

SOUTH AFRICA / JUDGMENT

Raudev (Pty) v Emerging Markets Home Loans Two (Pty) Ltd and Others (A141/20; 75566/17) [2021] ZAGPPHC 680 (7 October 2021)

[2021] ZAGPPHC 680

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher, Van Der Westhuizen, Van Der Schyff

CASE / FILE NUMBER

A141/20; 75566/17

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A141/20

GDP CASE NO: 75566/17

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

7 October 2021

In the matter between:

RAUDEV (PTY)

Appellant

and

EMERGING MARKETS HOME LOANS TWO

(PTY) LTD

First Respondent

THE BODY CORPORATE OF THE PICCOLO

CLOSE SECTIONAL TITLE SCHEME

Second Respondent

Neukircher J (Van Der Westhuizen J and Van Der Schyff J concurring)

- [1] This is an appeal against the whole of the judgment and order handed down by Baqwa J in this court against the present appellant and in which he granted certain declaratory and other relief against the appellant (“Raudev”).
- [2] The main dispute centred around a residential development known as Piccolo Close in respect of which the parties had concluded an Agreement of Sale (“the Agreement”) for the purchase of 45 residential units by the first respondent (Emerging Markets). Piccolo Close was still under construction at the time of purchase. In issue is the remedy to be granted to the respondents[1] given that the construction of Piccolo Close has, over a period of time, revealed certain latent defects.

BACKGROUND

- [3] On 28 June 2016 Raudev and Emerging Markets entered into an Agreement in terms of which the latter purchased 45 units[2] in a new development. The units were incomplete at the time the Agreement was entered into, and for a purchase consideration of

R33 700 000-00 Raudev contractually undertook to complete these units, develop the Scheme, open a sectional title register and transfer the units to Emerging Markets for on-sell to members of the public. Raudev was the developer of the Scheme and the actual building works were undertaken by its filial construction company known as Raubex Housing (Pty) Ltd (“Raubex”). Both Raubex and Raudev are part of a JSE listed company known as the Raubex Group Limited.

- [4] The Agreement defines the “practical completion”[3] as the

“...state of completion of the works when, in the opinion of the Seller’s architect, the works are complete to the extent that they are free of patent defects other than minor defects and can effectively be occupied for residential purposes”. According to Emerging Markets, as part of Raudev’s obligations, it had to not only bring the Scheme to practical completion, but also had to obtain the practical completion certificates and obtain certification from Emerging Markets’ architect that he was satisfied that practical completion had been achieved.

- [5] The Agreement furthermore provided that Emerging Markets would provide Raudev with a defects list in terms of clause 7.8 of the Agreement within 21 days of the practical completion date. It was only after these defects were made good that Raudev’s architect would issue a works completion certificate.

- [6] The Agreement describes a “defect”[4] as follows:

“...any aspect of the works which, in the opinion of the Seller’s architect is not in accordance with the plans and specification and schedule of finishes as provided for in this agreement and without limiting the generality of the foregoing, includes any imperfection that impairs the structure, composition or function of any aspect of the works or any section.”

- [7] To this end all defects indicated on the defects list[5] had to be completed within 90 days of the practical completion date which was 31 October 2016 and transfer was to take place on 21 December 2016. The final completion date was the date on which Emerging Markets' architect certified that any defects had been made good – it is common cause that the latter certification has yet to take place.
- [8] On 22 December 2016 the parties entered into an Addendum to the Agreement (“the Addendum”). In terms of this, despite practical completion not being achieved due to the outstanding defects list, transfer of the units would take place to Emerging Markets and *pari passu* the purchase price (less 10% retention) would be paid to Raudev – transfer took place on 20 January 2017 and the purchase price paid.

The defects

- [9] However, at an inspection conducted by Emerging Markets' architect Peter Herold of Profica (“Herold”), observed signs of isolated spalling or “plaster popping” on the interior walls of units 30, 31 and 34 of the Type C units.[6] He assumed that this was as a result of defects in the application of the plaster. As a result, these were included in the practical

defects list issued by Profica on 14 December 2016 and are included in the Addendum of 22 December 2016.

