IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, GQEBERHA)

Not Reportable

In the matter between: Case No: 742/2021

DOLCE DOMUS CC **Applicant**

AND

ELMARIE HERHOLDT **First Respondent**

REGISTRAR OF DEEDS, KING WILLIAMS TOWN Second Respondent

JUDGMENT

GOOSEN J:

[1] The applicant and the first respondent concluded a written agreement of sale of an immovable property. The applicant seeks an order directing the first respondent

to sign the transfer documents and to effect transfer of the property into the name of the applicant.

[2] The first respondent opposes the transfer on the basis that she has cancelled the sale agreement. The first respondent counter-applies for a declarator that the agreement has been validly cancelled. In the alternative, she seeks an order that the agreement be cancelled. In addition, the first respondent seeks an order striking out large sections of the applicant's founding affidavit and replying affidavit on the basis that the averments contained therein are irrelevant.

[3] In order to appreciate the issues which require adjudication it is necessary to set out the facts in some detail.

[4] The agreement, in terms of which the first respondent sold Erf 223 Newton Park for the sum of R2,3 million was concluded on 27 December 2019. The applicant was represented by Dean Colley who was authorised by resolution of the applicant. The first respondent acted personally. The purchase price was payable upon transfer of the property. Clause 1.2 of the agreement reads:

> "As security for the payment of the purchase price, the PURCHASER may elect, within 30 days of acceptance of this offer by the SELLER or 30 days after fulfilment of the special condition referred to in 16.3 (whichever is the later date), to either –
>
> 1.2.1 furnish the PURCHASER'S Conveyancers with a Bank or Financial Institution's guarantee securing payment of the Purchase Price. The guarantees shall be irrevocably expressed to be immediately payable

to the SELLER on written notification of the PURCHASER'S Conveyancers of registration of transfer and in a form reasonably acceptable to the SELLER; or

1.2.2 make payment in cash of an amount equal to the Purchase Price into the PURCHASER'S Conveyancers trust bank account and provide proof of payment thereof to the SELLER."[1]

[5] The applicant's appointed conveyancer is Glyn Marais Incorporated (Glyn Marais). Clause 16.3 provided that the applicant conduct an inspection of the property "by no later than 30 days after both parties have signed this offer". In the event that the applicant was not satisfied with the outcome of the inspection, it could notify the first respondent, whereafter the agreement would lapse.

[6] It is common cause that the inspection was conducted on 31 January 2020. Although this was outside of the 30-day period provided in the agreement, nothing turns on this. On 12 February 2020, the first respondent completed several documents required to give transfer of the property. Similar documents were completed by the applicant on 12 March 2020.

[7] On 24 March 2020, the first respondent's husband (Mr Herholdt) sent an email to Glyn Marais requesting them to notify the applicant that it is in breach of the sale agreement. The email does not state in what respect the applicant was alleged to be in breach. On 27 March 2020 Glyn Marais wrote to the first respondent advising that,

[1] The further portion of clause 1.2.2 is not reproduced here, since it is not germane to the issues.

in light of the professional relationship between the applicant and Glyn Marais, it is conflicted. Glyn Marais advised the first respondent to seek alternative legal representation.

[8] On 30 March 2020 Slabbert Attorneys, representing the first respondent, emailed Glyn Marais attaching the seller's (first respondent's) "written cancellation of his mandate with your office". The attached document, headed "CANCELLATION OF MANDATE" states that the first respondent

> "cancel[s] and/or terminate[s] my mandate . . . with Glyn Marais Incorporated regarding the transfer of my property . . . in terms of the Deed of Sale dated 27th of December 2019."

It further provided that any funds held in trust with regards to the transaction must be paid over to Slabbert Attorneys.

[9] On the same date, Slabbert Attorneys addressed a letter to the applicant in which they gave notice of breach of the agreement. The letter stated that the applicant had failed to make payment of the purchase price as provided in Clause 1.2 of the agreement. It stated that:

> "We have been instructed to demand, which we hereby do, that you deliver acceptable guarantees or make payment of the full purchase price . . . to our trust account with 7 (seven) days from the date hereof, failure of which the

> Seller's rights are reserved to institute formal legal action for the recovery thereof and/or to claim damages suffered due to your breach of contract."

