

# Real Estate Law

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## Are you entitled to a refund of your deposit when the sale lapses?

In the realm of property transactions, disputes can arise over seemingly straightforward agreements. The case of *Christopher Charles Hughes v Pam Golding Properties (Pty) Ltd and two Others (case number 1030/2022)* sheds light on the intricacies of real estate contracts and the consequences of their interpretation.

At the heart of this legal battle lies an agreement of sale for an immovable property situated in Hout Bay. The protagonists are Christopher Charles Hughes (the applicant) and Nicolas Gargassoulas (the first respondent), along with Cindy-Ann Oosthuizen (the second respondent) and Pam Golding Properties Pty Ltd (the third respondent). The dispute centres around the validity of the agreement, the waiver of suspensive conditions, and the cession of rights related to a substantial deposit. In this article, we delve into the facts, legal arguments and the court's decision in this intriguing case, which has far-reaching implications for property buyers, sellers and real estate professionals.

The dispute centred around an agreement of sale entered into between the applicant and Mr Peter Henry Green for the sale of the applicant's immovable property through the agency of Pam Golding Properties. The property sale agreement between Green and the applicant was finalised on 12 February 2020 and the agreed purchase price was R4,950,000. According to the terms of the

agreement, Green was required to deposit R1 million into Pam Golding Property's trust account within seven business days of signing the agreement. Additionally, he was to pay the remaining purchase price to the conveyancing attorneys appointed by the applicant upon property transfer registration.

Clause 6.1 of the agreement stipulated that the sale was subject to a suspensive condition. Green needed to secure mortgage loan approval for the balance of the purchase price by 13 March 2020. Notably, Clause 6.2 allowed Green to waive this condition by providing written notice to the seller before the fulfilment or waiver date. If the suspensive condition remained unmet by the due date, the agreement would become null and void, and the deposit, along with any accrued interest, would be promptly refunded to the purchaser within five business days.

Unfortunately, Green failed to meet this condition, resulting in the agreement lapsing. As a consequence of the lapsed agreement, the High Court ordered the third respondent to refund the substantial deposit that Green had paid to the first and second respondents.

### **The importance of precise contractual terms**

As a point of departure, the Supreme Court of Appeal (SCA) observed that the applicant and Green operated under the mistaken belief that the agreement remained valid and was still subject to the suspensive condition. This is

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because Green had, before the due date, offered to pay the remaining balance in cash and the parties mistakenly constituted this as a waiver of the suspensive condition. However, the High Court found that Green did not waive the suspensive condition by written notice in terms of Clause 6.2 and the agreement had actually lapsed because the condition was not met by the stipulated due date.

The SCA, after careful consideration, rejected the applicant's argument that the High Court had erred in determining that Green had not waived his reliance on the suspensive condition. The SCA found that the applicant had failed to meet the burden of proving that Green had waived the benefit of the suspensive condition. Consequently, the High Court's finding was deemed sound and beyond reproach.

For these reasons, the SCA found that Green was entitled to the refund of his deposit. Furthermore, he was entitled to transfer his rights to the deposit to the first and second respondents and any counterargument was deemed to have no reasonable chance of success.

This judgment underscores the importance of precise contractual terms and adherence to legal requirements in property transactions. It serves as a reminder to all parties involved in property sales to carefully consider the implications of suspensive conditions and their impact on the validity of agreements.

**Natasha Fletcher and Tyler Lillienfeldt**



## Court orders removal of livestock from South African farm

In a recent judgment from the Land Claims Court in *Moladora Trust v Mereki and Others* (189/2023) [2024] ZASCA 37 (3 April 2024), the Moladora Trust's (Trust) appeal was upheld, resulting in a significant ruling regarding the presence of grazing animals on a farm in the North West Province. The Trust, as the owner of the property, had sought relief against the Mereki children, who were occupying the land and grazing livestock without explicit consent.

The court's decision, authored by Weiner JA and concurred by Ponnann and Matojane JJA, emphasised the lack of evidence supporting any tacit agreement or consent for the Mereki children to keep livestock on the farm. Despite efforts by the Trust to communicate this to the Mereki children, including written notices, the children continued to graze animals on the property without permission.

The judgment set aside the previous ruling of the Land Claims Court, ordering the Mereki children to immediately remove all grazing animals from the farm. Failure to comply within 30 days would lead to the impounding of the livestock by the Sheriff of the High Court. Additionally, the Mereki children were interdicted and restrained from returning or keeping any livestock on the farm without prior consent from the Trust.

The ruling clarifies the importance of explicit consent in matters of land use and ownership, reaffirming the rights of property owners in South Africa. This decision underscores the significance of legal clarity and adherence to property rights, particularly in contexts involving land tenure and agricultural practices.

In order to secure the right to graze animals on another person's property, the options below can be considered.

### **Servitude**

A servitude can be registered in the relevant Deeds Office that has jurisdiction over the property to secure a limited real right over the property in question. The servitude can be registered for a limited period of time, or in perpetuity.

If the servitude is registered over a portion of land in terms of a notarial deed, a servitude diagram would usually need to be framed for the servitude to be registered.

It is, however, important to note that in terms of section 6A of the Subdivision of Agricultural Land Act 70 of 1970 (Act), a servitude over agricultural land may, however, not be registered without the written consent of the Minister of Agriculture, unless the following exceptions in terms of section 6A apply:

- a right of way, aqueduct, pipeline or conducting of electricity with a width not exceeding 15 metres;
- a servitude which is supplementary to a servitude referred to in paragraph (1) and which has a servitude area not exceeding 225 square metres which adjoins the area of the last-mentioned servitude;

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- a usufruct over the whole of agricultural land in favour of one person or in favour of such person and their spouse or the survivor of them if they are married in community of property.