- [10] According to Emerging Markets, by 17 January 2017 these had yet to be remedied. On 17 January 2017 another site meeting was held. This time it was attended by Herold and one Dwayne Jacobs of Raubex.[7] According to Herold, Jacobs informed him that he knows the cause of the problem and said “that it was being attended to” but didn't elaborate.

- [11] At a further site inspection on 1 February 2017 Herold noticed that spalling was occurring in other Type C units. He also noticed that the spalling – which seems to have been remedied in the meantime - in units 30, 31 and 34 was recurring. He became concerned

that the problem was endemic and not isolated as he had originally assumed.

- [12] At a third site meeting on 2 February 2017[8] the spalling evident on the external walls of units 5, 6, 7 and 8[9] was inspected and the surface was scraped away to reveal white powder particles.

- [13] In an email by Van der Werff to Dwayne Jacobs of Raubex and Hannes Geyer of Raudev dated 2 February 2017, Van der Werff states:

“We have been investigating the “popping” and we had meetings with our supplier to understand what caused the latent defect in the bricks...”

We subsequently changed your supplier...”

[14] According to Van der Werff, the cause of the spalling was “inclusions of free lime, near the surface of the brick” which expands in volume when exposed to moisture. As it turns out, the spalling only occurred in the bricks used in the Type C units. Raubex had remedied the issue by firing Brickit (the brick-maker) and appointing a different supplier and had become aware of the issue in a previous project.

[15] Subsequently, both parties obtained expert reports. According to Raudev’s expert, Mr van der Kuil of e-Struct Consulting[10], the popping occurs as a result of lime particles that are mixed into the bricks when they are manufactured and

“After the walls have been plastered it traps moisture in the brick walls as a “curing” process but also activates the lime particles that occur close to the structure of the bricks causing it to expand and “pop” the plastered/bag washed surface. They also appear to also look like blisters.”

[16] He opines that the popping is not of an extreme nature and will not compromise the structural integrity and stability of the units

mentioned above, however, constant monitoring of the surface must be done and recorded, with actual position of the “popped” areas on photographs or plan elevations of each unit.

[17] Emerging Markets’ expert[11] opined on 28 February 2017 much to the same effect and noted the following:

“4.2 The writer cannot place a time line for the problem to cease. Pop-outs may even occur at a later stage on internal wall surfaces triggered by condensation, with overcrowding of apartments and flats, poor ventilation and as washing and dishes are soaked for extended periods...”

And

“5. The writer foresees that pop-outs shall be addressed during ongoing routine and also annoying maintenance till the problem ceases.”

[18] It is important to note that in his email of 2 February 2017, Van der Werff states:

“...we take full ownership of the problem, we do not run away from the problem and would like to get your approval on the process we propose to address the “Latent Defect” which occurred.”

[19] Raudev’s solution to the problem was to treat only the affected areas by chiselling them out, re-plastering and repainting and then to monitor the situation for about six months.

[20] Given that the experts were of the view that no time-line could be put on the expression of the spalling, unsurprisingly this solution did not find favour with Emerging Markets, who then addressed a letter of demand to Raudev on 24 March 2017. The demand is extremely lengthy, but it is in fact only three paragraphs that are relevant for purposes of this appeal. They state:

“10 The reality is that you built and completed the units knowing of the underlying defect in the brick work, but intentionally failed to disclose same to our client. The latent defect in issue is the defective brick product containing the contaminant and the popping plaster is a manifestation thereof. In order to rectify the defect, you are required to demolish these structures affected by the contaminated brick and to rebuild same free of the defects in question.

11. In the circumstances, we are instructed to demand in accordance with the provisions of clause 15 of the Agreement, that you immediately take steps to rectify the defect by demolishing those parts of the structure affected by the defective brick work and to rebuild same, failing which our client will refer the dispute to arbitration and seek appropriate relief.
12. We are however, instructed to convey to you that our client is prepared to entertain a possible alternative: namely, that the affected units be transferred back to you and that you refund to our client the purchase price for those units listed in Annexure 5 to the Agreement together with interest and all associated costs...”

[21] Thus, Raudev was put to an election: they were to either remedy the spalling in the manner set out in the demand (and to the satisfaction

of Emerging Markets’ architect[12], or take the units back and refund Emerging Market its money.

