

THE LAW OF PURCHASE AND SALE

DJ LÖTZ*

LEGISLATION

There was no legislation affecting this branch of the law during 2012.

CASE LAW

PURCHASE AND SALE

Right of pre-emption

The issue argued in *Pick 'n Pay Retailers (Pty) Ltd and Others v Eayrs and Others* NNO 2012 (1) SA 238 (SCA) was whether an extended right of pre-emption should be preferred over a personal right acquired in terms of a deed of sale of shares concluded before an amendment granting the extended right of pre-emption. In terms of a franchise agreement concluded with Holdstock Family Trust during 2004, Pick 'n Pay Retailers (the appellant) was entitled to a right of pre-emption to purchase Holdstock Family Trust's shares within 30 days after receipt of a written offer from the franchisee. On 22 April 2010, Holdstock Family Trust sold 50 per cent of its shares to Daku Trust, disregarding Pick 'n Pay's right of pre-emption. After a legal spat between the parties over applications for specific performance and the perfection of a notarial bond, respectively by Daku Trust and Pick 'n Pay, against Holdstock, on 7 June 2010, Holdstock (pursuant to the right of pre-emption) offered to sell 50 per cent of its shares to Pick 'n Pay. To ensure that the exercise of the right of pre-emption coincided with the correct time frame, the period within which the right could be exercised was extended beyond 6 July 2010, when it was due to expire under the initial franchise agreement. This extension was effected by an amendment to the initial franchise agreement dated 5 July 2010. Pick 'n Pay sought to enforce its contractual entitlement to an extended period in which to consider exercising its right of pre-emption, while Daku

* B Jur LLB (Pret) LLM (Wits) LLD (Pret). Attorney and Conveyancer of the High Court of South Africa and Professor of Mercantile Law at the University of Pretoria.

Trust pursued its contractual right to specific performance for delivery of the shares it had purchased.

The trial court held that the *spatium deliberandi* granted to Pick 'n Pay in which to exercise its right of pre-emption in terms of the 2004 franchise agreement was 30 days (paras [45]–[46], quoted at para [16] of the judgment of the Supreme Court of Appeal). The entitlement to exercise the right of pre-emption beyond 30 days vested on 5 July 2010 when the amendment to the initial franchise agreement was concluded (*ibid*). In contrast, the personal right of Daku Trust to claim the shares vested on 22 April 2010 when the deed of sale was signed with Holdstock (para [47], quoted at para [16] of the judgment of the Supreme Court of Appeal). Therefore, by virtue of application of the maxim *qui prior est tempore potior est iure*, the rights Daku Trust acquired on 22 April 2010 in terms of the deed of sale were of greater force than those Pick 'n Pay obtained on 5 July 2010 in terms of the amendment to the initial franchise agreement (*ibid*).

On appeal to the Supreme Court of Appeal, Malan JA held that Pick 'n Pay's right of pre-emption was granted by the initial franchise agreement concluded during 2004 and 'triggered' by the 7 June 2010 offer by Holdstock to sell 50 per cent of its shares to Pick 'n Pay (para [15]). He held that the gist of the problem was whether a new right of pre-emption had come about as a result of the amendment to the initial franchise agreement on 5 July 2010 (*ibid*).

After also referring to *Van der Merwe v Scheepers and Others and the Coligny Village Council* 1946 TPD 147; *Botes v Botes en 'n Ander* 1964 (1) SA 623 (O); *Barnard v Thelander* 1977 (3) SA 932 (C); *Krauze v Van Wyk en Andere* 1986 (1) SA 158 (A); *Croatia Meat CC v Millennium Properties (Pty) Ltd (Sofokleous Intervening)*; *Sofokleous v Millennium Properties (Pty) Ltd and Another* 1998 (4) SA 980 (W); and *Ingledeu v Theodosiou* 2006 (5) SA 462 (W), Malan JA quoted RH Christie & V McFarlane *The Law of Contract in South Africa* 5 ed (2006) 525 with approval (para [17]). These authors capture the essence of the maxim *qui prior est tempore potior est iure* as follows

A satisfactory synthesis of these principles was achieved by Broome JP in *Le Roux v Odendaal* 1954 (4) SA 432 (N), and it can now be taken as settled law that the possessor of the earlier right is entitled to specific performance unless the other can show a balance of equities in his favour, and that no distinction is drawn between rights arising from an option or right of pre-emption and rights arising from a sale.

Malan JA pointed out that this maxim has often been criticised for two reasons: it lacks a proper theoretical foundation, and it does not apply to competing personal rights (para [18]; Reinhard Zimmermann 'Good faith and equity' in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross Civil Law and Common Law in South Africa* (1996) 217; GF Lubbe 'Law of Purchase and Sale' 1986 *Annual Survey* 141). As neither the equities nor the applicability of the maxim was debated in the present matter, the Supreme Court of Appeal was not in a position to assess this criticism (*ibid*).

It should be borne in mind that the aim of a right of pre-emption is to establish a restriction on disposal which is capable of becoming a limited real right. For this reason, the legal foundation of a right of pre-emption lies not in an obligatory agreement as such, but is, by operation of law, settled in a real agreement. The deed of sale of shares between Holdstock Family Trust and Daku Trust, in contrast, does not have this juristic characteristic. It is submitted that this argument — and not necessarily the maxim *qui prior est tempore potior est iure* — may serve as a theoretical foundation for affording preference to the right of pre-emption over the deed of sale of shares in the present matter .

Malan JA held that the right of pre-emption had not been exercised by Pick 'n Pay in accordance with the franchise agreement concluded during 2004 (para [19]). Instead, an addendum was concluded on 5 July 2010 extending the period in which the offer made by Holdstock to Pick 'n Pay on 7 June 2010 pursuant to its right of pre-emption, could be accepted (*ibid*).

He rejected Pick 'n Pay's submission that no new right of pre-emption or new contractual rights had been created by the addendum of 5 July 2010, and that the rights flowing from the 2004 franchise agreement continued to exist (para [21]). He held that the addendum of 5 July 2010 resulted in the variation of the provision specifying the period within which the right of pre-emption could be exercised (*ibid*). Consequently, the enforcement of the right of pre-emption was dependent on the addendum of 5 July 2010 which created a new agreement (*ibid*). Had the addendum not been concluded, the right of pre-emption would have lapsed after 30 days (on 7 July 2010), regardless of whether the addendum had been concluded before or after the said 30 days (*ibid*). As the addendum was concluded after the sale of shares to Daku Trust on 22 April 2010, the personal right Daku Trust acquired in terms of the deed of sale of the shares should be

preferred on the strict application of *qui prior est tempore potior est iure*. This right became unassailable in so far as Pick 'n Pay did not exercise its right of pre-emption in accordance with the original 2004 franchise agreement (para [22]).