[10] The events which followed occurred against the background of a National State of Disaster which was declared to combat the coronavirus (Covid-19) global pandemic.[2] Regulations were promulgated to restrict the movement of persons and goods.[3] These regulations imposed a national lockdown in five distinct alert levels. It is not in dispute that the lockdown imposed very significant restrictions upon the movement of persons and goods and caused disruptions of normal business and commercial activity.

[11] The applicant states that as a result of the national state of disaster, it wanted to assess the impact the lockdown might have upon its decision to invest in the property. Accordingly, in response to an email dated 6 April 2020 in which Slabbert Attorneys advised that said date was the last day for delivery of the guarantee, Glyn Marais requested that performance in terms of the agreement be suspended. Slabbert Attorneys replied, also on 6 April 2020, that the applicant remained in breach but that instructions were awaited from the first respondent. It was suggested that further communication occur after 16 April 2020.

[12] On 6 May 2020 Slabbert Attorneys wrote to Glyn Marais placing on record that no communication had been received since 6 April 2020. The email re-iterated the

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[2] The national state of disaster was declared in terms of the Disaster Management Act, 57 of 2002 on 26 March 2020.

[3] The Covid-19 Regulations, first promulgated in Government Gazette Notice No. 318 on 18 March 2020 were amended from time to time as the lockdown, established thereby, was adapted to meet changing circumstances related to the Covid-19 pandemic.

alleged breach of contract and required a response by 7 May 2020. On 12 May, a further email was sent. It appears that Mr Slabbert had been in telephonic contact with an assistant employed by Glyn Marais. The email requested Mr Brian Frank, who was dealing with the matter at Glyn Marais, to respond to the earlier email.

[13] On 13 May 2020 Mr Frank replied to the email dated 6 May. The reply was to the effect that Mr Colley, of the applicant, would address the issue after the lockdown has been lifted. This elicited a response from Slabbert Attorneys on 15 May 2020 in which an appeal was made to obtain telephonic instructions. The letter records the following:

> "Our instructions are that there is a contract, with terms and conditions and your client does not adhere to those conditions.
> Your client was placed on terms and at present he is in breach of contract.
> Our client reserved his rights in full, and we now need to advise our client the way forward to exercise his rights." (emphasis added)

[14] No further communication occurred until 8 September 2020. It is, however, alleged that Mr Herholdt addressed an email to the applicant cancelling the agreement. I shall return to this aspect later in this judgment. On 8 September, the original deed of transfer in respect of the property and a copy of the plan was dispatched to the first respondent. On 17 September 2020 Mr Herholdt sent an email to a Ms Nundlal at Glyn Marais under the subject title "Return of Serene original title deed". It stated that it had been a month since previous correspondence regarding the request, but that they had still not received the title deed. Ms Nundlal replied on 18

September enclosing confirmation of delivery. On 22 September, Mr Herholdt confirmed that it had been received but been mislaid.

[15] On 5 October 2020 an email was sent to Slabbert Attorneys by Glyn Marais under the subject title "E HEROLDT // DULCE DOMUS CC ERF 223 NEWTON PARK". It reads:

> "Our Brian Frank has been trying to get a hold of you to no avail. He is working from his farm in Mookgophang (Naboomspruit) and has trouble with his reception, as a result he is only able to make and take calls on his mobile phone.
>
> Mr Frank would like to discuss the abovementioned matter with you and would like to ascertain whether your client, would like to entertain our client's offer.
>
> Please feel free to email Mr Frank who is copied herein or call him on his mobile phone on . . ."

[16] On 8 October 2020 Slabbert Attorneys replied as follows:

> "Sorry to learn you find it difficult to get hold of us. Our phone numbers have not changed, herewith the email address.
>
> You are welcome to contact our client directly as we have closed our file in this matter."

[17] On 12 October, Slabbert Attorneys sent a further email. It reads:

> "We refer to the abovementioned matter and the emails below.