[22] On 11 April 2017, Raudev communicated its election to Emerging Markets in the following letter[13]:

“We refer to your letter dated 24 March 2017 and your further “without prejudice letter” dated 05 April 2017. We reserve our right to respond in full to each and every allegation made in your letter. This letter must not be considered as an acknowledgement of guilt or an admission to any of the allegations made in your various letters.

1. We herewith tender our acceptance of your demand in para. 11 of your letter dated 24 March 2017, namely to “immediately take steps to rectify the defect by demolishing those parts of the structure affected by the defective brickwork and to rebuild same”.
2. We have appointed our structural engineer to oversee the work and sign off on it at our cost.
3. We demand that this matter be excluded when considering the payment of the retention moneys on the transfer still being withheld by the attorney.”

[23] On 13 April 2017, Emerging Markets responded as follows:

“1. Your undertaking to remedy the defect is noted. For the avoidance of doubt we record that this will require the demolition of the structures being built using defective brick and will require those structures to be entirely rebuilt.

2. Whilst our clients do not intend to prescribe the nature and extent of the remedial work required – this being you and your contractors’ responsibility – it will be appreciated that the kind of demolition work required is going to affect surrounding structures in the scheme and more particularly, occupiers of such structures...”

[24] The final word on this came via Raudev’s response on 25 April 2017:

“6. With reference to your letter dated 13 April 2017, we respond as follows:

7. Ad para 1.3:
- a. We refer you to our letter dated 11 April 2017. We unequivocally record that it was never our undertaking that the entire structures be demolished, but that only those parts of the structure affected by the defective brickwork can be remedied.
- b. In this regard we will be guided by the engineer’s report, which we are awaiting and we can therefore not commit to any scale or scope until such time.”[14]

[25] It is clear from the judgment that Baqwa J found that:

25.1 it was common cause that the spalling was caused by a latent defect in the bricks;

25.2 the Agreement provided[15] for Emerging Markets’ remedy during the defects liability period[16];

25.3 that Emerging Markets had timeously notified Raudev in writing of the defects and that Raudev had unequivocally not only accepted the existence of the defects, but undertaken to repair them as per its tender in its letter of 11 April 2017;

25.4 that “[t]he clauses quoted above regarding latent defects are concise and explicit. There are no qualifications or conditions attached thereto. They constitute the agreement that was entered into between Emerging Markets and Raudev.”[17];

25.5 however, the latter was in the context of the provisions of the parties’ written Agreement alone – insofar as the content of the correspondence between the parties, he found that all that those did was to bring into operation clauses 10.1.19 and 10.1.20 of the Agreement and that no further contract was created by the parties’ correspondence.

[26] He also summarily rejected Raudev’s argument that the tender made in the letter of 11 April 2017 was conditional.

Raudev’s argument

[27] Both a quo and before us, Raudev’s argument was to the effect that:

27.1 the tender made to “immediately take steps to rectify the defect by demolishing those parts of the structure affected by the defective brickwork and to rebuild same” was conditional upon the appointment of Raudev’s structural engineer to oversee and “sign off” the repairs, and that the remedying of the defects “be excluded when considering the payment of the retention moneys on transfer still being withheld by the attorney”;

27.2 Emerging Markets did not accept this tender as it insisted (in its letter of 13 April 2017) that the structures be demolished and rebuilt;

27.3 as a result there was no new contract between the parties and that, in any event, clause 24 of the Agreement contained a non-variation clause which had not been complied with.

The defect

[28] Mr Stockwell argued before us that the latent defect complained of did not lie in the composition of the bricks. His argument was that it lay in the mechanism, composition and application of the plastering which covered the bricks and that this, when exposed to moisture, caused the spalling. The point of this argument was to demonstrate that Raudev’s objection to the demolition of the structure was well-founded and that its proposed remedy[18] was a cogent one.

[29] But this argument is not supported by either Raudev’s own expert reports, nor the email by Van der Werff, nor by Grobler[19] who states:

“The parties are ad idem that the lime contained in the bricks constitutes a latent defect entitling Emerging Markets to demand that these defects be remedied. It is not a structural defect nor is it required that the Type C units be demolished or be rebuilt.”

[30] In any event, the spalling is a patent manifestation of the above-mentioned latent defect.