Formalities

Compliance with section 2(1) of the Alienation of Land Act 68 of 1981

In *Van Aardt v Galway* 2012 (2) SA 312 (SCA), the description of the *res vendita* was the bone of contention. On 31 August 2001 Van Aardt (the appellant) signed a lease agreement with Galway (the respondent) in terms of which the farm Midhurst and a herd of Jersey cows were leased for a period of five years. Clause 14 of the lease agreement contained an option to purchase 'the farm property' which reads

The Lessor extends to the Lessee an option to purchase the farm property for the sum of R700 000 in which regard the Lessee shall exercise the option not later than three months before the termination of the Lease and not before a date six months before the termination of the Lease by delivering to the Lessor a signed agreement of sale in the terms aforesaid.

On 3 March 2005 Van Aardt purported to exercise this option, which right was disputed by Galway on the following grounds: First, clause 14 did not grant an enforceable option as the *res vendita* was inadequately described in the clause, so rendering it void for vagueness. Secondly, the requirement that the option should be exercised by the delivery of a signed deed of sale, indicates that the parties contemplated that the exercise of the option would be accompanied by further negotiations, culminating in a deed of sale on such envisaged terms, with the result that the act of acceptance would not on its own result in a binding agreement. Thirdly, the option referred only to the farm property, while the exercise of the option apparently included the dairy and its equipment. Fourthly, the purchase price was incorrect as it did not stipulate whether Value-Added Tax ('VAT') was excluded or included. Fifthly, as Van Aardt invited Galway to propose any reasonable amendments to the deed of sale accompanying the cover letter in which the option was exercised, no final acceptance of the option contained in clause 14 was procured. For these reasons it was argued that the option described in clause 14 did not comply with section 2(1) of the Alienation of Land Act 68 of 1981.

Wallis JA stated that the starting point in this matter was the property description in clause 14 (para [11]). He held that although clause 14 did not define 'the farm property', clause 1 of the lease agreement clearly indicated that Van Aardt was hiring 'the farm property Midhurst in the district Grahamstown' (ibid). Referring to *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A), Wallis JA endorsed the well-known principle that, had it been necessary, evidence identifying the farm could have been led to identify the *res vendita* so as to correspond to the idea expressed in the words of the written contract (ibid). Given that it was common cause between the parties that the farm Midhurst was the farm owned by Galway, the exact description of which was set out in his transfer deed, evidence to identify the *res vendita* was unnecessary (ibid). Mainly for this reason, Wallis JA concluded that the *res vendita* was adequately described and therefore complied with section 2(1) (para [14]).

Dealing with the procedure followed in exercising the option, Wallis JA held that it would be 'extremely unbusinesslike' for the parties to agree on an option and then specify a mode of exercising it that was incapable of bringing about a binding agreement, as was suggested by Galway (paras [15]–[16]). He referred to *Du Plessis NO and Another v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) in which an analogous argument, founded on a similar clause, was rejected (para [16]; see further 2009 *Annual Survey* 988–92; DJ Lötze & SC Gerber 'Alienation of Land Act 68 of 1981: The glitches continue' (2012) 75 *THRHR* 544). The basis for this rejection was appropriately articulated in *Dold v Bester* 1984 (1) SA 365 (D), where an agreement written on a page torn from a notebook, provided for 'formal documents to be drawn by Mrs J Millington Estates with no commission'. The submission, similar to the one in the present matter, that the parties were compelled to enter into a future agreement, was rejected by Page J in the following terms

In my view the premise upon which this argument is based is faulty. The agreement embodied in the handwritten document is not to enter into a new contract of sale, but to execute a formal document intended to replace the handwritten document as the memorial of the transaction. Such formal document would embody no more than the terms, expressed or implied, already agreed upon by the parties in the handwritten document (*Van Aardt v Galway* para [17], quoting *Dold v Bester* at 370H).

Wallis JA held that the above illustration accurately expressed the intention of the parties in the present case (para [17]). This

intention was that, for reasons of convenience, a deed of sale that reflected the terms of the sale (express or implied) as echoed in the option contained in clause 14, would be formulated (ibid). Wallis JA therefore rejected Galway's submission in this regard.

As regards the VAT and purchase price, Wallis JA held that the solution depended on whether the inclusion or exclusion of VAT could be classified as an implied or tacit term (para [23]). He confirmed that an implied term is one implied by law, and a tacit term is one derived from the actual or implied intention of the parties to the contract (ibid). Section 64(1) of the Value-Added Tax Act 89 of 1991, contains a presumption that any purchase price is deemed to include VAT even if the seller has not included tax in the purchase price. As a result of this provision, Wallis JA held, it was impossible to imply the suggested term as a matter of law; therefore, there was no room for an implied term in the present situation (ibid). He also found on the facts and in accordance with the hypothetical bystander test, that no tacit term regarding the VAT issue would arise from the actual or imputed intention of the parties (para [24]). Following *Strydom v Duvenhage NO en 'n Ander* 1998 (4) SA 1037 (SCA) where similar circumstances were present, Wallis JA concluded that it was also unnecessary to impute such tacit term in the present case in order to lend business efficacy to the contract (para [25]). (The officious bystander and business efficacy tests originated in English law, where the expression 'implied term' is used to encompass both the 'implied' and the 'tacit' term provided for by South African law: see Guenter Treitel *The Law of Contract* 11 ed (2003) 201.)

As regards whether the 'farm property' as stipulated in clause 14 included the dairy and its equipment, Wallis JA, after analysing the clause and the deed of sale, held that the latter did not seek to include items of movable equipment not referred to in the option as specified in clause 14 (para [29]). He further held that the issue of whether the dairy equipment had acceded to the 'farm property' was irrelevant for purposes of the present hearing, and ruled that the deed of sale related only to the immovable property constituting the 'farm property' (ibid).

He also held that the Van Aardt's invitation in the covering letter to propose reasonable amendments to the deed of sale was no more than a polite invitation in case Galway required minor adjustments to the deed (para [30]).

The Supreme Court of Appeal consequently concluded that the exercise of the option, as reflected in the deed of sale, was

exactly in step with the terms of the option and did not amount to a counteroffer (para [30]). As a result, a valid option and a valid exercise of it had been produced and had caused a binding agreement of purchase and sale to come into existence (*ibid*).

However, it is generally still a grey area whether an option to purchase, and for that matter, a right of pre-emption, should comply with section 2(1). In *Hirschowitz v Moolman* 1985 (3) SA 739 (A), a lease agreement and prospecting contact respectively contained a conflicting right of pre-emption (which did not comply with s 2(1)) and an option to purchase (which did comply with s 2(1)). The court of first instance (the Witwatersrand Local Division) held that a right of pre-emption must comply with the statutory formalities in order to be valid. The court of first appeal (the Transvaal Provincial Division), by contrast, held that the statutory formalities do not apply to a right of pre-emption. The then Appellate Division pointed out that both an option and a right of pre-emption are *pacta de contrahendo*, and confirmed the basic principle that, at common law, the *pactum de contrahendo* must satisfy the requirements set for the proposed contract. For this reason, the Appellate Division held that as a contract for the sale of land must comply with section 2(1), an option or a right of pre-emption concerning land must follow suit, otherwise a contract for the sale of land could effectively be constituted by the verbal exercise of an option or right of pre-emption, which would frustrate the legislature's intention in respect of formalities. In *Krauze v Van Wyk* (above), the trial court also held that a right of pre-emption must satisfy all the requirements for the validity of a contract of sale. Therefore, a right of pre-emption in respect of land is subject to the provisions of section 2(1). However, the Appellate Division stated that it did not necessarily endorse this view, and that the question of whether an option and a right of pre-emption must comply with these formalities, remained wide open.