> Our client is prepared to enter into discussions for the sale of his property. However, he requests a NON-REFUNDABLE deposit of R10 000 (TEN THOUSAND RAND) prior to any discussion."

No replying correspondence has been put up by the applicant in relation to this exchange.

[18] On 1 December 2020 the applicant obtained an Investec Bank guarantee as security for payment of the purchase price. It was provided to Slabbert Attorneys under cover of a letter dated 2 December 2020. The letter averred that the purported cancellation of Glyn Marais' conveyancing mandate was unlawful. In the light of the applicant's compliance with the terms of the agreement of sale, it was indicated that the transfer process was proceeding.

[19] On 9 December 2020 Slabbert Attorneys responded, enclosing an email received from Mr Herholdt. The email pointed out that the guarantee was more than a year late; that the first respondent does not wish to sell the property any longer, and that the title deeds had been returned to him.

[20] The present application was commenced in March 2021. The applicant's case is premised upon enforcement of the agreement of sale. It alleges that it has complied with its obligations, in particular that it has furnished a guarantee as security for payment of the purchase price upon transfer. It is not in dispute that the aforementioned guarantee was only furnished to the first respondent on 2 December 2020 notwithstanding the requirement contained in clause 1.2 of the contract. The

applicant contends that although it was in breach of its obligations, the first respondent did not elect to cancel the agreement and no notice of cancellation was delivered to it. On this basis the applicant, now having met its obligations, is entitled to an order compelling performance in accordance with the agreement.

[21] The first respondent's case is, in the first instance, that the agreement was cancelled. Notice of cancellation was dispatched to the applicant by way of an email written by Mr Herholdt. No copy of the email is available, since the data cannot be retrieved from Mr Herholdt's computer.

[22] The first respondent raises two additional defences. The first is that the guarantee, belatedly furnished by the applicant, does not comply with clause 1.2 of the agreement since it is not "irrevocably expressed". The second is that the applicant, by its ongoing failure to comply with its obligations, repudiated the agreement. This repudiation was accepted when the first respondent insisted that the titled deeds be returned.

[23] As an alternative the first respondent's answering affidavit, which served also as her founding affidavit in the counter-application to declare the agreement cancelled, contained the following averments:

> "12.17 Even if it is accepted that by the time that the Investec Guarantee was furnished there was not yet a cancellation or a repudiation and acceptance (all of which is denied), then and since the guarantee fails to comply with the contract, the furnishing thereof did not purge the

applicant's mora and since I have at various stages complied with the notice requirement in clause 1.2 of the agreement the contractual right to cancel remained, which my husband as my agent, through my attorney carried out as set out in paragraph 8.12 of the founding affidavit.[4]

12.18 Further and in any event, and even if there have never been a valid mora notice, nor valid cancellation, nor repudiation which was effective (all of which are denied) I hereby give written notice in terms of clause 12 of the agreement that the applicant has failed to comply with clause 1.2 of the agreement and that if it fails to properly comply with that term of the agreement within the period referred to in clause 12 that the agreement will the, without further notice be legally cancelled. I refer to my counter-application."

[24] As indicated, the first respondent's affidavit served a dual purpose, namely as answer to the main application and as a founding affidavit to the counter-application. The applicant's reply similarly served a dual purpose. The matters canvassed in reply will be addressed when dealing with the submissions made by the parties. Insofar as the answer to the counter-application is concerned, only one aspect need be highlighted at this stage.

[25] In response to paragraph 12.18 quoted above, in which the first respondent gave notice of her intentions to cancel the agreement in terms of clause 12 thereof, the applicant obtained and presented a new letter of guarantee dated 13 May 2021.

[4] The reference is to the email included in the correspondence of Slabbert Attorneys of 9 December 2020 in which Mr Herholdt states that the first respondent does not want to sell the property any longer. See par [20] above.

The new letter of guarantee expressly stated that it is irrevocable. The covering letter stated that the first guarantee is withdrawn and is replaced by the second guarantee.

[26] In response to the filing of the applicant's dual purpose replying affidavit, the first respondent launched an application to strike out substantial portions of the applicant's founding affidavit and portions of the replying affidavit.

