary principles relating to the exception non adimpleti contractus, that entitle a party to withhold counter-prestation when the other fails to perform his reciprocal side of a bilateral contract. See generally *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979

(1) SA 391 (A) and also *ESE Financial Services (Pty) Ltd v Cramer* 1973

(2) SA 805 per Corbett J (at that time).

Ultimately the respondent refused to perform on a ground that amounted to a breach of the terms of the agreement (by seeking to re-negotiate it) and his default was not purged until his answering affidavit was filed.

Similarly, when the applicants noted from the contents of the answering affidavit that the respondent was insisting on the interest

component being R2 390 per month and not per annum, they partially revised their position in their replying affidavit by

stating that they were prepared to pay whatever amount is lawfully due and payable. This position was again repeated in open court.

I accordingly find that that while the applicants did not perform in terms of the agreement which the court finds to be the final and valid one genuinely signed by all the parties, the respondent had already failed to perform his side of the agreed bargain; he was therefore precluded from relying on any of the applicants' subsequent breaches, if regard is had to the circumstances of this case.

COSTS

This has posed some difficulty. Up to a point the applicants have been successful. They are entitled to obtain transfer of the property. Ordinarily that would be the most important part of the order sought. However two factors militate against such a course. The first is that upon receipt of the answering affidavit the applicants' knew full well that the respondent had abandoned

any attempt to aver that the agreement was of no effect for want of consensus.

That would have left only the issue of repudiation outstanding.

Despite contending that they would pay whatever amount the court found was payable under the agreement between the parties, the applicants persisted in disputing their initials alongside clause 1.12 and their signatures to addendum C. Assuming that the defence of repudiation would nonetheless have been raised, the persistence in requiring a decision as to whether the respondent's agreements bore the applicants' genuine initials and signatures resulted in extending to five days what otherwise would have been a one to one and a half day trial limited to a readily resolvable issue of repudiation – possibly even as a stated case on the papers.

I have weighed up whether the costs should be equally split between the parties or, having regard to the time and resources expended in dealing with establishing which is the true agreement between the parties, whether the applicants should pay half or two thirds of the costs.

In my view the applicants should bear two thirds of the costs for the following reasons. Firstly there were in fact three main findings that this court was required to make and the evidence led dealt with each, namely; whether the parties had in fact considered and agreed upon a monthly or annual interest figure of R2390; whether the applicants' initials against clause 1.12 of the main agreement relied upon by the respondent and their signatures on Addendum C were genuine; and finally whether the applicants' had repudiated the agreement entitling the respondent to cancel. In the result the respondent was successful on two of the three issues upon which a factual finding was sought.

Secondly there is also the time devoted to hearing evidence on the respective issues. I have already indicated that the overwhelming period was devoted to the signatures to the agreement and what had been discussed with the agent concerning the structuring of the instalment sale agreement as well as the negotiations around it. This applies equally to volume devoted to these respective issues in the application proceedings.

A final aspect is that courts are taking greater control of case management in order to ensure that strained resources achieve the objectives of meaningful access to justice while securing due or fair trial process. In the present case the applicants effectively

utilised not less than three and a half days of the courts resources to fight over a sum of less than R70 000 (R636 771.67

being the amount which the applicants' notice of motion directed was to be paid against transfer as opposed to the R706 480

I have found to be payable). Moreover the applicants persisted in doing so despite their papers averring that they would be

comfortable in paying the greater amount if the court so directed.

However it was not only the court's resources that were expended over an issue involving a relatively small amount of money when considered against the monthly instalments the applicants were prepared to make and the increase in monthly repayments over the life of any bond they would obtain in order to service this extra amount.

The applicants would have expended much more themselves in legal and other fees and required the respondent to do the same. Not only did the expense outstrip the potential financial reward on a matter that did not involve a rights issue but the applicants themselves appreciated that they could not come to court with a handwriting expert who would conclusively back them despite giving notice that they intended to call one. The applicants, each being involved in commercial or financial related activities albeit for NGOs, could not have believed that only a totally insignificant amount of interest would have to be paid in the circumstances already fully discussed earlier.

In the present case suffice it that the cumulative weight of these several considerations leads me to make the cost award I have. This does not include the taxable costs of the handwriting expert, whose services were exclusively engaged in dealing with that one issue. They are to be paid by the applicants in their entirety. In this regard Lt Col Cloete is declared an expert witness and that his qualifying fees and expenses are to be paid by the applicant.

ORDER

The following order is made:

The documents attached to the applicants' founding affidavit as annexures MA1, 2 and 3 do not constitute the agreement of sale of land on instalments concluded between the parties in respect of stand no 145, township Eastleigh, situated at 9A Isabella Road, Eastleigh Ridge ("agreement of sale")

The documents attached to the respondent's answering affidavit in the series marked annexure JL1 comprising an agreement of sale of land on instalments together with addenda A, B and C constitute the terms of the agreement of sale.

The capital sum reflected in Addendum C is rectified from R15 000 to read R12 610.

The agreement of sale was not lawfully cancelled by the respondent.

The amount due by the applicants to the respondent against which the respondent is to effect transfer is R 706 480 calculated as follows;

The purchase price of R1.2 million less the deposit and the capital component of the instalments paid;

The deposit paid was R90 000;

The capital component of the R15 000 per month instalment was R12 610.00;

Thirty two instalments were paid making a total capital payment of R403 520 towards the purchase price, exclusive of all other charges (ie 32 instalments of R 12 610 each);

The purchase price of R1.2 million less the total of the amounts referred to in sub-paragraphs (b) and (d) amounts to R 706 480

The applicants are to pay two thirds of the respondent's party and party costs and in addition the full qualifying fees and expenses of Lieutenant Colonel GM Cloete who is declared an expert.

Dates of Hearing: 5 to 9 November 2012

Date of Order: 15 July 2013

Date of revised judgment: 22 July 2013

LEGAL REPRESENTATIVES:

FOR APPLICANTS: Adv. Uys

BMV Attorneys

FOR RESPONDENT: Adv. Verster

Gildenhuis Lessing Malatji Inc

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