THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1317/2018

In the matter between:

SOUTH AFRICAN FOOTBALL ASSOCIATION **APPELLANT**

and

FLI-AFRIKA TRAVEL (PTY) LIMITED **RESPONDENT**

Neutral citation: *South African Football Association v Fli-Afrika Travel (Pty) Limited* (1317/2018) [2020] ZASCA 4 (4 March 2020)

Coram: Ponnan, Saldulker, Plasket and Mbatha JJA and Eksteen AJA

Heard: 20 November 2019

Delivered: 4 March 2020

Summary: Contract – interpretation – whether obligation contended for by respondent an express or tacit term – settlement agreement – effect of settlement.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Carelse, Mabusele JJ and Malungana AJ sitting as court of appeal).

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court below is set aside and replaced with the following order:
'The appeal is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Plasket JA (Ponnan, Saldulker and Mbatha JJA and Eksteen AJA concurring)

[1] The appellant, the South African Football Association (SAFA), and the respondent, Fli-Afrika Travel (Pty) Ltd (Fli-Afrika), have had a long-standing business relationship that commenced in the 1990s. SAFA administers football in the country. Fli-Afrika was SAFA's travel agent. Shortly before South Africa was to host the 2010 Federation Internationale de Football Association World Cup (the World Cup), the parties entered into a joint venture agreement with a view to exploiting possibilities that the World Cup would offer.[1] It is that agreement, concluded on 23 January 2009, that is the subject of this appeal, as well as a subsequent agreement, concluded on 16 April 2010, that the parties styled a settlement agreement.

[2] The litigation that culminated in this appeal commenced in a trial in the Gauteng Division of the High Court, Johannesburg, Fli-Afrika having claimed substantial damages on the basis of what it alleged was a breach of the joint venture agreement

[1] On SAFA generally, and on its role in hosting the 2010 World Cup, see *M & G Media Ltd & others v 2010 FIFA World Cup Organising Committee South Africa Ltd & another* 2011 (5) SA 163 (GSJ) paras 84-89.

on the part of SAFA. Matojane J dismissed Fli-Afrika's claim with costs. His order was set aside by Mabesele J, with whom Carelse J and Malungana AJ concurred, in a subsequent appeal to a full court of that division. In place of the order of Matojane J, the full bench ordered SAFA to pay Fli-Afrika R13 989 452.78, interest on that amount and costs. Special leave to appeal was granted to SAFA by this court.

The background

[3] Prior to the parties entering into the January 2009 agreement, they had, on 10 July 2007, concluded what they termed a memorandum of understanding (the MOU). It was to endure for a period of four years. The MOU recognized 'the commonality of interest and objectives, and the benefits of mutual co-operation arising between SAFA and FLI-AFRIKA TRAVEL in regard to travel arrangements for SAFA and its Members'. It created a framework for SAFA and Fli-Afrika to cooperate in the future.

[4] The MOU recorded that Fli-Afrika was SAFA's 'official travel agency' and was 'responsible for all travel arrangements both locally and internationally, inclusive of the Executive's and various Regions' arrangements for the 2010 FIFA World Cup'. Two of three conditions for Fli-Afrika's right to be SAFA's official travel agent were that SAFA was to be able to 'participate in various travel ventures and/or programmes' which may present themselves, provided that it did so through Fli-Afrika; and that Fli-Afrika could benefit from its association with SAFA 'through its membership, family of sponsors and third party agreements which are currently in force'.

[5] It was agreed that in any joint venture that arose, SAFA would 'share the benefits which may accrue after inception of the partnership, in the ratio of 40% - SAFA/ 60% - FLI-AFRIKA TRAVEL, net after payment of all expenses relating to the FIFA 2010 World Cup'.

[6] The MOU was followed by the agreement of 23 January 2009. The parties called it a service level agreement, or SLA.

[7] The effect of the SLA was to form a joint venture between SAFA (referred to in the SLA as 'the Association') and Fli-Afrika for a specific project. The heart of the agreement is contained in clause 3. It provides:

'3.1 The Association requires Fli-Afrika to source and supply 2 500 (two thousand five hundred) Football World Cup 2010 "Packages" per week for and on behalf of the Association, its VIP's and various international Football Federations referred to Fli-Afrika Travel by the Association.