[27] The application to strike out portions of the founding affidavit and the replying affidavit is premised upon three contentions. Based upon the fact that the applicant has put up a new Investec guarantee in response to the first respondent's alternative claim for cancellation and that this guarantee replaces the first guarantee, the first respondent contends:

[1] that the first guarantee "no longer exists" and therefore every allegation referring thereto in the founding and replaying affidavits is irrelevant and falls to be struck out.

[2] that the presentation of a new guarantee in reply amount to making out a new case in reply and for this reason all reference to the new guarantee ought to be struck out.

[3] that there are some passages in the reply which are argumentative and ought to be struck out.

[28] The first two contentions amount to sophistry. At the heart of the argument lies the assertion that the first guarantee has ceased to "exist". The assertion is fallacious. It asserts the term "exist" in a manner that is ambiguous and thereupon equates it with

the notion of “validity” or “enforcement”. The fallacious reasoning is compounded by the assertion that the “replacement” or “substitution” of the guarantee by another establishes that the first was not “irrevocable”. And since it was not irrevocable the legal consequences must be that the applicant remained in breach and the first respondent was/is entitled to cancel.

[29] The letter of guarantee dated 13 May 2021 was furnished in response to the first respondent’s notice of intention to cancel the agreement, raised for the first time, in her counter-application seeking cancellation of the agreement. The notice called upon the applicant to remedy an alleged breach inasmuch as the first guarantee was not “irrevocably expressed”. This latter averment was denied but *ex abundanti cautela* the applicant procured a guarantee which would meet the objection. Two important things flow from this. First, the applicant was quite within its rights to respond to the notice of breach (pleaded as an alternative) in answering the first respondent’s counter-application. Second, the 13 May 2021 guarantee was not the presentation of a new case in reply. The applicant’s case was always that it had complied with its obligations and is entitled to an order compelling transfer. The first respondent’s case in her counter-application changed tack inasmuch as she pleaded a new ground upon which to cancel the agreement, namely that the guarantee itself was a breach of the agreement. The applicant was quite within its rights to meet this case.

[30] There is accordingly no basis to strike out these allegations on the basis relied upon by the first respondent.

[31] As I have already indicated the very basis upon which the striking out application is based rests upon a logical fallacy. The replacement of the original guarantee with the new guarantee does not expunge the existence of the earlier guarantee. It exists as a matter of fact. Its replacement by a new letter of guarantee may mean that the first guarantee can no longer be relied upon as security for the payment of the purchase price on transfer. A new guarantee is available for that purpose. The question is could the first guarantee be relied upon as signifying the applicant's compliance with its obligations? That is a question to be answered with reference to the terms of that guarantee. If the answer is yes, then the applicant would be entitled to the order sought in its notice of motion. If, on the contrary, the first guarantee was provided at a stage when the cancellation of the agreement had already occurred, then the terms would (subject to what is set out later in this judgment) be relevant.

[32] The application to strike out all reference to the first guarantee in the founding affidavit cannot succeed. So too, the application to strike out reference to the new guarantee. What remains to be considered is the contention that certain passages in the replying affidavit consist of argument. I shall accept, without deciding, that the passages complained of are framed in argumentative terms. However, the first respondent did not content for prejudice in any manner and I am not able to discern what prejudice could flow should these passages not be struck out.

[33] In the circumstances, the application to strike out must be dismissed with the usual costs order. This brings me to the issues to be decided upon. They are three. The first is whether it is established that the agreement was cancelled. Closely related

is the question whether the applicant's conduct constituted a repudiation of the agreement and whether the first respondent elected to accept and cancel. If these questions are answered in the affirmative it disposes of the application. In the event that they are answered in the negative, the second and third issues arise. The first of these is whether, notwithstanding the delivery of the guarantee dated 1 December 2020, the first respondent was (is) entitled to cancel because the guarantee does not comply with the terms of the agreement. The second is the effect of the delivery of a notice of breach in the first respondent's counter-application.

