



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 2020/19368

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

Signed: **Date:** 24 October

In the matter between:

KUNMEI YAN

Applicant / Plaintiff

and

MLUNGISI ABRAHAM MAHLANGU

Respondent / First Defendant

RIA AND ASSOCIATES (PTY) LTD

Second Defendant

POTSISO AIGINER MAHLAELA

Third Defendant

SIMON MAIDO

Fourth Defendant

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy hereof to Caselines.

Contract — Litigants seeking to rely on Constitutional values and good faith in contract to explain how and why relevant established rules of law are to be adjusted — Interpretation — Relationship between text, context and purpose — Implied and tacit terms — Failure to plead

MOULTRIE AJ

- [1] The applicant is the plaintiff in an action instituted against *inter alia* the respondent (who was cited in the action as the first defendant) in which she claimed repayment of a portion of a deposit that had allegedly been paid by her and received by the respondent pursuant to a failed sale agreement concluded between the parties in respect of a certain immovable property. Although the action was defended and a plea and counterclaim were delivered, the parties concluded a written agreement settling the action on 9 April 2021 in terms of which the respondent was required to pay a reduced “settlement amount” on or before 31 May 2021 (clause 2), failing which he would be required to pay “the full claim” and interest thereon from 8 May 2020 (clause 11).
- [2] Relying on the respondent’s failure to pay the settlement amount contemplated in clause 2 of the settlement agreement, the applicant now applies for an order requiring the respondent to pay the outstanding portion of the sum envisaged in clause 11 thereof together with interest thereon.¹

Relevant facts

- [3] The express terms of the settlement agreement insofar as they are relevant for current purposes are as follows:

1. The First Defendant shall make payment to the Plaintiff of the sum of R2 200 000-00 (TWO MILLION TWO HUNDRED THOUSAND RAND) in full and final settlement of all and any claims of whatever nature from whatever cause arising herein between the Plaintiff and the First Defendant in respect of the matter ...

¹ In the draft order uploaded onto Caselines that the applicant does not persist in seeking an order making the settlement agreement an order of court.

2. Payment thereof shall be made by the First Defendant to the Plaintiff on or before the 31st of May 2021 (“the payment date”), in the event that there [sic] any unforeseen and valid cause of delay, the parties may agree in writing to extend the payment date. ...

3. It is hereby recorded that the First Defendant’s attorneys ... are attending to the registration of transfer of [the property] and the proceeds of the sale has been or will be paid by the purchaser into the First Defendant's attorneys' trust account for the benefit and credit of the First Defendant. ... The First Defendant and the First Defendant's attorneys hereby undertake to earmark an amount of not less than R 2 200 000-00 from the proceeds of sale in the said trust account for the settlement payment as referred to in paragraph 2 above. ...

5. Upon payment of the settlement amount referred to in Paragraph 2 aforementioned, neither party shall have any other claim of whatever nature against the other from whatever cause arising and this agreement shall be in full and final settlement thereof.

...

11. The parties hereto specifically undertake and agree that should payment in terms hereof not be made on or before the due date stated in paragraph 2 above, then and in such event, the full claim of R 2 773 534-56 together with interest on the said sum a tempora morae at the prescribed interest rate from the 8th of May 2020 to date of payment together with interest thereon as well as costs either taxed or agreed shall be due and payable immediately by the First Defendant to the Plaintiff and the Plaintiff shall be entitled to proceed further for the recovery thereof in execution without any further notice to the First Defendant or to approach the above Honourable Court for the appropriate relief.

13.1.3 This agreement: ... no variation, amendment or alteration thereof [sic] shall be of any force or effect unless reduced to writing and signed by both parties.

- [4] I have underlined a portion of clause 2 in view of the central role that it plays in the matter.
- [5] It is common cause between the parties that the respondent did not make payment of the sum of R2,200,000.00 (i.e. the amount referred to in clause 5 as “the settlement amount”) or any portion thereof on or before 31 May 2021 as envisaged in clause 2 of the settlement agreement, but that an amount equal to the settlement amount (i.e. R2,200,000.00) was paid to the applicant on 5 August 2021, after this application was launched.