3.2 These Football World Cup 2010 Packages are to include accommodation in various host cities, tickets to various Football World Cup Games, and return transport from the accommodation provided in terms of the Package to the Stadium where the games are played.

3.3 The Association irrevocably undertakes to supply Fli-Afrika Travel with 2 500 (two thousand five hundred) tickets per week to various World Cup Games.

3.3.1 The Association further irrevocably undertakes to make payment to Fli-Afrika Travel of the balance of any weekly unsold Packages in the event that Fli-Afrika is not able to sell 2 500 Packages per week.

3.4 All such amounts as shall become payable by the Association to Fli-Afrika Travel from time to time shall be paid by not later than the 7th day of the next succeeding month in which the debt arose.

3.5 Insofar as consulting services which may be rendered by Fli-Afrika Travel to and/or for and on behalf of the Association from time to time is concerned, as contemplated in this agreement, Fli-Afrika Travel shall be paid the agreed fee of R2 000 (two thousand rand) per hour or part thereof in respect of necessary time spent by Fli-Afrika Travel for and on behalf of the Association in supplying such consulting services.'

[8] Clause 4 is also of importance. It provides, in relevant part:

'FLI-AFRIKA TRAVEL will be responsible for the day-to-day running of its finance and administrative affairs, and as such will implement travel arrangements and ensure that the necessary costs of such travel arrangements are submitted to the Association, who in turn will arrange for payment of same in terms of the current payment structure.'

[9] It would appear from clause 2.6, which defined the term 'services', that SAFA planned to provide the tickets for the joint venture from its allocation of tickets from the Federation Internationale de Football Association (FIFA), the international governing body for football.[2] Clause 2.6.3 recorded that SAFA 'receives certain hospitality and ticketing packages from FIFA and/or Match in terms of its requirements for both its

[2] On FIFA generally, and its role in relation to World Cups, see *M & G Media Ltd & others v 2010 FIFA World Cup Organising Committee South Africa Ltd & another* (note 1) paras 76-83. See too Plasket 'The Fundamental Principles of Justice and Legal Vacuums: the Regulatory Powers of National Sporting Bodies' (2016) 133 *SALJ* 569 at 571-572.

membership and for distribution and sale to international visitors inclusive of the "Footballing Family" who may wish to avail themselves of the ticketing benefits available to the Association as the host Association of both the 2010 FIFA World Cup and the 2009 FIFA Confederations Cup'.[3]

[10] When the SLA had been signed, and hence came into operation, Fli-Afrika set about making bookings of hotel rooms with a view to 'completing' the packages once SAFA supplied the tickets. To this end, it expended R27 698 839.26. SAFA failed to deliver a single ticket, with the result that no packages could be sold and Fli-Afrika was left holding a vast number of hotel bookings. It managed to mitigate its loss to an extent by selling hotel bookings to the value of R13 709 346. 48.

[11] SAFA did not provide any tickets, as it had undertaken to do, because it was precluded from doing so by the terms of the Organising Association Agreement, the agreement in terms of which FIFA granted SAFA the right to host the World Cup. Only FIFA and its agent, Match, were entitled to sell tickets.

[12] With the World Cup looming and no sign of any tickets being provided by SAFA, Mr Nazeer Camaroodeen, Fli-Afrika's managing director, had begun to engage with SAFA officials as early as the beginning of 2010. This engagement took the form of meetings as well as the exchange of correspondence.

[13] In a letter from Mr Camaroodeen to Mr Leslie Sedibe, SAFA's chief executive officer, dated 1 February 2010, Mr Camaroodeen threatened litigation against SAFA if it did not comply with its contractual obligation to supply tickets. He also recorded that Fli-Afrika had incurred 'considerable expenses' securing accommodation for the joint venture contemplated by the SLA. He warned SAFA that if it did not comply with its obligation to supply the tickets, Fli-Afrika would 'sustain considerable damages'.

