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LAPSE OF A SALE AGREEMENT DUE TO NON-FULFILMENT OF A SUSPENSIVE CONDITION

This question is answered in the case of Thokan v Kriegler and Another (40781/2018) [2022] ZAGPJHC 680 (13 September 2022) in which case a seller and a buyer proceeded with a transaction, even though it had lapsed due to the suspensive condition not being fulfilled by the due date.

The agreement required an extension of the due date to be in writing and signed by all parties. The parties assumed that the estate agent had negotiated for an extension, but the agreement was not extended in writing. Later, when it became clear that the contract had lapsed, the seller attempted to keep the buyer's deposit, claiming that the buyer should forfeit it due to misrepresentation or breach. When the purchaser indicated that he no longer wanted to proceed, the seller relied on fictional fulfillment and estoppel.

Fictional fulfillment is when a condition is deemed to be fulfilled due to a party deliberately preventing fulfilment of such a condition. The court dismissed this as the purchaser did apply for a bond and even requested an extension of the due date. Estoppel prevents a party to rely on for example, lapsing of an agreement if such party made a representation to the other party regarding a fact, on which the other party relied. The court found that the purchaser did not even know the agreement was null and void and therefore did not mislead the seller.

The Court decided that the buyer was entitled to the deposit's refund as the agreement was null and void due to non-fulfilment of the suspensive conditions.