Then again, the problem with a right of pre-emption is that all the terms of the proposed contract of sale are often not fixed or determinable when it is granted. This makes it practically impossible to comply with the statutory formalities. An option, by contrast, consists of two offers: (a) the substantive offer; and (b) the offer to keep the substantive offer open for a certain period for exclusive acceptance by the option holder. Acceptance of the first offer creates a contract of sale, and acceptance of the second initiates an option contract. *Hirschowitz* (above) implies

that both the substantive offer and the offer to keep the substantive offer open for a certain period must comply with the statutory formalities. However, according to ADJ van Rensburg ('Formaliteitsvoorskrifte, voorkoopsregte en opsies' (1986) 49 *THRHR* 208), only the substantive offer — not the offer and acceptance to constitute the option — must comply with the statutory formalities. According to Van Rensburg, an option contract can therefore be concluded informally. He is also of the opinion that *Hirschowitz* did not alter the position in respect of option contracts, and that these can still be concluded informally. Van Rensburg offers the following reasons for his opinion: (a) the remarks made in *Hirschowitz* in respect of the *pacta de contrahendo* are *obiter* as far as options are concerned as the case dealt primarily with a right of pre-emption; (b) there is no direct authority for the proposition that an option contract is subject to statutory formalities; (c) *Hirschowitz* emphasises that the substantive offer must comply with such formalities; (d) at common law, no formalities are required for option contracts, and legislation which deviates from the common law should be interpreted restrictively; (e) the fact that an option contract can come about informally does not detract from the legislature's aims regarding formalities; and (f) the authorities relied on in *Hirschowitz* are not founded in common law. In summary, Van Rensburg's view is that a right of pre-emption must comply with the statutory formalities, while an option contract can arise informally, provided that the substantive offer complies with the formalities. Unfortunately, there was no opportunity to tackle these concerns in *Van Aardt*.

Non-compliance with section 2(1) of the Alienation of Land Act was yet again applied as a weapon to attack the validity of a deed of alienation in *Booyesen and Others v Booyesen and Others* 2012 (2) SA 38 (GSJ). The applicants' parents, the late Dora and Joseph Booyesen, were married in community of property. They jointly owned a house, among other things. In terms of their joint will, the surviving spouse was the sole heir of their joint estate, including the house. Mrs Booyesen died in April 1998 and Mr Booyesen became the sole heir of the joint estate. Mr Booyesen sold the house to one of his sons and his daughter-in-law on 8 October 2007, before Mrs Booyesen's estate had been finalised. The deed of alienation and an addendum to the deed were signed by Mr Booyesen, his son and his daughter-in-law. Mr Booyesen died on 8 May 2008, before transfer of the house could be completed. The applicants challenged the validity of the deed

of alienation on the ground that as Mrs Booyesen's estate had not been finalised when the deed of alienation was concluded, their father was a joint, and not the sole owner of the house; consequently, he was not entitled to alienate it as sole proprietor. In addition, the applicants argued that the deed of alienation disregarded the provisions of section 2(1), inter alia, in so far as the seller was not correctly described and the documentation not properly signed.

According to Moshidi J, the crux of the dispute was whether Mr Booyesen could legally sell the house; whether Mrs Booyesen's executor should have authorised the sale; and whether the deed of alienation was subject to the provisions of section 2(1) (para [6]).

Referring to F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 673; MM Corbett, Gys Hofmeyr & Ellison Kahn *The Law of Succession in South African Law* 2 ed (2002) 14; R King *Law and Estate Planning* (2010); D Meyerowitz *Administration of Estates* (2007); and *Greenberg and Others v Estate Greenberg* 1955 (3) SA 361 (A), Moshidi J held that as Mrs Booyesen's estate had not yet been finalised, Mr Booyesen had not yet acquired ownership of the whole of the joint estate and he consequently did not have legal capacity to sell the house (paras [10]–[12]). This conclusion was founded on the familiar principles that an heir does not acquire ownership of the testator's assets upon the death of the testator, but merely has a vested claim against the executor. This claim is enforceable only once the liquidation and distribution account has been confirmed (para [11]). An heir, therefore, merely has a *ius in personam ad rem acquirendam* against the executor, and does not acquire ownership by virtue of the will (ibid). Furthermore, the capacity to deal with the deceased's assets vests in the executor and not the heirs (ibid). For these reasons, the deed of alienation was found to be *void ab initio* (para [12]).

Turning to compliance with section 2(1), Moshidi J held that as the capacity to conclude the deed of alienation vested in the executor, Mr Booyesen was not entitled to sign it, unless he had done so as the executor's agent (para [13]). It is important to note that if an agent's capacity cannot be determined *ex facie* the deed of alienation, extrinsic evidence may be led to show that the agreement was in fact entered into in the name of the principal (*Cook v Aldred* 1909 TS 150; *Van der Merwe v Kenkes (Edms) Bpk* 1983 (3) SA 909 (T); *Ten Brink NO v Motala* 2001 (1)

SA 1011 (D)). The reason for allowing extrinsic evidence, is that it does not alter the agreement.

In *Tabethe and Others v Mtetwa NO and Others* 1978 (1) SA 80 (D), it was held that in order to avoid invalidity in terms of section 1 of the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969 (the forerunner to s 2(1)), a deed of alienation involving land in a deceased estate must be signed by the executor or an agent acting on behalf of the executor, and be authorised by him or her in terms of a written authority (ibid). Moreover, section 2(1) also requires that the *essentialia* of the sale, including the identity of the parties, must appear clearly from the deed of alienation (ibid). If these requirements have not been satisfied and evidence is required to establish the identity of the seller, the deed of alienation will be void (ibid). The fact that neither of these requirements had been met in the present case, also rendered the deed of alienation void. Moshidi J also referred to *Mills NO v Hoosen* 2010 (2) SA 316 (W) where it was confirmed that a deceased estate has no legal *persona*, and that the *dominium* in its assets vests in the executor, who alone has the power to deal with it (para [14]). Consequently, Moshidi J held that as the executor was not a party to the deed of alienation, it was also void for non-compliance with section 2(1) and the Administration of Estates Act 66 of 1965 (ibid). The court further held that a deed of alienation cannot be rectified by attaching the signature of the executor *ex post facto* (para [15]).