[31] It being common cause therefore that the spalling is caused by a latent defect, the question then is: what remedy is proposed by the Agreement?

[32] The Agreement specifically provides that any latent defect must be “expeditiously remedied” and upon notification by Emerging Markets.

[33] In my view, this is all that the parties’ respective letters dated 24 March 2017, 11 April 2017, 13 April 2017 and 25 April 2017 do: it is common cause that the spalling was included in the defect list; it is common cause that the spalling was an ongoing issue. All Emerging Markets’ demand does is to invoke clause 15 of the Agreement[20] and put Raudev on notice that if it fails to remedy these latent defects within 10 days of notice, Emerging Markets will take further steps.[21]

[34] It is telling in its response to the clause 15 notice, that Raudev neither denies that it is in breach nor does it deny that the latent defects have not been remedied.[22] Instead, it does exactly what clause 15 proposes – it undertakes to remedy the latent defects and it repeats this undertaking on 25 April 2017.

[35] Given this, I do not agree with Mr Stockwell that the demand and undertaking constitute a new Agreement which had to be reduced to writing and comply with clause 24[23] of the Agreement and in this I cannot find that Baqwa J erred in coming to the conclusion that “no further contract was created” by these letters.[24]

The Undertaking

[36] The question of whether Raudev’s undertaking was conditional also requires analysis. Mr Stockwell argued that Raudev’s

undertaking was conditional upon the demand being met that the retention monies be released. Later in his argument, he also sought

to rely on the argument that Raudev’s would appoint its own structural engineer to oversee and sign off on the work.

[37] But clauses 10.1.19 and 10.1.20 of the Agreement apply to the undertaking, and in this context Baqwa J found that “[t]hose clauses must be read and interpreted as they are and without any importation of any extrinsic evidence as to what they meant. It must therefore be accepted in this context that whatever Raudev sought in its reply, “Annexure 17”, in relation to payment of retention moneys was external to the terms of the purchase agreement regarding the remedying of latent defects...”.

[38] Here too, I cannot find he has erred both in the reliance on the Agreement itself and as regards the manner in which the letter of 11 April 2017 is written: the rules of grammar tell us that a full stop at the end of a sentence is to show that the sentence contains a complete thought and it indicates that there is nothing more to say on the particular topic.[25]

[39] In contra-distinction, a colon and a semi-colon are used to link sentences and a semi-colon is often used to replace words like “and”. A semi-colon is also used in lists to show that there is a further thought which will link previous sentences or concepts.

[40] But the above is not what Mr Grobler did on 11 April 2017. Mr Stockwell argued that one should regard Mr Grobler as a legal layperson and that not much stock can be placed on the phrasing of the letter. But this ignores the fact that Mr Grobler is a professional engineer who is well-versed in his trade and building contracts. There is nothing to suggest that he did not know the import of the letter of 11 April 2017.

[41] Furthermore, each paragraph contains a separate thought which is distinct from all previous sentences. Were any one of the last two paragraphs to be excluded, the letter would still contain the undertaking in compliance with the clause 15 and the demand.

[42] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[26] the court stated that:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be

given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between

interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

Therefore, in my view, any argument that the undertaking is conditional is artificial and cannot be upheld.

[43] Mr Stockwell submitted that this case is distinguishable from that in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*[27] where a disintegration of the bricks was caused by a latent defect and the bricks needed to be replaced. He used this to further his argument that a) it was not the bricks that contained a latent defect, but the plasterwork; and b) to show that it was unnecessary

to demolish and rebuild the structures as demanded by Emerging Markets.

[44] He also argued that the effect of demolishing the structures would infringe on the rights of the property owners who had not been joined and were not given notice of the application *a quo*.

[45] The latter argument is a new one – it does not appear on either the papers or the heads of argument – thus Emerging Markets has not been given an opportunity to respond to it. Even so it holds not water: the Scheme is represented in these proceedings by the Body Corporate. The only units which were not purchased by Emerging Markets are units 9, 10, 29, 32 and 33. However, Annexure FA1 to the founding affidavit is a Special Resolution of the Body Corporate of Piccolo Close. In that an entire list of all the units and the names of the owners of units 9, 10, 29, 32 and 33 appears. It is very clear from that Resolution, that the owners of units 29, 32 and 22 supported the decision to join these proceedings to “seek remediation of defects, damages or other appropriate relief”. The owner of units 9 and 10[28] clearly did not participate at all – his failure to do so means he is bound by the decision and his failure to participate cannot stymie these proceedings or the relief sought.