The respondent's defences

- [6] Bearing in mind that the affidavits delivered in an application serve the function of both pleadings and evidence,² the defence pleaded by the respondent in his answering affidavit is somewhat unclear. As far as I can glean from the affidavit, the respondent resists the application on the basis that:
- (a) *“at all times it was within the intention of the parties that the settlement amount would emanate from the proceeds of the transfer of the ... property”* to the new purchaser referred to in clause 3 of the agreement *“as and when same was registered”*;
 - (b) the respondent’s failure to make payment of the settlement amount by 31 May 2021 was *“due to unforeseen circumstances”* as envisaged in clause 2 of the settlement agreement in the form of an unforeseen delay in registration of the transfer of the property to the new purchaser which *“was beyond the control of either myself and/or my attorneys of record who attended to the transfer thereof”* and *“culminated in my being unable to make payment of the agreed sum upon the due date”*;
 - (c) this constituted *“a valid reason which lawfully justifies the delay of payment of the settlement amount”*;
 - (d) the respondent had made numerous requests to the applicant to agree to extend the date for payment (the first having been a request made by his attorneys on 28 May 2021 to *“grant our client an indulgence”* until

² *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) para 13.

30 June 2021), but the applicant “*unreasonably refused to agree to the extension of the due date notwithstanding a request by my attorneys of record, who set out in detail the reasons for such request*”;

(e) the respondent has “*never been in willful [sic] breach of the Settlement Agreement*”; and

(f) the respondent complied with clause 2 of the settlement agreement when he paid the settlement amount on 5 August 2021 once the proceeds of the sale of the property to the new purchaser had been received into his attorney’s trust account.

[7] A generous reading of the answering affidavit indicates that the respondent’s defence is essentially that, on a proper interpretation of the settlement agreement, the applicant may not unreasonably withhold her consent to an extension of the payment date of the settlement amount, and the respondent would be entitled to not to pay it, for as long as the transfer of the property to the new purchaser (and consequently the receipt of the purchase price pursuant thereto) may be delayed by unforeseen circumstances beyond the respondent’s control. I shall refer to this below as “the interpretation defence”.

[8] In addition to this pleaded defence, the respondent’s counsel sought, in his heads of argument, to raise the further defence that the court “*ought to find that it was an implied, alternatively tacit term of the settlement agreement that consent to the extension would not unreasonably be withheld by the applicant*”.

The role of Constitutional values and the principle of good faith in contract

[9] Before proceeding to consider these defences, it is necessary to briefly reiterate the role that Constitutional values such as fairness, reasonableness, justice and ubuntu and the principle of good faith play in the law of contract, as it is these values and principles upon which the respondent seeks to rely.

[10] The recent decisions of the Constitutional Court and the Supreme Court of Appeal relied upon by the respondent are not authority for the proposition that these values and principles could directly operate as a defence to the applicant’s claim. To the contrary, the Constitutional Court has clearly

explained that although these “*abstract values*” are central to our law, they “*do not provide a free-standing basis upon which a court may interfere in contractual relationships*”.³ As such, although they underly and inform the substantive law of contract,⁴ they may be invoked only indirectly for the purposes of establishing the rules applicable to contractual relationships, either by the courts in developing the common law or finding that a contractual term with a particular effect unenforceable on the grounds that it is contrary to public policy in South Africa’s Constitutional order, or by the legislature in enacting legislation governing contractual relationships.⁵

[11] Despite this clear guidance, so succinctly and effectively laid down by the Constitutional Court in *Beadica*, the respondent makes no attempt to explain how and why the established rules applicable to his defences (i.e. those relating to the interpretation of contracts and the identification of implied or tacit terms) are deficient or inappropriate in any way. The unfortunate consequence is that I am left to imagine for myself what the arguments based on these values and principles might be. This approach (which appears to reflect a growing practice)⁶ is to be deprecated. Litigants seeking to rely on Constitutional values and the principle of good faith in contract are required to explain how and why they affect the relevant established rules of law and how and why those rules are to be developed. Constitutional values deserve greater respect than to be ‘thrown into the pot’ as seasoning when a litigant feels that his or her case is insufficiently spicy.

³ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) at para 80.

⁴ *Id.* paras 71 – 78.

⁵ See, for example, the provisions of the Consumer Protection Act, 68 of 2008 and the National Credit Act, 34 of 2005.

⁶ Some of the most recent examples (from the first 9 months of 2022 alone) are: *Goliath and Another v Chicory SA (Pty) Ltd* [2022] JOL 55350 (ECG) paras 98 – 100; *Firststrand Bank Limited v Nel and Another* [2022] JOL 55297 (GJ) paras 44 – 54; *Wyno Construction and Projects (Proprietary Limited v Miway Insurance Limited* 2022 JDR 1689 (GP) paras 13 – 22; *Twenty Third Century Systems (Pty) Ltd and Another v SAP African Region (Pty) Ltd* 2022 JDR 1340 (GJ) paras 55 – 58; *EC Security CC v The Body Corporate of Saffron Gardens* 2022 JDR 1682 (GP) paras 72 – 79; *Centrafin (Pty) Ltd v Mazibuko* 2022 JDR 1262 (GP) paras 11.13 – 11.18; *Dancing Beauty and Hair (Pty) Ltd v Northern Centre Shareblock and Another* 2022 JDR 0565 (GJ) paras 29 – 34; *Sasol Oil (Pty) Limited v Eurozar (Pty) Limited and Others* 2022 JDR 1087 (GJ) paras 35 – 43.

The interpretation defence

- [12] In *University of Johannesburg v Auckland Park Theological Seminary*, the Constitutional Court confirmed that the interpretation of written documents including contracts is a “unitary exercise” involving the simultaneous consideration of text, context and purpose, and that “*from the outset one considers the context and the language together, with neither predominating over the other*”. It was emphasised that “[a] court interpreting a contract has to, *from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract*”.⁷
- [13] While it is clear from this that language, context and purpose are all central to the exercise being undertaken, it bears emphasis that the exercise in question is one in which the ultimate objective is the determination of the meaning of an actual written instrument comprising language in the form of express words. In other words, the question that must be answered is this: what does the language of the document mean? In determining that meaning, the circumstances of the document’s creation (i.e. its context and purpose) are as important as the language used by the drafter.
- [14] Thus, the Supreme Court of Appeal held in *Capitec Bank* that the equal role played by context and purpose recognised in *University of Johannesburg* and the earlier *Endumeni* judgment⁸ “*is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does [it] licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable*”.⁹ The SCA also observed that none of the cases, including *University of Johannesburg*, “*evinced skepticism that the words and terms used in a contract have meaning*”.¹⁰ The

⁷ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) paras 65 – 66.

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

⁹ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 36.

¹⁰ *Id.* para 49.

recognition of the importance of context and purpose “*simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining [and] that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose*”.¹¹ And finally, given that the exercise of interpretation is orientated towards determining the meaning of the language that is used:

*[I]nterpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.*¹²

[15] In the current instance, it cannot be ignored that the settlement agreement does not expressly state that the applicant may not unreasonably withhold her consent to an extension of the payment date of the settlement amount. The mooring lines relied upon by the respondents to tether that meaning to the text of the settlement agreement are the portion of clause 2 that I have underlined above, and the allegation that clause 3 of the settlement agreement contemplates that the proceeds of the sale of the property to the new purchaser will be used to pay the settlement amount. In my view, these connections are tenuous and unpersuasive.

[16] Firstly, at an ordinary grammatical level, the words employed in clause 2 (“*may agree*”), especially when read in the context of the non-variation provision in clause 13.1., suggest that neither party is under an obligation to agree to an amendment of the agreement. As the Constitutional Court has pointed out, “*in the ordinary sense ‘may’ does not mean ‘must’. Nor is it its equivalent*”, and it is

¹¹ Id. para 50.