It should also be borne in mind that transfer of the house could in any event only be achieved if the Master of the High Court had no objection to the sale (s 42(2) of the Administration of Estates Act). However, this point was not raised in the present matter.

Donation of land and formalities

Scholtz v Scholtz 2012 (1) SA 382 (WCC), 2012 (5) SA 230 (SCA) deals with the formal requirements set in section 5 of the General Law Amendment Act 50 of 1956 and section 2(1) of the Alienation of Land Act. Section 5 of the General Law Amendment Act stipulates that no donation concluded after 22 June 1956 shall be invalid merely because it is not registered or notarially executed, provided that it is embodied in a written document signed, in the presence of two witnesses, by the donor or his or her agent acting in terms of a written authority. This Act only applies to so-called real donations, that is, donations made from pure generosity and unselfish goodwill (*De Jager v Grunder*

1964 (1) SA 446 (A)). This type of donation is a unilateral contract concluded with the intention of impoverishing the donor and enriching the beneficiary. As soon as a counter-performance is required from the beneficiary, it is not a true donation (*The Master v Thompson's Estate* [1961] 2 All SA 174 (FC); *Ovenstone v Secretary for Inland Revenue* [1980] 2 All SA 25 (A) 37; *Commissioner, South African Revenue Services v Wouldge* 2002 (1) SA 68 (SCA)). Furthermore, the donation still needs to be executed at the time the agreement was concluded (*Albert v Pearse and the Master* 1973 (1) SA 827 (N); *Nezar v Die Meester* 1982 (2) SA 430 (T); *Savvides v Savvides* 1986 (2) SA 325 (T); *Jordaan v De Villiers* 1991 (4) SA 396 (C); *Stander v Commissioner for Inland Revenue* 1997 (3) SA 617 (C); *Commissioner, South African Revenue Services v Marx* 2006 (4) SA 195 (C); *Janse van Rensburg v Koekemoer* 2011 (1) SA 118 (GSJ)). These formalities apply only to donations *inter vivos*. Donations *mortis causa*, by contrast, must satisfy the validity requirements for a will (*Ex parte Oosthuizen* 1964 (1) SA 174 (O)). Nevertheless, authority on the nature and consequences of donations is limited, and PR Owens's contribution in WA Joubert (founding ed) *The Law of South Africa* vol 8 sv 'Donations' (2005) ¶ 300ff (updated by H Daniels) is the source most often referenced in the courts.

Section 2(1) of the Alienation of Land Act similarly provides that no alienation of land shall be of any force or effect unless it is contained in a written deed of alienation, signed by the parties or their agents acting on their written authority. However, unlike in the case of donations, this written authority need not be attested by two witnesses. It is important to record that, in terms of the Alienation of Land Act, 'alienation' includes the 'donation' of land (s 1).

The formalities demand that all essential and material terms be contained in the written deed of alienation in sufficient detail to allow them to be identified and determined without extrinsic evidence (*Magwaza v Heenan* 1979 (2) SA 1019 (A); *Johnston v Leal* 1980 (3) SA 927 (A); *Herselman v Orpen* 1989 (4) SA 100 (SEC); *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A); *Jones v Wykland Properties* 1998 (2) SA 355 (C); *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC* 2002 (6) SA 202 (C); and *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 (1) SA 654 (SCA)).

While decisions on section 5 are relatively rare, reported authority on section 2(1) is commonplace (see, for example,

Engelbrecht v Merry Hill (Pty) Ltd 2006 (3) SA 238 (EC); *Just Names Properties 11 CC v Fourie* 2007 (3) SA 1 (W); *Manna v Lotter* [2007] 3 All SA 50 (C); *Reivelo Leppa Trust v Kritzinger* [2007] 4 All SA 794 (SEC); *Thorpe v Trittenwein* 2007 (2) SA 172 (SCA); *Just Names Properties 11 CC v Fourie* 2008 (1) SA 343 (SCA); *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* (above); *Waterval Joint Venture Property Co (Pty) Ltd v City of Johannesburg Metropolitan Municipality* [2008] 2 All SA 700 (W); *Balduzzi v Rajah* [2008] 4 All SA 183 (W); *Fraser v Viljoen* 2008 (4) SA 106 (SCA); *Fairoaks Investment Holdings (Pty) Ltd v Olivier* 2008 (4) SA 302 (SCA); *Lancino Financial Investments (Pty) Ltd v Bennet* [2008] 4 All SA 220 (SCA); and *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd, Pine Villa Estates (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 (4) SA 302 (SCA)). Curiously, in the decision under discussion, the court referred to only one decision — *Stalwo*.

In *Scholtz v Scholtz*, the parties, while still married, entered into a written agreement during November 2007. In terms of the agreement, Mr Scholtz (the defendant) donated an undivided half share of his property, known as Stand 1809, Bakkershoogte, to the plaintiff. In an action by Mrs Scholtz (the plaintiff) for specific performance, Mr Scholtz raised the defence that the donated property was mortgaged in favour of Nedbank Limited, and that the donation agreement was void in that it did not comply with section 5 as it failed to indicate how the vested rights of the mortgagee would be dealt with.

The legal question for the court was whether, in terms of a donation *stante matrimonio*, property encumbered by a mortgage bond may be legally donated, even though no reference is made to the mortgage bond as a 'provision' of the donation, as required by section 5.

In the court below, Le Grange J primarily relied on *Savvides* (above) where a similar question was considered, that is, whether land subject to a mortgage can be donated without reference to such encumbrance in the deed of donation. In *Savvides*, Myburgh AJ referred to the phrase 'unless the terms thereof are embodied in a written document' (s 5 of the General Law Amendment Act), and held that the donation assumed that the donor was the absolute owner of the land, which she was not. Referring to *Owens* (above ¶ 308) where it is argued that not only ownership, but also limited real rights in property, such as a mortgage or a usufruct, may be donated, Myburgh AJ confirmed

that a donor is entitled to donate limited real rights in property. Since the donated land was subject to the limited real right of a mortgagee, *Savvides* was not its absolute owner. Consequently, because the donation agreement did not refer to the mortgage and all the 'terms' were not in writing, the donation agreement was void.

It should be noted that Owens does not refer to authority and, in fact, what he argues does not relate to formalities concerning the validity of a donation at all. Therefore, it is difficult to understand how the judge in *Savvides* could have applied Owens's view as justification for his decision. Unfortunately, the reasoning in *Savvides* was accepted by Le Grange J in *Scholtz* (above) as 'sound' in order to substantiate his conclusion that all the terms of the donation were not in writing 'as required by law' (para [21]). As the above statements in *Savvides* did not deal with the basic principles of a donation and were merely made in passing, they should not have been followed by Le Grange J in *Scholtz*. However, on appeal, Brand JA noted

[T]he facts in *Savvides* were not entirely on all fours with the facts of this case. Yet I believe they were similar enough to render the two cases indistinguishable on their facts (para [10]).