[14] SAFA's response to this letter was complicated by the fact that Mr Sedibe had only recently been appointed to his position and was not, understandably, fully aware

[3] Match is Match Event Services (Pty) Ltd, FIFA's agent in administering the Tour Operator Program, or TOP. In this capacity it allocated and supplied tickets for games to participating tour operators, such as Fli-Afrika.

of all of SAFA's contractual obligations. This problem was aggravated by Mr Camaroodeen's inexplicable reluctance to provide Mr Sedibe with a copy of the SLA. Mr Sedibe consulted with his predecessor who appeared to know nothing about the SLA, but his attention was drawn to the MOU and an addendum to it. He wrote in response to Mr Camaroodeen's letter of 1 February 2010:

'If you don't mind, I would really appreciate a copy of the joint venture agreement between SAFA and Fli-Afrika to which the addendum to the JV Agreement relates.'

He added that if he was provided with a copy of the SLA that would 'avoid an endless exchange of correspondence on an issue that could be resolved by perusing the agreements'.

[15] As far as the demand for the delivery of tickets was concerned, Mr Sedibe wrote:

'As you are no doubt aware, FIFA is the owner and seller of tickets to matches of the 2010 FIFA World Cup South Africa and accordingly (and this is without admission of the correctness of your allegation that SAFA has a duty to deliver tickets to Fli-Afrika), in order for SAFA to acquire tickets on your behalf, SAFA would have to purchase the tickets from FIFA and as the Accounting Officer of SAFA, I can assure you that SAFA is not in a financial position to purchase such tickets unless FIFA approves an extra ordinary payment procedure. Accordingly any threat to institute legal action against SAFA would be premature in my view.'

[16] While it appears that a copy of the SLA was still not forthcoming, at a meeting between Mr Camaroodeen, on the one hand, and Mr Sedibe and Mr Gronie Hluyo, SAFA's financial director, on the other, SAFA asked to see Fli-Afrika's contracts for accommodation with various hotels, and proof that it had paid for that accommodation. These documents were provided by Fli-Afrika.

[17] On 5 March 2010, Mr Camaroodeen wrote to Mr Sedibe to say that the World Cup was to commence in 96 days and 'we are unable to sell packages without your confirmation that you will supply the event tickets as you are obliged to do'; and that Fli-Afrika was losing business as a result and 'will suffer a potentially huge loss of revenue should the current impasse continue'. The letter concluded by demanding that SAFA state its 'position and intentions regarding the ticket allocation', and that it do so within five days.

[18] Mr Camaroodeen then consulted an attorney. On 15 March 2010, the attorney wrote to Mr Sedibe to demand a written undertaking, within two days, that SAFA would obtain the necessary tickets from FIFA and supply them to Fli-Afrika.

[19] On 18 March 2010, SAFA's attorney wrote to Mr Camaroodeen. This letter appears to be a response to Mr Camaroodeen's letter of 5 March 2010. The attorney complained that SAFA had tried in vain to 'obtain clarity on the obligation you require our client to fulfil and in terms of what agreement our client is to fulfil this obligation'. He asked for a copy of the agreement that Fli-Afrika relied on.

[20] Once again, instead of providing the clarity sought by SAFA's attorney, Fli-Afrika's attorney responded, on 30 March 2010, with yet more belligerence and no assistance in ending the impasse. He wished, he said, to make it 'abundantly clear' that Fli-Afrika was of the view that SAFA was in breach of the SLA. He stated, however, that Fli-Afrika had begun to source tickets from elsewhere, but reserved Fli-Afrika's rights to claim damages from SAFA in due course. Mr Camaroodeen explained in his evidence that by this stage Fli-Afrika had approached Match for tickets.

[21] In response, SAFA's attorney, in a letter dated 13 April 2010, expressed the view that 'a formal Joint Venture Agreement' had to be concluded, that Fli-Afrika, as a registered tour operator for the World Cup was entitled to an allocation of tickets (from Match) and that SAFA would assist it to acquire the tickets it required.

[22] Mr Camaroodeen testified that the tickets that Fli-Afrika wished to obtain from Match were in addition to the allocation it was entitled to as a registered tour operator. That allocation was insufficient to meet the additional needs created by the joint venture that it had entered into with SAFA to create and sell packages.