¹² Id. para 51. This *dictum* has since been repeated by the Supreme Court of Appeal in *Masinga and Others v Chief of the South African National Defence Force and Others* 2022 JDR 0030 (SCA) para 32.

only in the context of administrative law, which imposes overarching duties upon decision-makers to perform their duties (i.e. to make a decision) and, in so doing, to act rationally or reasonably, that it might be the case in certain specific circumstances that the decision-maker clothed with a permissive power is compelled to make a specific decision.¹³ While I am prepared to accept that the reference to “*any unforeseen and valid cause of delay*” in clause 2 means that the applicant was required (as she did) to make a decision whether or not to agree to an amendment in the event that an unforeseen and valid cause of delay arose in relation to the transfer of the property, I do not accept that either the settlement agreement or the general law of contract (as to which, see below) impose any duty on her to act reasonably or even rationally in making such a decision. The word ‘may’ must, in this context be regarded as being purely discretionary.

- [17] Secondly, the respondent’s undertaking in clause 3 to “ *earmark an amount of not less than R2 2000 000-00 from the proceeds*” of the sale of the property to the new purchaser to pay “*the settlement payment as referred to in paragraph 2*” must of course be read in view its purpose, which was self-evidently to act as a form of partial security for the payment that would have to be made by the respondent to the applicant. It would be stretching credulity to hold that the parties intended that whereas whole of the settlement amount would be secured by the proceeds of the sale, no part of the amount potentially due under clause 11 would be secured in this way – especially in view of the inclusion of the words “*not less than*” the settlement amount.
- [18] Thirdly, there is nothing “*insensible or unbusinesslike*” about the construction of the settlement agreement contended for by the applicant. It makes eminent business sense for parties to conclude an agreement with a clear cut-off date before which the amount due by one of them is ‘discounted’, and leaving it up to the discretion of the creditor whether that discount may be extended for a further period. Not only are such arrangements common in my experience (and contracts requiring consent not to be unreasonably withheld relatively uncommon, and contracts requiring a party to agree to an amendment of the contract even less common), it seems to me that the purpose of the settlement

¹³ *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC) paras 71 – 73.

agreement is served by the applicant's construction. Indeed, once the purpose of the "earmarking" of a portion of the proceeds of the sale is identified as applying to payments under either clause 2 or clause 11, it becomes clear that the interpretation advanced by the respondent is an unbusinesslike one that does not support the purpose of the agreement.

[19] Finally, the contextual setting for interpretation includes evidence of the subsequent conduct of the parties which indicates a common understanding of the terms of the agreement provided that it does not alter the meaning of the words used and is used as conservatively as possible.¹⁴ In the current instance, the very first communications between the parties' attorneys in relation to the delays experienced in the transfer of the property on 28 May 2021 reveal that the respondent's attorneys indicated that: "... we would be pleased if your client would kindly grant our client an indulgence of effecting payment of the settlement amount to your client on/before the 30th of June 2021", and the applicant's attorneys responded that although she was sympathetic to the delays, "we hold strict instructions that payment in terms of the Settlement Agreement ... must be adhered to". This exchange indicates a common understanding by the parties that the decision whether or not to extend the date for payment of the settlement amount was purely discretionary, and indeed was a matter of indulgence on the part of the applicant.

[20] In the circumstances, I conclude that the interpretation of the settlement agreement contended for by the respondent is unsustainable and there was no obligation upon the applicant to act reasonably when deciding whether or not to agree to an amendment of the agreement so as to allow for an extension of the payment date of the settlement amount.

The respondent's attempted reliance on an implied, alternatively tacit term

[21] Given the conclusions I have reached above in relation to the pleaded interpretation defence, it is perhaps unsurprising that it was not pursued with any vigour by the respondent's counsel in argument. Instead, for the first time

¹⁴ *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* 2020 JDR 0911 (SCA) para 7, referring to *Unica Iron and Steel (Pty) Ltd v Mirchandani* 2016 (2) SA 307 (SCA) para 21 and *Urban Hip Hotels (Pty) Ltd v Kcarrim Commercial Properties (Pty) Ltd* 2016 JDR 2213 (SCA) para 21.

in the respondent's heads of argument, the defence was sought to be raised that the court "*ought to find that it was an implied, alternatively tacit term of the settlement agreement that consent to the extension would not unreasonably be withheld by the [applicant]*". There are a number of reasons why I am not persuaded by this contention.