Furthermore, Owens's examples of a donation of limited real rights (mortgage and usufruct) are inappropriate, as, in practice, mortgages are usually not 'donated' but 'ceded' as security (*Lief v Dettmann* 1964 (2) SA 252 (A)), and, being a personal servitude, a usufruct is not capable of being donated (*Durban City Council v Woodhaven* 1987 (3) SA 555 (A); *Armstrong v Bhamjee* 1991 (3) SA 195 (A); *Resnekov v Cohen* 2012 (1) SA 314 (WCC); s 66 of the Deeds Registries Act 47 of 1937). A usufruct can only be notarially created and cancelled (ss 65(1), 67, 68(2) and 69(1) of the Deeds Registries Act).

Mrs Scholtz's counsel argued that the provisions of section 5 of the General Law Amendment Act cannot be more onerous than those of section 2(1) of the Alienation of Land Act. Le Grange J held that section 2(1) of the Alienation of Land Act also applies to donations of land, and considered the following quote from *Stalwo* (para [7]) as to the purpose of section 2(1)

Section 2(1), whose objective is to achieve certainty in transactions involving the sale of fixed property regarding the terms agreed upon and limit disputes, requires an agreement for the sale of land to be in writing and signed by the parties. That means that the essential terms of the agreement, namely the parties, the price and subject matter,

must be in writing and defined with sufficient precision to enable them to be identified. And so must the other material terms of the agreement.

Consequently, Le Grange J held that the same considerations of 'certainty' should underpin the provisions of section 5 of the General Law Amendment Act (para [14]), and concluded that in the context of donations still to be performed, the words 'the provisions' must refer to at least all the material terms, including a reference to the bond, in a case such as the present (para [15]). The fact that limited real rights may also be donated was a decisive reason why the requirements of section 5 were not satisfied. Le Grange J found that because limited real rights may also be donated, defining the real extent of one's ownership in property is imperative (para [16]). As a result, it was unclear whether Mr Scholtz intended to donate unencumbered or encumbered land to Mrs Scholtz, which rendered the donation void for non-compliance with section 5(1) of the General Law Amendment Act.

The obvious result of *Savvides* and *Scholtz* is that where immovable property is donated, whether under the General Law Amendment Act or the Alienation of Land Act, a limited real right over the property, such as a mortgage bond or usufruct, must be fully disclosed in the deed of donation or alienation.

On appeal, the respondent stuck to the same defence, namely that the donation was void as the existence of the mortgage bond was not reflected in the deed of donation.

Brand JA held that where land is donated, both the General Law Amendment Act and the Alienation of Land Act apply, and since the General Law Amendment Act prescribes stricter prerequisites (the attestation of the donor's signature by two witnesses) it prevails (para [8]). However, as the court below did not contemplate that the 'missing term' concerning the bond could have been supplemented by a proper interpretation of the express terms, or alternatively, could have been regarded as a tacit term, its finding that this omission resulted in a nullity was rejected on appeal (para [11]). The methodology followed by the Supreme Court of Appeal is supported by the general rule in the interpretation of contracts, that where ambiguity exists, the interpretation of a contract is not limited to the wording of the document, and that the context of the factual surrounding circumstances and background should be taken into account (*KPMG Chartered Accountants SA v Securefin Ltd* 2009 (4) SA 399 (SCA)).

Brand JA explained that the foundation of this rule does not fall within the scope of the interpretation of express terms, nor is it based on real consensus. It originates from the common intention of the parties as derived by the court from the express terms of the contract and the surrounding circumstances (para [12]; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A)). In *Wilkins NO v Voges* 1994 (3) SA 130 (A) 143, it was held that if a tacit term is read into a contract that is subject to statutory formalities, such as the predecessor to section 2(1) of the Alienation of Land Act, it does not affect such statutory formalities. Further

[a] tacit term in a written contract, be it actual or imputed, can be the corollary of the express terms — reading, as it were, between the lines — or it can be the product of the express terms read in conjunction with evidence of admissible surrounding circumstances. Either way, a tacit term once found to exist, is simply read or blended into the contract as such: as such it is ‘contained’ in the written deed. Not being an adjunct tool but an integrated part of the contract, a tacit term does not, in my opinion, fall foul of . . . the Act.

According to Brand JA, it was not clear from the pleadings whether a dispute indeed existed on how the bond should have been addressed in terms of sections 56(1) and 57(1) of the Deeds Registries Act. In other words, was there a dispute as to whether the bond should have been cancelled or substituted? Brand JA held that if the latter confusion could be resolved, the missing provision in the agreement could possibly be supplemented by a proper interpretation of the contract, or the insertion of a tacit term (paras [13]–[17]).

Referring to *Neethling v Klopper* 1967 (4) SA 459 (A), where it was observed that statutory provisions cannot eliminate all disputes, Brand JA concluded

It therefore stands to reason that a subsequent dispute about the terms of the contract, in itself, cannot render the agreement void *ab initio*. The court will simply have to determine the dispute. Once the facts of this case have been determined on the pleadings or by the court it may emerge that the donation is indeed invalid because the deed omitted to record a material term (para [18]).

Consequently, Brand JA held that the respondent had not disclosed a valid defence and upheld the appeal (para [19]).

Although both the High Court and the Supreme Court of Appeal in *Scholtz* relied significantly on *Stalwo*, *Stalwo* primarily dealt with the purpose of section 2(1); the fulfilment of suspensive

conditions; the subdivision of agricultural land; and the payment of agent's commission. Therefore, the legal question in the present matter (whether property encumbered by a mortgage bond may be legally donated by way of a donation *stante matrimonio*, even though the deed of donation does not refer to the mortgage bond) was not the major concern in *Stalwo*. Moreover, specifically on the question of what should be considered an essential or material term in a deed of alienation, the court in *Stalwo* held that the precise meaning of 'material term' need not be decided (para [8]). *Stalwo* is, therefore, not authority for the crucial assessment of whether the existence of a mortgage bond should be disclosed in a deed of donation or alienation of land.

It should be noted that it is only if land designated for residential purposes is sold on instalment, that the deed of alienation should contain a provision that the land is encumbered by a mortgage bond (s 6 of the Alienation of Land Act). Notably, section 2(1) of the Alienation of Land — which applies to all deeds of alienation of land — does not require this information to be included in the deed of alienation. Consequently, the legislature explicitly indicated that the information on the existence of the bond has to be included in a deed of alienation in specific circumstances only, that is, when land is sold for residential purposes on instalments. Alas, this scenario was not argued in *Scholtz*.