[23] It appears that while Fli-Afrika and SAFA were exchanging correspondence, Match became involved in an effort to resolve the problem that had arisen between Fli-Afrika and SAFA and which, judging from the correspondence, was otherwise not going to be resolved. What was proposed by Match, in essence, was that Match would

endeavor to supply the tickets that SAFA was supposed to have supplied to Fli-Afrika in terms of the SLA, and Fli-Afrika and SAFA would enter into a settlement agreement.

[24] The proposal was encapsulated in a letter dated 15 April 2010, written by Mr Jaime Byrom, the executive chairman of Match. It was addressed to Mr Sedibe and Mr Camaroodeen. It referred to 'numerous discussions' between the parties 'over the last few months' regarding the ticket allocation requested by Fli-Afrika. It also referred to the letter of 13 March 2010 written by SAFA's attorney.

[25] Paragraph 2 of the letter, while not completely accurate in one respect, explained the involvement of Match in the dispute. It stated:

'There seems to be an intention by the parties to enter into a formal joint venture agreement at some time in the future. However, given the commencement of the Last Minute Sales Phase today, and the need to resolve matters before it becomes impossible to satisfy the ticket requirements of Fli-Afrika, the parties have requested MATCH to assist in an effort to resolve this long-standing impasse.'

(The inaccuracy that I referred to is the statement that Fli-Afrika and SAFA intended to enter into a joint venture agreement in the future. As Mr Camaroodeen pointed out in his evidence, they had, by that time, already done so. That agreement was the SLA.)

[26] In paragraph 3, reference was made to a spreadsheet containing details of tickets that either had been allocated to Fli-Afrika, were to be allocated to it or were hopefully to be allocated to it. Paragraph 4 referred to two annexures, namely an agreement between Fli-Afrika and Match 'which confirms the special terms of payment that shall apply to tickets identified in Schedule A' and an agreement in full and final settlement in respect of the dispute between Fli-Afrika and SAFA. (Schedule A contained a list of 5 907 tickets for Fli-Afrika that had already been confirmed.)

[27] The letter ended with a request to Mr Sedibe and Mr Camaroodeen to 'review' the annexures and, if they had no queries about them, to return signed copies of the settlement agreement to Mr Byrom by the following evening.

[28] Mr Sedibe wrote back to Mr Byrom on the same day enclosing a signed copy of the settlement agreement. He undertook to arrange for Fli-Afrika to sign the

agreement before the deadline. Fli-Afrika duly signed both the agreement with Match and the settlement agreement with SAFA.

[29] The agreement with Match contains a preamble that explains the circumstances that led to it coming into existence. It recorded, in the first place, that Fli-Afrika and SAFA had 'entered discussions to establish a joint venture' in terms of which Fli-Afrika would sell World Cup travel packages, 'such packages consisting of match tickets sourced by SAFA, and certain other services including but not limited to accommodation and travel elements sourced by Fli-Afrika'. It also recorded that Fli-Afrika and SAFA wished to 'conclude and adjust as necessary the basis of their arrangements' in respect of their joint venture and to 'deal with this by way of a full and final settlement letter'. The preamble concluded as follows:

'As a consequence of its adjusted arrangements with SAFA and in view of the fact that the Last Minute Sales Phase for tickets to the 2010 FIFA World Cup South Africa commences on 15th April 2010, Fli-Afrika wishes to finalise its requirements to source tickets directly from 2010 World Cup Ticketing without delay to avoid the risk of diminishing availability of tickets.'

[30] The heart of the agreement is contained in clauses 1 and 2. They provide:

'1 MATCH, as the operator of the TOP on behalf of FIFA, will allocate and supply to Fli-Afrika the tickets identified at Schedule A to this agreement and will endeavour to source, allocate and supply Fli-Afrika a second tranche of tickets as identified in Schedule B to this agreement SUBJECT TO the prior fulfilment by Fli-Afrika of the following two conditions:

1.1 Receipt by MATCH of the fully executed Full and Final Settlement substantially in the form appearing in Schedule C.

1.2 Receipt by 2010 FIFA World Cup Ticketing of payment by no later than Wednesday 21st April of One Million Five Hundred Thousand South African Rand in part payment for the tickets identified at Schedule A and for the balance due for such tickets on the earlier of 1st June or seven days prior to the collection of such tickets.