[46] As to the issue of whether *Holmdene Brickworks* can be used to disallow relief unless the latent defect was so serious it compromised the structural integrity of the works[29], my view is no: *Holmdene Brickworks* is the locus classicus on the test for latent defects and a claim for damages that is not the case here: paragraphs 13 and 15 *supra* rejects the notion

that the latent defect is in the plasterwork and not the bricks. As to whether the structure should be demolished and rebuilt: Raudev's own undertaking provides for the remedy. The argument is a circular one[30] and is interrupted at the first hurdle.

- [47] All that the order does is give effect to Raudev's undertaking to remedy the defects as is evidenced in paragraphs 3.3 and 5 of the order.

The Breach

- [48] Bearing in mind that the practical completion date has yet to be achieved, that Raudev has yet to remedy the defects[31] and that Raudev's architect has yet to issue a final completion certificate (the one step a condition for the next), it is difficult to understand Raudev's argument that it is not in breach.

The Declarator

- [49] The argument is that although a court has a discretion to grant a declarator, clause 15 of the contract requires that a party make an election whether to claim specific performance, or to cancel the agreement – it cannot do both. The fact that the order was granted in which Emerging Markets was granted an order for specific performance and, in the alternative, allowed to cancel the agreement and claim damages if Raudev failed to remedy the defects, means that the court a quo sanctioned an approbation and a reprobation.
- [50] But a court is entitled to do exactly this: in *Culverwell and Another v Brown*[32], the court stated:

"Plainly, where a party elects to terminate the contract, he cannot thereafter change his mind: the contract is gone. But if the injured party elects to abide by the contract and obtains a decree of specific performance, and the defaulting party refuses or fails to comply with the order, what is the plaintiff to do with the property? Is he to hold it indefinitely at his disposal? The answer is no. In such a case it would be competent for the plaintiff to ask in another action in lieu of that decree, for cancellation of the contract and damages. And there is no reason in law why the plaintiff in an action should not claim specific performance, and ask alternatively (should there not be performance within the time fixed by the court) for an order cancelling the contract and directing the defaulting party to pay damages. And where the injured party refuses to accept the repudiation and thereby allows the defaulting party to repent of his repudiation and gives him an opportunity to carry out his portion of the bargain, and the defaulting party nevertheless persists in his repudiation, the injured party is entitled to change his mind and notify the other party that he would no longer treat the agreement as existing, but that he would now regard it as rescinded and sue for damages."[33]

- [51] This being so, the court a quo was entitled to grant the declaratory in the alternative.

Other points

- [52] Several other points are apparent from the heads of argument filed by Raudev, for example the joinder of the Body Corporate as a party and the failure to give effect to the arbitration clause – these were not persisted with before us and are therefore not discussed.

Condonation

[53] Condonation was sought for the late filing of the appeal record. This was not opposed and condonation was granted from the outset.

Para 4: damages order

[54] Para 4 of the order provides, as a separate and distinct order:

“Raudev is liable to Emerging Markets for such damages as the latter is proven to have suffered as a result of the said breaches.”

Mr Dickerson conceded that the order may be misinterpreted. Mr Stockwell, however, submitted that Raudev had always understood it

that the damages were awarded in the context of the specific performance remedy. However, clause 15 does not give an option to

claim damages in the event of specific performance being claimed and clause 7.11 entitles the plaintiff to “undertake the necessary work and to recover the reasonable costs thereof” in the event of Raudev’s failure to do so. It thus appears that paragraph 4 of the order is misplaced and should be struck out.

[55] There is no reason to order that costs should not follow the result. The minor success of Raudev does not warrant a departure from this view.

Order

[56] Thus the order granted is the following:

Save that paragraph 4 of the order of Baqwa J of 17 October 2019 is struck out, the appeal is dismissed with costs.

B NEUKIRCHER

JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 October 2021.