The crucial uncertainty as to whether the disclosure of the mortgage bond was a material term to be incorporated in the deed of donation, was not debated. Unlike essential terms that are easily identifiable by legal certainty, the classification of a term as material is problematic. Phillip Maurice Wulfsohn (*Formalities in Respect of the Contracts of Sale of Land Act (71 of 1969)* (1980) 75) considers a material term to be one 'which the parties regard as important enough to insert in their contract'. This test is too vague and subjective. The submission by ADJ van Rensburg & SH Treisman (*The Practitioner's Guide to the Alienation of Land Act 2* ed (1984) 51–2) on a material term, is also of little help. They state that: '[t]he essential terms of the contract, together with all the additional terms incorporated into the contract by agreement, constitute its material terms'. Put differently, according to these authors, a non-material term is a provision merely included in a contract for information purposes, and the intention with such 'term', is not that it will bind the parties

contractually. It was observed in *Johnston v Leal* (above) that it is difficult precisely to define what a substantial term is, and, as in the case of *Stalwo*, the court unfortunately found it unnecessary to determine this (973H).

Conveniently, the following test was proposed in *Jones v Wykland Properties* (above) as a means by which to establish whether a term is material or not: (a) did the parties familiarise themselves with the term; (b) did they explicitly or tacitly agree that the term should form part of the contract; and (c) will they be bound by the term? If the answer to all three questions is in the affirmative, the term is regarded as material. This test is effective and easy to apply.

In *Jones*, the parties used a standard-form printed agreement of sale and completed the blank space indicating the occupation and risk date by inserting 'as agreed'. The court found that the occupation and risk date was material, and that the parties had not legally agreed on a date. As the agreement did not comply with section 2(1) of the Alienation of Land Act, it was held to be void. (See also *King v Potgieter* 1950 (3) SA 7 (T) where it was held that the date of occupation is material.) In *Smit v Walles* 1985 (2) SA 189 (T), by contrast, it was held that the date of occupation, which was completed as 'a date to be agreed upon', was not material. This was because the purchaser, who was also the lessee of the property, occupied it before concluding the purchase agreement, and the improper completion of the purchase agreement was not inconsistent with the provisions of section 2(1). (See also *Mulder v Van Eyk* 1984 (4) SA 204 (SEC) where it was held that the date of occupation is not material.) From the above it is clear that the test for determining whether a term is material or not, is a question of fact and not of law.

As all the facts were not before the court below in *Scholtz* (as confirmed on appeal), it could not be determined whether the non-disclosure of the mortgage bond in the deed of donation resulted in the non-completion of a material term. However, it should be borne in mind that, although the pleadings did not indicate this, the bond was registered in the names of Mr and Mrs Scholtz as joint co-owners of the property. Therefore, it is undeniable that Mrs Scholtz knew that the donated property was encumbered by a mortgage bond. Furthermore, the possibility is not excluded that, despite the decision in *Frye's (Pty) v Ries* 1957 (3) SA 575 (A), the doctrine of constructive knowledge could have been applied in this case, given that both spouses were parties to

the registration of the mortgage bond. (In *Frye's*, it was held that the doctrine of constructive knowledge may not be applied to any information available to the general public in the database of the Deeds Offices.) As Mrs Scholtz was at all times aware of the existence of the mortgage bond, the disclosure of the bond in the deed of donation was probably reduced to a non-material term. (See, for example, *Smit and Mulder* (above).) Alternatively, as pointed out by the Supreme Court of Appeal, the court below should have taken the factual surrounding circumstances and background into account in order to afford the deed of donation a proper contextual interpretation. (See further DJ Lötz & CJ Nagel 'Beskrywing van geskenkte onroerende goed wat met 'n verband beswaar is: *Scholtz v Scholtz* 2012 (1) SA 382 (WWK); *Scholtz v Scholtz* 2012 (5) SA 230 (SCA) (2012) 9(2) *LitNet Akademies* 117.)

Corondimas principle

It is a trite principle of the law of contract, that a condition is an uncertain future event on which either the *commencement* of the duty to perform, or the *continued existence* of the contract, is made dependent. Pending the fulfilment of the condition, a contractual relationship indeed exists between the parties. On fulfilment of the condition, the parties are entitled to performance and obliged to perform (JM Otto & B Prozesky-Kuschke 'General principles of the law of contract' in CJ Nagel (ed) *Commercial Law* 4 ed (2011) 114–15). If the condition is not fulfilled, the contract is terminated and neither party is required to perform. In addition, either party is entitled to the return of anything already performed. (See also Dale Hutchison & Chris-James Pretorius (eds) *The Law of Contract in South Africa* (2009) 247–8; Schalk van der Merwe et al *Contract General Principles* 3 ed (2007) 289–93; WA Joubert (founding ed) *The Law of South Africa* vol 5(1) sv 'Contract' (by ADJ van Rensburg, JG Lotz & TAR van Rhijn (updated by RD Sharrock)) 2 ed (2010) ¶ 436–7; Alistair James Kerr *The Principles of the Law of Contract* 6 ed (1989) 446–9; RH Christie & GB Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 145 and the authorities cited there.)

However, as far as a contract of sale is concerned, a deviation from the above legal position, which became known as the *Corondimas* principle, was formulated by Watermeyer CJ in *Corondimas v Badat* 1946 AD 548 551

[W]hen a contract of sale is subject to a true suspensive condition, there exists no contract of sale unless and until the condition is fulfilled . . . Until that moment, in the case of a sale subject to a true suspensive condition . . . it is entirely uncertain whether or not a contract of sale will come into existence at some future time.

The *Corondimas* principle originated in a misunderstanding of Voet 18.1.26 and *D* 18.1.80.3 in *Fazi Booy v Short* (1882) 2 EDC 301, and, in particular, *Quirk's Trustees v Assignees of Liddle and Co* (1885) 3 SC 322. *Quirk's Trustees* was uncritically adopted in *Johnson v Samuels* 1914 CPD 169; *Mitchell's Piano Saloons v Theunissen* 1919 TPD 392; *Flax v Van der Linde* 1928 CPD 495; *Frasers v Nel* 1929 OPD 182; *Massey-Harris v Van der Walt* 1932 EDL 115; *SA Land Exploration Co Ltd v Union Government* 1936 TPD 174; *Kinsella v Hermanus-Mossel River Township* 1945 TPD 104; *Corondimas v Badat* 1946 AD 548; *Palm Fifteen v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A); *Sentraalwes Personeel Ondernemings v Wallis* 1978 (3) SA 80 (T); *Tuckers Land and Development Corporation v Somerville* 1981 (2) SA 17 (C); and *Soja v Tuckers Land and Development Corporation* 1981 (3) SA 314 (A).

Voet 18.1.26 deals with the situation where the parties have entered into a contract on the basis that ownership would never pass to the purchaser, in which case no contract of sale comes into being. This position is correct, as the parties never had the intention to buy and to sell, which nullifies one of the *essentialia* of a deed of sale. In the case of a suspensive condition, the parties still intend ownership to pass, but only on the occurrence of some uncertain future event. If the uncertain future event does not materialise, the contract lapses with no further liability for either party.