2 The allocation of any such tickets to Fli-Afrika shall at all times be made strictly subject to Fli-Afrika's continuing compliance with all of its obligations pursuant to its appointment as a Participating Tour Operator.'

[31] The settlement agreement between Fli-Afrika and SAFA is described in the heading to the document as a 'FULL AND FINAL SETTLEMENT AGREEMENT'. Its operative clauses read as follows:

'BACKGROUND

A Fli-Afrika and SAFA have together been engaged in certain discussions and/or arrangements which include the provision by SAFA to Fli-Afrika of match tickets for the 2010 FIFA World Cup South Africa.

B Fli-Afrika and SAFA wish to confirm by the execution of this full and final settlement agreement that no such commitments for the provision of tickets by SAFA to Fli-Afrika are continuing from the date hereof.

THEREFORE IT IS AGREED AS FOLLOWS:

'1 SAFA hereby confirms that Fli-Afrika has no continuing commitment of whatever kind to acquire tickets for the 2010 FIFA World Cup South Africa from or through SAFA.

2 Fli-Afrika hereby confirms that SAFA has no continuing commitments of whatever kind to provide tickets for the 2010 FIFA World Cup South Africa to Fli-Afrika.

3 The parties therefore release each other from any obligations implied or otherwise that may exist in connection with any such commitments.'

The issues

[32] Fli-Afrika's case was that SAFA was not only under an obligation, in terms of the SLA, to provide Fli-Afrika with tickets, but that it was also under an obligation, in terms of the SLA, to pay for the accommodation and other travel arrangements that Fli-Afrika had already made and paid for.

[33] The heart of its claim, and the alleged basis of SAFA's obligation to pay Fli-Afrika is to be found in paragraphs 8 and 9 of the particulars of claim. They read:

'8 On a proper interpretation of clauses 3.2 and 4 of the agreement, the Plaintiff would lay out money for all travel arrangements, including accommodation and would be reimbursed therefor on submission of the expenditure to the Defendant.

9 Alternatively, it was a tacit term of the agreement that, in complying with its obligations in terms of clause 3.2, the Plaintiff would lay out money for hotel accommodation and would as contemplated by clause 4, be reimbursed by the Defendant for the costs of all travel arrangements.'

[34] SAFA's plea to each of these paragraphs is identical. It denied the content of the paragraphs and pleaded that the interpretation of clauses 3.2 and 4 contended for by Fli-Afrika was erroneous.

[35] In addition, SAFA raised a number of special pleas, including impossibility of performance and prescription. All but one these special pleas can safely be left out of account. The only one I shall deal with is the special plea that the settlement agreement, when properly construed, constituted a 'mutual termination/cancellation' of the SLA or a waiver on the part of Fli-Afrika of any right to claim from SAFA.

[36] Both of the issues that I have identified require an interpretation of the applicable agreement, the SLA in the first instance and the settlement agreement in the second instance. The proper approach to the interpretation of written documents, including contracts, has been set out by this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] in which it was held:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

---

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

The interpretation of the SLA

[37] Fli-Afrika's case is that it was obliged, in terms of clauses 3.2 and 4 of the SLA, either expressly or tacitly, to pay for accommodation and travel in advance, and SAFA, in turn, was required to reimburse it for what it had expended. Whether this is correct depends upon an interpretation of these clauses within their context.

[38] Clause 3.1 imposed an obligation on Fli-Afrika to source and supply 2 500 packages per week on behalf of SAFA, its VIPs and 'various international Football Federations' that were to be referred to Fli-Afrika by SAFA. Clause 3.2 defined what those packages comprised of – accommodation in various host cities, tickets for games and transport. In clause 3.3, SAFA undertook to supply the tickets and to pay Fli-Afrika 'the balance of any weekly unsold Packages in the event that Fli-Afrika is not able to sell 2 500 Packages per week'. Clause 3.4 provided for a process for payment and clause 3.5 provided for a fee of R2 000 per hour in respect of any consulting services provided by Fli-Afrika to SAFA. Clause 4 provided that Fli-Afrika would be responsible for running its day-to-day financial and administrative affairs and that, when it implemented 'travel arrangements' it was to ensure it billed SAFA which, in turn, would arrange for payment in terms of its 'current payment structure'.