- [22] In the first place, one searches the answering affidavit (and paragraphs 17 and 23ff of the answering affidavit, which are cited by the respondent's counsel as being the source of this defence) in vain for any suggestion of a pleaded case as to the existence of such a term. Indeed, even the heads of argument do not attempt to formulate the precise wording of the term sought to be invoked. This failure to plead and formulate the implied or tacit term is fatal to the respondent's attempted reliance on this defence.¹⁵
- [23] Secondly, an implied term is a "*standardised [term] amounting to a rule of law which the Court will apply unless validly excluded by the contract itself*".¹⁶ Although it is well-established that "*there is no numerus clausus of implied terms and the courts have the inherent power to develop new implied terms*", and that "*our courts' approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract*", it is salutary to observe that "*[o]nce an implied term has been recognised ... it is incorporated into all contracts, if it is of general application, or into contracts of a specific class, unless it is specifically excluded by the parties. It follows ... that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can serve only as catalysts in the process of legal development.*"¹⁷

¹⁵ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) per the majority judgment of Rumpff ACJ at 528H – 529A; *Administrator, Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 196C-E; *Sasol Oil (Pty) Limited v Eurozar (Pty) Limited and Others* (above) para 39.

¹⁶ *Alfred McAlpine* (above) per Corbett AJA at 532G. Neither the majority judgment nor the judgment of Jansen JA departed from Corbett AJA's exposition of the law relating to implied and tacit terms.

¹⁷ *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 28.

- [24] It is inconceivable to me that the principle of good faith in contract or any of the values underlying our Constitution or any of the rights contained therein require that the common law must be developed so as to impose an implied term that creates an overriding obligation on parties to agree to amend their contracts if it would be objectively reasonable to do so because the other party's ability to perform has been made more onerous (but not objectively impossible) by unforeseen circumstances beyond their control.
- [25] Apart from the difficulties attendant upon the formulation of the implied term contended for (how is it to be framed so as to be generalisable to all contracts, and if it is not to apply to all contracts, how is the class of contracts to which it is to apply to be defined?), it seems to me that, in order to be of any practical effect, such a term would have to empower courts to rewrite contracts for parties who refuse to agree to amend them should the relevant circumstances arise. This would give rise to intolerable levels of contractual uncertainty and indeterminacy,¹⁸ as may be vividly demonstrated by asking the question in the current instance: what is the duration of the extension that the applicant should have granted when she was requested to do so? Attempting to answer this question evokes the difficulties described by the Supreme Court of Appeal when contemplating a similar exercise in *Roazar*.¹⁹
- [26] Furthermore, it seems to me that the task of developing and formulating implied contractual terms in the form of rules of law that apply to all contracts (or even to a class of contracts) is one that is so fundamentally multi-dimensional (also referred to as polycentric) as to render it exceedingly difficult for a court involved in the process of adversarial claim adjudication to undertake it with any hope of achieving an appropriate balance between all the

¹⁸ *Beadica* (above) para 81: “The rule of law requires that the law be clear and ascertainable. ... The application of the common-law rules of contract should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain. It is therefore vital that, in developing the common law, courts develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This is what the rule of law, a foundational constitutional value, requires. The enforcement of contractual terms does not depend on an individual judge's sense of what fairness, reasonableness and justice require. To hold otherwise would be to make the enforcement of contractual terms dependent on the 'idiosyncratic inferences of a few judicial minds'. This would introduce an unacceptable degree of uncertainty into our law of contract. The resultant uncertainty would be inimical to the rule of law.”