The alleged cancellation of the agreement of sale

[34] It is not in dispute that the applicant did not furnish a letter of guarantee as security for payment of the purchase price within the time stipulated in clause 1.2 of the agreement. Clause 12 of the agreement deals with default. It provides that:

> "If after acceptance hereof either party fails to fulfil any of the conditions hereof, and remains in default for a period of 7 (seven) days after written notice has been given by the other party or his agents, then the aggrieved party shall be entitled without prejudice to any other right of law, to claim performance or cancellation of this contract and damages. An amount not exceeding 10% (ten percent) of the PURCHASE PRICE paid by the purchaser may be forfeited as a pre-estimate of damages should this contract be cancelled as a result of the purchaser's breach."

[35] The first respondent states that the failure by the applicant to deliver a guarantee for payment of the purchase price within the stipulated period, resulted in it being placed in *mora*. The notice of breach in terms of clause 12 was dispatched by

Slabbert Attorneys on her behalf on 30 March 2020. Upon failure to remedy the breach, the first respondent was entitled to cancel the agreement. She asserts that the agreement was in fact cancelled.

[36] It is alleged that her husband cancelled the agreement and requested that the original title deed be returned. No detail of the cancellation is provided and no correspondence reflecting the cancellation is furnished. The reason for this is the assertion that Mr Herholdt's email sever has lost much of its content and the particular email is irrecoverable. This averment is confirmed by Mr Herholdt.

[37] In support of the cancellation, reliance is placed upon correspondence which passed between Mr Herholdt and Glyn Marais regarding the return of the title deed and the subsequent attempts to proceed with the sale.

[38] In relation to the title deed it is common cause that Mr Herholdt wrote to Ms Nundlal, a conveyancing secretary at Glyn Marais on 17 September 2020. The email states that.

> "It is now a month since my previous correspondence with you re the above.
>
> And still we have not received the original title deed of Serene back from you.

[39] It is not in dispute that the original title deed had in fact been couriered to Mr Herholdt on 10 September 2020 under cover of a letter dated 8 September. According to the applicant this was sent back in error.

[40] It was argued that the reference by Mr Herholdt to his earlier correspondence, supports the conclusion that he had, in such earlier correspondence, cancelled the agreement. The cancellation of the agreement precipitated the returning of the title deed. Reliance was placed on the correspondence between Glyn Marais and Slabbert Attorneys in October 2020 in which reference was made to the applicant's offer and by Slabbert Attorneys, that they had closed their file. This, it was suggested, supports a finding that the agreement had been cancelled. It was further argued that inasmuch as there is a factual dispute regarding cancellation, the dispute must be determined in favour of the first respondent by reason of the rule in ***Plascon-Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd***.[5]

[41] The difficulty with the latter argument is that there is much about the alleged cancellation of the agreement, a central feature of the first respondent's case, that is not explained. Mr Herholdt does not state when he cancelled the agreement; to whom the notice of cancellation was addressed; nor why he undertook this task when Slabbert Attorneys were instructed to deal with the alleged breach. If the first respondent's inferential argument is to be accepted the cancellation occurred in or about August 2020 possibly in July 2020. Yet, there is no explanation of what transpired in the period after May 2020.

[42] According to the correspondence from Slabbert Attorneys, they were still attempting to establish, during May 2020, whether the applicant was going to remedy its breach. The correspondence on 15 May 2020 indicated that is the light of the continuing breach. Slabbert Attorneys would "advise our client the way forward to

[5] [1984] (3) SA 623 (A)

exercise his rights". Nothing is said about whether such advice was furnished nor what the first respondent elected to do. In the light of this, it is surprising that the cancellation did not then occur and that Slabbert Attorneys apparently played no role at all in giving notice of the cancellation. Instead, the cancellation is said to have occurred by way of an email written by Mr Herholdt on an undisclosed date.

[43] This alleged cancellation must, however, be considered in the light of facts alleged by the applicant in relation thereto. Not only does the applicant deny that any notice of cancellation was given to it, each of the professional staff at Glyn Marais deny having received any notice of cancellation by email from Mr Herholdt. These allegations cannot be disputed by the first respondent. They form part of the factual matrix to be considered.