[39] What is clear from my summary of clauses 3 and 4 is that the parties did not provide expressly that prior to SAFA supplying tickets, Fli-Afrika was obliged to expend money, recoverable from SAFA, for accommodation and other travel arrangments. That is certainly not what clause 3.2 said. Fli-Afrika's primary obligation was to provide packages, not to the public in general, but to SAFA, its VIPs and football governing bodies of SAFA's choice. It could only do so once it had the tickets to which it could then match the accommodation and transport, thus forming the package. By way of illustration, it could only book accommodation once it knew that a ticket had been given by SAFA to an official of a football governing body, for instance, for a particular game to be played at a particular stadium in a particular city. In other words, it was only after a ticket had been supplied that a package could be completed.

[40] The focus of clause 3 was on packages, and the obligations of the parties in relation to the packages. All that clause 3.2 did was to define the packages. It did not

create an obligation for Fli-Afrika, without knowledge of the recipients of tickets, to book accommodation in advance. Clause 4 did no more than provide for payment in respect of unsold packages.

[41] Paragraph 9 of the particulars of claim alleged in the alternative that it was a tacit term of the SLA that Fli-Afrika was obliged to pay for accommodation prior to the tickets being supplied. A tacit term must be 'inferred by the Court from the express terms of the contract and the surrounding circumstances'.[5]

[42] It seems to me that a tacit term to the effect contended for by Fli-Afrika is not tenable because the packages were specific to SAFA, its VIPs and its chosen allies in football governance: an obligation on the part of Fli-Afrika to book accommodation prior to receiving the tickets would place the cart before the horse. I can consequently see no logical reason why the unexpressed common intention of the parties, when they defined what a package was in clause 3.2, should have been, as the tacit term was formulated by counsel for Fli-Afrika, that 'in the event that Fli-Afrika sourced and paid for accommodation in anticipation of SAFA supplying tickets, and SAFA does not supply the tickets, then SAFA would be obliged to reimburse Fli-Afrika for any wasted accommodation'.[6] In any event, given the express terms of the agreement that I have alluded to, there plainly can be no room for importing the alleged tacit term asserted by Fli-Afrika.[7]

[43] I conclude that the interpretation of clause 3.2 and 4 of the SLA contended for by Fli-Afrika cannot be supported. Fli-Afrika has consequently not established a basis, that can be sourced either expressly or tacitly in the SLA, for the recovery of money expended by it in anticipation of SAFA supplying tickets. No such obligation was imposed upon SAFA by the SLA properly construed. This conclusion is dispositive of the appeal against Fli-Afrika. For the sake of completeness, however, I shall also address the effect of the settlement agreement.

---

[5] *Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531H-532A.

[6] Reliance on the tacit term was initially abandoned but was revived during the hearing of this appeal. I have quoted the term as counsel for Fli-Afrika formulated it during his argument.

[7] *Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd* [2011] ZASCA 158 para 13-14.

The interpretation of the settlement agreement

[44] SAFA pleaded, inter alia, that the settlement agreement, being either a 'mutual termination/cancellation' of the SLA, a waiver of any claim that Fli-Afrika may have had in terms of it or a variation of it, had the effect of 'barring' Fli-Afrika 'from claiming any payment of any sum of money arising from' the SLA. In its replication, Fli-Afrika pleaded that the settlement agreement, 'on a proper interpretation', only extinguished obligations that arose after the date on which it was signed, leaving unaffected those obligations that had arisen prior to the date on which it had been signed.

[45] I have sketched, in some detail, the background to and context in which the settlement agreement came to be concluded. That background and context is important for purposes of interpreting the agreement and determining its scope and purpose.

[46] As important, however, are the words used by the parties. The agreement described itself as an agreement in full and final settlement. The dispute that it settled related to SAFA's obligation in terms of the SLA to provide tickets. It put an end to that obligation and Fli-Afrika's obligation to acquire tickets from SAFA. Clause 3 then provided:

'The parties therefore release each other from any obligations implied or otherwise that may exist in connection with any such commitments.'