¹⁹ *Roazar CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA) paras 19 – 22.

potentially competing interests that will undoubtedly be affected. That difficulty becomes a virtual impossibility in circumstances where the issue is not pleaded, and the court has not had the benefit of comprehensive argument on the matter. As such, I do not consider that this is an appropriate case to determine whether an implied term such as that advanced by the respondent should be imported into the law of contract and I decline to do so.²⁰

[27] Thirdly, a tacit term is “*an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances*”.²¹

[28] I do not accept that the tacit term contended for in this case meets the established bystander test. In particular, I am not “*satisfied upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term*”.²² As I have noted above, the construction of the settlement agreement contended for by the applicant is a “*fully functional*”²³ one and it can thus not be said that it was necessary to include the tacit term contended for, no matter how “*wise*”, “*reasonable*”, “*desirable*” or “*equitable*” it may have been to do so.²⁴ Furthermore, as I have also noted above, “*... there is difficulty and doubt as to what the term should be or how far it should be taken*”, which militates against its importation.²⁵

[29] Finally, no reasons have been advanced (and I cannot conceive of any), how and why the established rules regarding tacit terms require adjustment on the basis of Constitutional values or the principle of good faith in contract.

²⁰ Compare the similar difficulties experienced and conclusion reached by the court in *Sasol Oil (Pty) Limited v Eurozar (Pty) Limited and Others* (above) paras 36 – 43.

²¹ *Alfred McAlpine* (above) at 531H.

²² *Id.* at 532H – 533B.

²³ *Wilkens NO v Voges* 1994 (3) SA 130 (A) at 137A – C.

²⁴ *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 236F – G.

²⁵ *Desai v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 522H – 523A.

Did the applicant unreasonably refuse to agree to the extension?

- [30] In any event, notwithstanding the conclusions reached above, even assuming the interpretation contended for by the respondent is correct, or that an implied or tacit term to the effect contended for may be imported into the settlement agreement, I do not agree that the allegations in the answering affidavit establish that the delay in the payment of the settlement amount after 31 May 2021 was both “*unforeseen and valid*” as required by clause 2, let alone that the applicant’s refusal to agree to an extension was unreasonable. This is for the following reasons.
- [31] All that the respondent alleges is that “*the first delay which had occurred was as a result of the South African Revenue Services requesting further supporting documents prior to their issuing a Transfer Duty Receipt and a second delay was caused by the fact that the Deeds Office Pretoria was closed due to the Covid-19 pandemic and registrations would take a further 30 days to be effected*”. These reasons for the delay are advanced without any context demonstrating that they were truly unforeseen, that they were truly beyond the control of the respondent or his attorneys, that the applicant should reasonably have agreed to the extension and if so, until when.
- [32] For example, no information is furnished with regard to the date upon which the respondent’s attorneys had commenced the transfer process following the conclusion of the sale agreement on 11 December 2020, what steps (other than making payment of the transfer duty on 22 April 2021) they had taken to advance it, including what steps they had taken (and when) to ensure that all the required supporting documentation had been submitted to SARS for the purposes of obtaining a transfer duty receipt. In addition, no information is furnished to demonstrate that it could not be foreseen as of 9 April 2021 (i.e. the date of the settlement agreement) that transfer would not be registered by the Pretoria Deeds Office by 31 May 2021 in circumstances where the transfer duty had not yet been paid – and would only be paid on 22 April 2021. Furthermore, it seems to me to be questionable whether the closure of the Deeds Office due to Covid-19 (which seems, from the correspondence attached to the affidavit, to have occurred on about 30 June 2021) was a truly

unforeseen possibility at the time of the conclusion of the settlement agreement. Indeed, the respondent's counsel urged me in his heads of argument to "*take judicial notice of the fact that there have been numerous delays at the Deeds Office due to the outbreak of the Covid-19 pandemic, which have led to substantial delays in the transfer of properties. Deeds offices across the country continue to be impacted by COVID-19 as most of the Deeds Offices had to close their doors on a number of occasions due to recurring positive cases of COVID-19 to allow for the decontamination thereof*". It is telling that the article on the internet site of a well-known firm of attorneys that is referred to in support of this submission is dated 15 September 2020, i.e. more than 6 months prior to the conclusion of the settlement agreement.