[44] In ***Wightman t/a J W Construction v Headfour (Pty) Ltd and Another***[6] it was said:

> "[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge

[6] 2008 (2) SA 371 (SCA); [2008] 2 All SA 512 (SCA) at par [13].

of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[45] There are, as I have indicated, a number of circumstances pertaining to the cancellation of the agreement which go beyond the inability to produce a written record thereof. These facts fall within the knowledge of the first respondent, Mr Herholdt and their attorney. They might well have allowed the court to come to a different conclusion in relation to this crucial issue in the case. They were not addressed.

[46] Mr Marais, for the first respondent, argued that the only inference which can be drawn from the available correspondence including that in October and December 2020 is that the agreement had in fact been cancelled as alleged by the first respondent. In cannot agree, even assuming that is a proper approach to adopt. One example suffices. As is recorded earlier in the judgment, the response to the delivery of the Investec guarantee of 1 December 2020 made no reference to the cancellation. All it said was that the guarantee was a year late and that the first respondent no longer wishes to sell. One might have expected some clear and unequivocal statement then that the agreement has already been cancelled because of the applicant's breach.

[47] In order for cancellation of the contract to be effective, it is necessary that a notice of cancellation be delivered to the recalcitrant party. The fact that the first respondent may have been entitled to cancel because of the applicant's default does not assist her. She was required to exercise an election and to communicate it to the applicant. In this regard, she bore an onus. The available evidence does not discharge such onus.

The alternative pleas

[48] The first respondent's reliance upon the applicant's continuing failure to remedy its breach as amounting to a repudiation of the agreement does not assist. If it is accepted, for the present, that the failure to deliver the letter of guarantee timeously and the failure to do so after the notice of breach amounts to repudiation on the part of the applicant, the first respondent must have exercised her election to cancel and

have communicated it to the applicant.[7] This the applicant did not do. The further alternative defence poses still further difficulties for the first respondent's reliance upon an alleged cancellation.

[49] As indicated earlier in the judgment the first respondent contends that the bank guarantee furnished on 1 December 2020 (the first guarantee) was not "irrevocable in its terms". Accordingly, so it was alleged, it did not cure the breach and the applicant remained in *mora*. For this reason, she was, despite its delivery, entitled to cancel. She accordingly prayed for cancellation of the agreement.

[50] However, she went further in her counter-application to give notice of breach based upon the fact that the guarantee was not "irrevocable in its terms" and called upon the applicant to remedy such breach.

[51] The assertion that the delivery of the first guarantee did not remedy the breach because of its terms, is not sustainable. Clause 1.2.1 of the agreement of sale required the delivery of a guarantee "irrevocably expressed to be immediately payable to the seller on written notification of the purchaser's conveyance of registration of transfer." The notice of breach required that the applicant deliver "acceptable guarantees" or make payment of the purchase price into a Trust account. The delivery of the first guarantee cured the breach the applicant was then required to remedy, namely that it had not presented a letter of guarantee within the stipulated time period. The document dated 1 December 2020 which was presented to cure the applicant's breach

[7] Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A) at 642G; Ponisamy and Another v Versailles Estates (Pty) Ltd 1973 (1) SA 372 (A) at 387B.

is, as a matter of fact, a letter of guarantee issued by a financial institution to secure payment of the purchase price upon registration of transfer. To the extent that the guarantee did not comply with clause 1.2.1, either because it was not irrevocably expressed or was not in a form acceptable to the first respondent, may constitute a further breach. The first respondent is not entitled to simply ignore it. She would have to give notice of the further breach before she could elect to cancel on the basis that the guarantee does not comply with the requirements stipulated in clause 1.2 of the agreement.

[52] This is, of course, what she elected to do in her counter-application. However, in doing so, she pleaded and purported to rely upon an election which is in conflict with an alleged prior cancellation of the agreement.[8] Such conduct strengthens the conclusion, already reached, that the agreement was not cancelled.

[53] If it is accepted that the agreement was not cancelled, as it must be, then the first respondent could rely upon the further breach arising from the terms of the first guarantee. In other words, the first respondent could assert that by reason of non-compliance with clause 1.2.1 the first guarantee is not in terms acceptable to her. Once she did so, the applicant was equally entitled to remedy the alleged breach. If remedied within the stipulated notice period, the first respondent's entitlement to elect to cancel does not arise.