Where a servitude over agricultural land is described in general terms, for example where the servitude area or route will be determined at a later stage, the ministerial consent will therefore also be required unless it is clear that the provisions of section 6A of the Act are not being contravened.

It is also important to bear in mind that where a servient property is mortgaged, the mortgagee's consent to the registration of the servitude will be required.

## **Lease agreement**

The parties could enter into a lease agreement and the tenant could then be restricted to using the land only for the purpose as set out in the lease agreement, such as the grazing of animals and related activities.

The Act, however, states that no lease in respect of a portion of agricultural land shall be entered into if:

- the period of such lease is 10 years or longer or is the natural life of the lessee or the life of any other person mentioned in the lease; or
- the lease is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years.

## **Grazing agreement**

A grazing agreement would include the right to take what grows on the land, referring specifically to the grass/plants which will be removed by virtue of it being grazed by the livestock (rather than a right to occupy the property).

It is, however, important to note that the following actions are also prohibited in terms of the Act, except where these actions relate to the purposes of a mine as defined in section 1 of the Mines and Works Act 27 of 1956:

- no portion of agricultural land, whether surveyed or not and whether there is any building thereon or not, shall be sold or advertised for sale;
- no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for periods aggregating more than 10 years.

It is therefore advisable to consult an attorney to obtain advice on the best option for the specific circumstances in question.

**Simone Immelman and Kirsty de Sousa**



## OUR TEAM

For more information about our Real Estate Law practice and services in South Africa and Kenya, please contact:



**Muhammad Gattoo**  
Practice Head & Director:  
Real Estate Law  
T +27 (0)11 562 1174  
E muhammad.gattoo@cdhlegal.com



**Bonita de Silva**  
Managing Partner | Namibia  
T +264 811 222 884  
E bonita.desilva@cdhlegal.com



**Bronwyn Brown**  
Director:  
Real Estate Law  
T +27 (0)11 562 1235  
E bronwyn.brown@cdhlegal.com



**Mike Collins**  
Director:  
Real Estate Law  
T +27 (0)21 481 6401  
E mike.collins@cdhlegal.com



**Simone Franks**  
Director:  
Real Estate Law  
T +27 (0)21 670 7462  
E simone.franks@cdhlegal.com



**Fatima Gattoo**  
Director:  
Real Estate Law  
T +27 (0)11 562 1236  
E fatima.gattoo@cdhlegal.com



**Simone Immelman**  
Director:  
Real Estate Law  
T +27 (0)21 405 6078  
E simone.immelman@cdhlegal.com



**Lydia Owuor**  
Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E lydia.owuor@cdhlegal.com



**Muriel Serfontein**  
Director:  
Real Estate Law  
T +27 (0)11 562 1237  
E muriel.serfontein@cdhlegal.com



**John Webber**  
Director:  
Real Estate Law  
T +27 (0)11 562 1444  
E john.webber@cdhlegal.com



**Alex de Wet**  
Director:  
Real Estate Law  
T +27 (0)11 562 1771  
E alex.dewet@cdhlegal.com



**Natasha Fletcher**  
Counsel:  
Real Estate Law  
T +27 (0)11 562 1263  
E natasha.fletcher@cdhlegal.com



**Samantha Kelly**  
Counsel:  
Real Estate Law  
T +27 (0)11 562 1160  
E samantha.kelly@cdhlegal.com



**Kirsty de Sousa**  
Professional Support Lawyer:  
Real Estate Law  
T +27 (0)11 562 1747  
E kirsty.desousa@cdhlegal.com



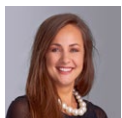
**Bridget Witts-Hewinson**  
Senior Associate:  
Real Estate Law  
T +27 (0)21 481 6447  
E bridget.witts-hewinson@cdhlegal.com



**Lutfiyya Kara**  
Senior Associate:  
Real Estate Law  
T +27 (0)11 562 1859  
E lutfiyya.kara@cdhlegal.com

## OUR TEAM

For more information about our Real Estate Law practice and services in South Africa and Kenya, please contact:



**Sune Kruger**

Senior Associate:  
Real Estate Law  
T +27 (0)11 562 1540  
E [sune.kruger@cdhlegal.com](mailto:sune.kruger@cdhlegal.com)



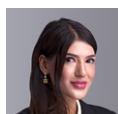
**Muneerah Hercules**

Associate:  
Real Estate Law  
T +27 (0)11 562 1579  
E [muneerah.hercules@cdhlegal.com](mailto:muneerah.hercules@cdhlegal.com)



**Lulama Lobola**

Senior Associate:  
Real Estate Law  
T +27 (0)21 481 6443  
E [lulama.lobola@cdhlegal.com](mailto:lulama.lobola@cdhlegal.com)



**Zahra Karolia**

Associate:  
Real Estate Law  
T +27 (0)11 562 1701  
E [zahra.karolia@cdhlegal.com](mailto:zahra.karolia@cdhlegal.com)



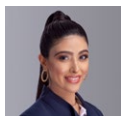
**Ceciley Oates**

Senior Associate:  
Real Estate Law  
T +27 (0)11 562 1239  
E [ceciley.oates@cdhlegal.com](mailto:ceciley.oates@cdhlegal.com)



**Ebum Taigbenu**

Associate:  
Real Estate Law  
T +27 (0)11 562 1049  
E [ebun.taigbenu@cdhlegal.com](mailto:ebun.taigbenu@cdhlegal.com)



**Fatima Essa**

Associate:  
Real Estate Law  
T +27 (0)11 562 1754  
E [fatima.essa@cdhlegal.com](mailto:fatima.essa@cdhlegal.com)



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**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

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