Appearances:

For the Appellant

: Adv Stockwell SC

Instructed by

: Smit Jones & Pratt Attorneys

For the Respondents : Adv Dickerson SC and with him

Adv Engelbrecht

Instructed by

: Edward Nathan Sonnenbergs

Matter heard on

: 8 September 2021

Date of judgment

: 7 October 2021

- [1] The first respondent is referred to as “Emerging Markets” and the second respondent as “the Scheme”
- [2] Consisting of “Type A”, “Type B” and “Type C” units of which only the latter are relevant to the present proceedings
- [3] At clause 1.1.21
- [4] At clause 1.1.8
- [5] Defined as “the list of defects which must be made good by the Seller in order to achieve works completion”
- [6] It is common cause that the Scheme consisted of Type A, Type B and Type C units
- [7] (Emerging Markets says he represented Raudev and Raubex but Raudev denies this).
- [8] Attended by Verbaan from Emerging Markets, Herold and Harris from Profica and Hannes Geyer and Van der Werff and 3 other employees of Raudev – Raudev says these were Raubex representatives
- [9] Which are part of the common property of the Scheme
- [10] His report is dated 20 February 2017
- [11] Mr Crotts of FSC Consulting Engineers CC
- [12] See par 4 supra
- [13] Written by Mr Grobler, a qualified engineer and the director of Raudev
- [14] Emphasis provided
- [15] In clauses 10.1.19 and 10.1.20

[16] Clause 10.1.19 states: “During the defects liability period, the Seller will expeditiously remedy any latent defects which appear in the units provided that the purchaser notified the seller in writing of such defects within the defects liability period.” Clause 10.1.20 states: “For a period of 5 years from the occurrence date, the seller will expeditiously remedy latent and/or structural defects which appear in the units provided that the purchaser notifies the seller, in writing of such structural defects, within the 5-year period.”

[16] Clause 10.1.19 states: “During the defects liability period, the Seller will expeditiously remedy any latent defects which appear in the units provided that the purchaser notified the seller in writing of such defects within the defects liability period.”

Clause 10.1.20 states: “For a period of 5 years from the occurrence date, the seller will expeditiously remedy latent and/or structural defects which appear in the units provided that the purchaser notifies the seller, in writing of such structural defects, within the 5-year period.”

[17] At par [28] of the judgment

[18] I.e the scraping, replastering and repainting of the affected areas

[19] Who is the deponent to the answering affidavit

[20] The “breach clause”

[21] Clause 15 states: “If either party breaches any provision of this agreement and remains in breach for 10 days after written notice to such party requiring that party to rectify that breach or if either party repudiates this agreement, the other party shall be entitled at that party’s option – 15.1 to sue for the immediate specific performance of any or all of the defaulting party’s obligations under this agreement whether or not any such obligation is then due; or 15.2 (either as an alternative to a claim for specific performance or upon the abandonment of such claim) to cancel this agreement. Written notice of such cancellation shall be given to the defaulting party and the cancellation shall take effect on the giving of such notice.”

[21] Clause 15 states:

“If either party breaches any provision of this agreement and remains in breach for 10 days after written notice to such party requiring that party to rectify that breach or if either party repudiates this agreement, the other party shall be entitled at that party’s option –

15.1 to sue for the immediate specific performance of any or all of the defaulting party’s obligations under this agreement whether or not any such obligation is then due; or

15.2 (either as an alternative to a claim for specific performance or upon the abandonment of such claim) to cancel this agreement. Written notice of such cancellation shall be given to the defaulting party and the cancellation shall take effect on the giving of such notice.”

[22] Both of which it now does in its papers

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- [23] The non variation clause
- [24] At para 30 of the judgment
- [25] [Lexico.com/definition/full_stop](https://www.lexico.com/definition/full_stop)
- [26] 2012(4) SA 593 (SCA) at para 18
- [27] 1977(3) SA 670 (A) at 677F – 678D
- [28] A Mr B K J Solomon
- [29] Which it is common cause it does not in this case
- [30] I.e. that because the bricks themselves are not defective, no demolition is required
- [31] Clause 7.11
- [32] 1990(1) SA 7 (A) at 17B - F
- [33] This principle affirmed in *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017(5) SA 420 (SCA)
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