Conclusion, costs and order

- [33] In conclusion therefore, the settlement amount remained payable on or before 31 May 2021, and the respondent's admitted failure to make payment thereof by that date triggered the operation of clause 11 of the settlement agreement, in terms of which the respondent became liable to pay the applicant the sum of R2,773,534.56 together with interest thereon from 8 May 2020 to date of payment at the prescribed rate (given that no specific interest rate had been agreed). The applicant is thus entitled to the relief that she seeks in this application.
- [34] The usual rule is that the successful party should be awarded their costs. The applicant has been substantially successful, and I see no reason to depart from that approach in this matter. Misconceived as the defences advanced by the respondent were (and despite the extraordinary and seemingly unsupportable statement by the respondent's counsel that the applicant "*has acted in utmost bad faith in doggedly pursuing this application*"), I do not consider that there are sufficient grounds for the imposition upon the respondent of the punitive costs order sought by the applicant.
- [35] Two issues relating to costs require specific attention. The first relates to the costs incurred by the applicant in preparing the application to strike out the respondent's opposition for failure to serve his heads of argument timeously. The respondent argues that he should not be mulcted in costs in relation to the

preparation of the application. I disagree. Although it is was only stamped by the Registrar on 7 December 2021 and was uploaded to Caselines the following day, there can be no doubt that the order of Senyatsi J compelling the respondent to file his heads of argument “*within 5 (five) days of the Court handing down this order*” was “*handed down*” on 6 December 2021.²⁶ As such, the 5-day time period for the delivery of the respondent’s heads of argument expired on 13 December 2021.²⁷ It is furthermore undisputed that the respondent’s heads of argument were only uploaded to Caselines on 15 December 2021. Although the application to strike out was only served on the respondent at 14h48 on the same day, seemingly after the respondent’s heads of argument had been uploaded, I have little difficulty in accepting the applicant’s counsel’s assurance that the application was prepared after the deadline expired but before the heads of argument were uploaded, and this could not be seriously gainsaid by the respondent’s counsel in argument. In those circumstances, although the application to strike out was rightly not pursued, I am persuaded that the applicant is entitled to recover the costs of preparing the application. The suggestion made in argument that the applicant was somehow acting improperly in moving to prepare the application as soon as the *dies* stipulated in the order of Senyatsi J expired is misplaced. In my view, the applicant’s actions were entirely appropriate – especially in view of the dilatory conduct on the respondent’s part that had forced the applicant to seek the compelling order granted by Senyatsi J in the first place.

[36] The second specific issue relating to costs is the reserved order of costs granted by Keightley J in the trial interlocutory court on 7 March 2022. It appears that notwithstanding what (it is common cause) was an error in the office of the Registrar that led to the matter being incorrectly set down in that court for that date, both parties were ready to proceed on the day and indeed urged that the matter should be dealt with, as the error had not been of their making. In those circumstances, my view is that the most appropriate approach is for the costs incurred in relation to that hearing to be costs in the cause.

²⁶ Although it is not relevant, the uncontradicted evidence shows that the respondent’s attorneys were notified of the content of the order as handed down by email at 12h29 on the same day.

²⁷ Rule 1, definition of “court day”: “*only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court*”.

Indeed, this appears to be the approach adopted not only by the applicant, but also by the respondent who similarly sought these costs on the assumption that he would be successful.

[37] I make the following order:

1. The respondent is ordered to pay the applicant:
 - 1.1. the sum of R573,534.56;
 - 1.2. mora interest on the amount of R2,773,534.56 from 8 May 2020 to 4 August 2021 at the prescribed rate; and
 - 1.3. mora interest on the amount of R573,534.56 from 5 August to 2021 to date of payment at the prescribed rate.
2. The respondent is ordered to pay the costs of the application, including the costs incurred in preparing the application to strike the respondent's opposition to this application for failure to serve his heads of argument timeously, as well as the costs reserved by Keightley J on 7 March 2022.

RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 4 October 2022

JUDGMENT SUBMITTED FOR DELIVERY: 24 October 2022

APPEARANCES

For the Applicant: J Karuaihe, instructed by Sun Attorneys

For the Respondent: T Lauré, instructed by Paul T Leisher & Associates