The *Corondimas* principle is clearly not in step with the general principles of the law of contract, and has been (and still is) criticised, with good reason, in case law and academic circles (*Provident Land Trust Ltd v Union Government* 1911 AD 615; *Tuckers Land and Development Corporation v Strydom* 1984 (1) SA 1 (A); South African Law Commission *Investigation into the Legal Consequences of Suspensive Conditions in Contracts of Sale* Project 39 (1986); *DP de Villiers 'Die betekenis van opskortende voorwaarde by ooreenkoms'* (1943) 7 *THRHR* 13; P Nienaber 'Opskortende en ontbindende voorwaarde' (1967) 30 *THRHR* 353; DSP Cronjé & JG Lotz 'Die koopkontrak en die opskortende voorwaarde' (1977) 40 *THRHR* 276; GE Devenish

'The nature of contracts of sale subject to suspensive conditions' (1977) 94 *SALJ* 385; TAR van Rhijn 'Die verbod op die verkoop van ongeproklameerde erwe' (1980) 2 *Modern Business Law* 30; PJJ Olivier 'Opskortende voorwaarde en koopkontrak' (1980) 13 *De Jure* 288).

In *Diggers Development (Pty) Ltd v City of Matlosana* [2012] 1 All SA 428 (SCA), the *Corondimas* principle again came under fire. (Although a number of other aspects also featured in the case, the focus here is on the *Corondimas* principle.) Diggers Development (Pty) Ltd (the appellant, 'Diggers'), was the registered owner of a shopping centre known as Flamewood Walk. After a public invitation by the City of Matlosana (the first respondent) to develop approximately 1 172 hectares of land along the N12 corridor between Klerksdorp and Stilfontein, a deed of sale was concluded with Isago @ N12 (Pty) Ltd (the second respondent, 'Isago') on 2 October 2007 in accordance with a resolution in terms of section 115 of the Local Government: Municipal Finance Management Act 56 of 2003 ('the MFMA') dated 23 March 2007. This sale was subject to the suspensive conditions that it should comply with section 79(18) of the Local Government Ordinance 17 of 1939 ('the Ordinance'), section 84 of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'), and sections 14, 20, 33, 90, 110(3), 116 and 168 of the MFMA. It was also stipulated in the deed of sale, that the City of Matlosana would at all times support Isago in causing a township to be proclaimed, and to do all things necessary to implement the terms and conditions of the agreement. On 8 September 2009 Isago, which had applied for shopping mall rights on certain erven, sold some 22 hectares of land to West Ridge Shopping Centre (later known as Matlosana Mall). It was evident that the intended shopping mall would compete for business with the mall operated by Diggers. This triggered Diggers' concern and prompted it to take legal steps.

Although the deed of sale between the City of Matlosana and Isago was concluded on 2 October 2007, the City of Matlosana, in order to satisfy the legislative requirements, published a notice in terms of section 33(1)(a)(i)(bb) of the MFMA (read with s 21A of the Systems Act) and section 79(18)(b)(ii) of the Ordinance on 21 May 2008, 5 June 2008 and 21 November 2008. The purpose of this notice was, first, to inform the public of its intention to conclude a contract which would impose financial obligations on the municipality beyond the three-year period covered in the

annual budget, and, secondly, to invite the local community and other interested persons to submit comments or representations in respect of the proposed contract by no later than 4 August 2008. Given that the deed of sale had been concluded before compliance with the provisions of the MFMA or the Systems Act, Diggers' attorney objected to the sale on 29 July 2008. The core of this objection was that the entire process followed by the City of Matlosana was *ultra vires*.

This objection notwithstanding, a certificate was issued on 30 January 2009 by the municipal manager of the City of Matlosana, verifying that the sale complied with the relevant statutory provisions. This was followed by a council resolution on 5 February 2009 which endorsed the deed of sale of 2 October 2007. Consequently, all suspensive conditions in the deed of sale had been duly fulfilled, and implementation of the sale was initiated by the City of Matlosana and Isago from 19 May 2009.

On 4 August 2009, Diggers launched an application in the court below in which it sought an order reviewing and setting aside the council's resolution, and declaring the deed of sale void. The matter came before Murphy J, who held that as the sale was subject to suspensive conditions, the *Corondimas* principle applied. It followed that the City of Matlosana had complied with the relevant legislative provisions before the deed of sale became unconditional. Consequently, Murphy J held that the deed of sale was enforceable and no foundation existed to declare either the council's resolution or the deed of sale void.

According to counsel for Diggers, the core question was whether, as certain clauses in the sale agreement were subject to the fulfilment of suspensive conditions, the City of Matlosana had to comply with the statutory prerequisites applicable to the sale of immovable property by local authorities, before it entered into the sale agreement of 2 October 2007, or whether compliance after the conclusion of the sale agreement was sufficient. In the both court below and on appeal, Diggers submitted that the procedure followed by the City of Matlosana in complying with the provisions of the MFMA and the Ordinance was flawed, in so far as the city was obliged to abide by these provisions before concluding the deed of sale. The crux of Diggers' concern was not the factual non-compliance with the statutory provisions, but the timing of the process. As a result of the timing, the statutory process had been compromised by the deed of sale having been signed before compliance with the process. To substantiate this

submission, Diggers relied on *Ferndale Crossroads Shareblock (Pty) Ltd v City of Johannesburg Metropolitan Municipality* (WLD case 3879/08, unreported). However, Diggers' reliance on *Ferndale* was rejected on appeal as the facts of the cases were distinguishable: in contrast to the present appeal, there was no compliance with section 79(18) of the Ordinance in *Ferndale* before the conclusion of the lease agreement (para [31]).

Diggers referred to the following observation on the *Corondimas* principle in *Tuckers Land and Development Corporation v Strydom* (above) 18C–G

A last aspect for consideration is to what extent maintaining the *Corondimas* approach could lead to permanent injustice. It appears to me that the approach has little, if any, practical meaning other than to the interpretation of legislation wherein terms such as 'contract of sale' or 'sale' are used. Whether a sale subject to a suspensive condition is characterised as not being a contract of sale, or as a contract of sale which is not *perfecta*, there is still no reason why the common law legal consequences which attach to such a sale should not find full application. And regarding legislation, more clarity will presumably be provided in the future, as was achieved now by s 57A(2) as to the interpretation of the above mentioned concepts. It is also the legislature's prerogative to enact statutory provisions which, without infringing on existing rights, would amend the interpretation given by judgments, including this judgment, so as to give effect to the true intention of the legislature which had previously not been clearly articulated. It is also instructive that after periods of respectively five and four years following the judgments in [*Sentraalwes Personeel Ondernemings (Edms) Bpk v Wallis* 1978 (3) SA 80 (T)] and [*Sentraalwes Personeel Ondernemings (Edms) Bpk v Nieuwoudt* 1979 (2) 538 (C)], s 3(e) of Act 70 of 1970 has remained unamended (court's translation para [26] n 9).