[54] That is the effect of the delivery of the second guarantee which is framed in terms that expressly render it "irrevocable in its terms". The delivery of the second

[8] Salwedle v Roath 1956 (2) SA 160 (E) at 163D.

guarantee cured the further alleged breach. In these circumstances, the first respondent is not entitled to cancel the agreement. Her counter-application seeking a declarator of cancellation, alternatively an order cancelling the agreement, must therefore fail.

[55] These aspects, latterly addressed, relate to the alternative defences raised by the first respondent. As indicated, the first respondent's primary defence, which was premised upon a prior cancellation, is not established on the evidence. It follows therefore that the applicant is entitled to an order compelling transfer of the property.

[56] What remains is the question of costs. The costs should, in accordance with the usual rule, follow the result. It was, however, argued that the costs ought to be awarded on a punitive scale. In support of this it was submitted that the first respondent's conduct of the litigation warranted such order. The application to strike out was, it was submitted, vexatious and an abuse of the process. It was calculated, without any basis, to strike out the applicant's case in its entirety. Given the nature of the application, the applicant was put to unnecessary expense in prosecuting its case.

[57] There is, in relation to the application to strike out, considerable force in the argument. The application was founded upon entirely fallacious reasoning and was, without substance and merit. In my view, a punitive costs order in relation to the application to strike out is warranted. That, however, does not mean that a punitive costs order should be made in relation to the case as a whole. A punitive costs order reflects disapproval of the conduct of the litigation or an aspect of the litigation. It is

not a sanction for lack of success. The usual costs order is designed to meet such circumstances.

[58] In the result, I make the following order:

1. The first respondent's application to strike out is dismissed with costs, such costs to be paid on the scale as between attorney and client.
2. The first respondent's counter-application is dismissed with costs.
3. The first respondent is compelled to take all steps necessary to pass transfer of ownership of Erf 223, Newton Park, Province of the Eastern Cape, and held by the first respondent under Deed of Transfer T46801/2016CTN (the "property") to the applicant including obtaining, inter alia:

    3.1 municipal rates clearance certificates issued by the local authority in terms of section 118(1) of the Local Government: Municipal Systems Act, No. 32 of 2000; and/or

    3.2 valid electrical compliance certificates in respect of each of the 7 (seven) dwelling units situated on the property, in accordance with the provisions of the Electrical Installations regulations, as published in Government Notice R242, government Gazette 31975 of 6 March 2009, under the Occupation Health and Safety Act, No. 85 of 1993.

4. The first respondent shall, as a step contemplated in prayer 3 above, forthwith appoint a conveyancing attorney of her choosing to attend to the preparation of all documents necessary to effect the aforesaid transfer and

shall advise the applicant of such appointment within 5 (five) days of this order.

5. Should the first respondent fail to comply with prayer 2 above timeously, the applicant shall appoint Glyn Marais Incorporated to prepare all documents necessary to pass transfer of ownership of the property to the applicant.
6. The first respondent is directed to sign all documents necessary to effect the transfer of the property prepared by the conveyancing attorney appointed by herself, or Glyn Marais Incorporated as the case may be, within 14 (fourteen) days of this order.
7. That, if the first respondent fails to comply with prayer 6 timeously, then the Sheriff of the Court is authorised to take such steps and to sign all such documents as are necessary on the first respondent's behalf, in order to effect transfer of ownership of the property to the applicant.
8. The first respondent pay the costs of this application.

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G.G GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

Obo the Applicant	:	*Adv J J Nepgen*
Instructed by	:	*Glyn Marais Incorporated c/o Joubert Galpin & Searle, 173 Cape Road, Mill Park, Gqeberha*
Obo the First Respondent	:	*Adv P.T Marais*
Instructed by	:	*DSSG Attorneys & Conveyancers c/o Morne Struwig, 11 Carstens Street, Kamma Ridge, Gqeberha*
Heard:	:	*18 November 2021*
Delivered	:	*24 February 2022*