[47] There can be no doubt that the settlement agreement was concluded as a result of SAFA's inability to provide tickets and the commitments that Fli-Afrika had undertaken when it booked accommodation in advance of obtaining the tickets. The driving force behind the settlement agreement was, without doubt, Match which had an interest, as FIFA's agent concerned specifically with administering the distribution of tickets, to ensure that the World Cup ran smoothly and efficiently. It wanted to avoid what had the potential of being a most destructive and unseemly dispute between the host of the World Cup and one of its long-term commercial partners.

[48] In order to avoid this result, Match stepped into the breach to supply Fli-Afrika with tickets. It imposed a condition on Fli-Afrika: if it wanted to obtain tickets, Fli-Afrika had to settle its dispute with SAFA. When Fli-Afrika entered into the agreement with

Match, it agreed to that condition and entered into the settlement agreement on the same day. The agreement between Match and Fli-Afrika, on the one hand, and SAFA and Fli-Afrika, on the other, are complementary in the sense that the conclusion of a settlement agreement was a condition of Fli-Afrika being able to obtain tickets from Match.

[49] The effect of Fli-Afrika's agreement with Match was that Fli-Afrika was able to obtain tickets – insufficient in number compared to its accommodation commitments, as it happened – so that it could make packages that it could sell, not to the persons that SAFA had undertaken to refer to it in terms of the SLA, but to the public in general. In this sense, the agreement contemplated Match more or less stepping into SAFA's shoes so that Fli-Afrika could complete what it had started. The price it had to pay for this was to agree to the condition that it had to settle its dispute with SAFA. By concluding the settlement agreement, it indicated its willingness to do so – to abandon the SLA and 'any obligations implied or otherwise' that may have existed. The agreement between Match and Fli-Afrika was subject to a suspensive condition that Fli-Afrika would conclude a 'fully executed Full and Final Settlement agreement' with SAFA, substantially in the form proposed by Match. There clearly could be no agreement between Match and Fli-Afrika absent this settlement agreement.

[50] The settlement agreement identified the bone of contention between the parties to the SLA – SAFA's inability to provide the tickets it had undertaken to supply – and then settled the dispute with three inter-locking clauses: first, it was agreed that SAFA no longer had to supply tickets; secondly, it was agreed that Fli-Afrika was no longer obliged to take tickets from SAFA; and thirdly, it was agreed that each party released the other from 'any obligations' in connection with 'any such commitments'. When the words used in the settlement agreement are construed within the context I have outlined, and bearing in mind its purpose, it is clear that the agreement was, as it proclaimed, in full and final settlement of all obligations that had arisen, including any claims for damages that may have arisen by the time it was concluded.

[51] Given the history of the dispute between SAFA and Fli-Afrika, which I have sketched in some detail, it plainly would not have made any sense for them to conclude a settlement agreement that only purported to regulate any future relationship between

them. The settlement agreement expressly recorded that neither Fli-Afrika nor SAFA had any ‘continuing commitment of whatever kind’ to acquire tickets, in the case of Fli-Afrika, or provide tickets, in the case of SAFA. That being so, it is difficult to understand what future contractual obligations remained that fell to be regulated by the settlement agreement. And, as I demonstrated, the tickets were integral to the packages. If that primary reciprocal obligation no longer remained, it ought to follow that any subsidiary obligations could likewise no longer be enforced.

Conclusion

[52] In summary, the SLA did not impose an obligation on Fli-Afrika to book and to pay for accommodation prior to obtaining tickets from SAFA, and no obligation was imposed by the SLA on SAFA to pay Fli-Afrika for the accommodation that it had booked. Secondly, even if such a set of obligations had been created by the SLA, they were all extinguished by the settlement agreement which was concluded by SAFA and Fli-Afrika, on the insistence of Match. The result is that the appeal must succeed.

[53] I make the following order:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following order: ‘The appeal is dismissed with costs, including the costs of two counsel.’

_____

C Plasket

Judge of Appeal

APPEARANCES

For the appellant:	N Arendse SC and S Fergus Instructed by: Dikotope Attorneys, Benoni Matsepes Inc, Bloemfontein
For the respondent:	A Gautschi SC and R G Cohen Instructed by: Glynnis Cohen Attorneys, Johannesburg Lovius Block, Bloemfontein