Counsel for Diggers submitted that, should the court still find the *Corondimas* principle applicable, the principle should be revisited as was suggested in *Strydom* (above). This was necessitated by the new constitutional dispensation, which requires strict compliance by municipalities with legislation in order to curtail public power when disposing of public assets. Diggers further submitted that the policy considerations, which convinced the court in *Strydom* to retain the *Corondimas* principle, were outweighed in the new constitutional dispensation aimed at curtailing abuse of power and corruption at municipal level. Diggers also emphasised that the Constitution requires strict compliance with legislation providing for the alienation of public assets.

The appeal was dismissed, primarily for two reasons: (a) compliance with the relevant statutory provisions; and (b) the upholding of the *Corondimas* principle. (Compliance with the relevant statutory provisions is not discussed further.)

It was not in dispute that the deed of sale contained suspensive conditions. Referring to Christie & Bradfield (above) 145 and Kerr (above) 339, the Supreme Court of Appeal again voiced no objection to the trite principle that a suspensive condition suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event (para [23]). However, the court referred with approval to the *dictum* of Watermeyer CJ (quoted above), and held that as a deed of sale subject to a suspensive condition cannot, pending fulfilment of the condition, be regarded as a 'sale' in terms of the *Corondimas* principle, it is not affected by legislative embargos pending fulfilment of the condition (para [24]). The court also quoted Brand JA in *Geue v Van der Lith* 2004 (3) SA 333 (SCA) paragraph [8], who, having reviewed the authority in point, stated the following

In all these cases it was held that contracts subject to these suspensive conditions were not hit by the legislative enactments concerned. The reasoning that formed the basis of these decisions was essentially that the agreement prohibited by both enactments was a *sale* whereas, in accordance with the decision of this Court in *Corondimas*, an agreement of sale subject to a suspensive condition cannot, pending fulfilment of the condition, be regarded as a 'sale'. It only becomes a sale when the condition is fulfilled, in which event there is no contravention of the statutory provisions involved (*Diggers Development* para [24]).

To counter Diggers' arguments in favour of revisiting the *Corondimas* principle, Cloete and Mhlantla JJA also referred to *Tuckers Land and Development Corporation v Strydom* (above) where it was held that the key impact of the *Corondimas* principle concerns the interpretation of legislation in which terms such as 'contract of sale' or 'sale' are used, and that it has no practical significance (para [26]). It follows that although a sale subject to a suspensive condition is characterised as not being a 'sale', or as an '*imperfecta* sale', no rationale exists as to why the common-law consequences should not be applied (*ibid*). On the subject of legislation, it was further ruled in *Strydom* that it is the legislature's prerogative to ratify statutory provisions which had previously been interpreted inconsistently with the legislature's true intention (*ibid*).

In the context of the latter remark in *Strydom*, the Supreme Court of Appeal observed that although section 79(18) of the Ordinance has subsequently been replaced (see s 9(1)(h) of Ordinance 18 of 1985), the legislature has still not found it necessary to provide that 'sell', for the purposes of section 79(18) of the Ordinance, includes a deed of sale subject to a suspensive condition (para [27]). By contrast, the definition of 'sale' in the Subdivision of Agricultural Land Act 70 of 1970 and Town Planning and Township Ordinance 25 of 1965 (T), for example, was amended after *Strydom* to include a sale subject to a suspensive condition (ibid). Cloete and Mhlantla JJA, therefore, concluded that the legislature is aware of the numerous cases since *Corondimas*, and has chosen not to amend the definition in the Ordinance so as to include a sale subject to a suspensive condition (ibid).

Finally, the court pointed out that the *Corondimas* principle was recently endorsed in *Paradyskloof Golf Estate v Stellenbosch Municipality* 2011 (2) SA 525 (SCA) para [17], where it was reiterated that a deed of sale subject to a suspensive condition does not establish a contract of sale, but nevertheless creates a contractual relationship which, on fulfilment of the condition, transforms into a deed of sale (para [28]). Thus, *stare decisis* applies (para [29]).

The court, therefore, held as follows

It is clear therefore that the council's intention to exercise the power to alienate was only formulated on 5 February 2009 when it took the resolution sought to be impugned by the appellant. The contract of sale thus came into existence on that day. Counsel for the appellant correctly conceded that the council could have decided at that stage not to proceed with the contract. *And that is the answer to the appellant's submission that the Corondimas principle should be departed from in view of the new constitutional dispensation aimed at curtailing abuse of power and corruption at municipal level.* The effect of the *Corondimas* principle in a case such as the present, is that interested parties affected by the sale contract would be able to examine not proposals, but the detailed scheme itself. Any competitor of the successful tenderer could be relied upon to draw the council's attention to any irregularity or corruption, and at the end of the day, the elected council of the respondent could have walked away from the project if it thought this would be in the interests of the first respondent and its ratepayers (emphasis added) (ibid).

In keeping with general legal principle, a suspensive condition should have no bearing on the existence of a contract of sale.

Provided that all other requirements for validity have been satisfied, a contract of sale comes into being when the parties reach consensus on the conclusion of an agreement to buy and to sell, in terms of which ownership of the *merx* is transferred by the seller to the purchaser against payment of a sum of money. In law, a suspensive condition should not alter these principles.

For reasons of the lack of practical significance and probable interpretation hiccups, the South African Law Commission *Project 39* (above) also did not recommend that legislation be promulgated to adjust the legal position in general. The commission consequently proposed that, should the *Corondimas* principle be problematic in a particular legislative setting, the particular legislation could be amended to include a sale subject to a suspensive condition in order to prevent its circumvention. For this reason, the definition of 'sale' has been extended in the Shareblocks Control Act 59 of 1980, the Alienation of Land Act, the Timeshare Control Act 75 of 1983 and the Housing Development Schemes for Retired Persons Act 65 of 1988 to include a 'sale subject to a suspensive condition'. However, the possibility that legislative circumvention could also be achieved by a resolutive condition was not investigated by the Commission.

Unfortunately, the travesty caused by the *Corondimas* principle in instances where a legislative provision has no relevance is not resolved by the above proposal, or by methodology implemented by the courts and the South African Law Commission.

The fundamental objections against the view in the positive law of suspensive conditions in contracts of sale, are: (a) a contract of sale still exists *ab initio* despite the suspensive condition; (b) the transfer of ownership — not the coming into being of the contract — is suspended; (c) the obligatory act (the making of the contract) and the real act (the transfer of ownership) are confused; and (d) a suspensive condition postpones the claim to performance, not the legal obligation (contract of sale) itself. Consequently, in countless cases the reservation of ownership or payment of the purchase price forms part of the parties' performance duties.

It would be instructive to see whether the *Corondimas* principle would pass constitutional muster; it is hoped that the Constitutional Court will soon have the opportunity to place its stamp of disapproval on it (DJ Lötze & CJ Nagel 'The *Corondimas* principle is still alive and well — *Diggers Development (Pty) Ltd v City of Matlosana* 2012 (1) All SA 428 (SCA)' (2012) 75 *THRHR* 681).