IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 32/22
Court *a quo* Case No.: 2082/21P

In the matter between:

SKEMA HOLDINGS PROPRIETARY LIMITED	**FIRST APPELLANT**
(REG. NO. 1990/006817/07)	(First respondent in court *a quo*)
FRIEDRICH WILHELM GERHARD WŐRNER	**SECOND APPELLANT**
	(Second respondent in court *a quo)*
and	
ROBERT FELLNER-FELDEGG	**RESPONDENT**
	(Applicant in the court *a quo)*

Coram: **Madondo AJP, Koen J et Mathenjwa AJ**
Heard: **9 September 2022**
Delivered: **21 September 2022**

ORDER

On appeal from the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Bedderson J) sitting as the court of first instance:

1. The appeal is dismissed with costs.
2. The order of the court a quo is supplemented by the addition of the following order:

   'The counter application is dismissed with costs.'

JUDGMENT

Koen J (Madondo AJP et Mathenjwa AJ concurring)

Introduction

[1] This is an appeal against the order of the court a quo which granted judgement in motion proceedings in favour of the respondent against the appellants, jointly and severally, for payment of the sum of €1.5 million together with interest thereon at the rate of 5% per annum capitalized annually in arrears from 24 January 2017 to date of payment, an order declaring the immovable properties mortgaged in covering bond B1022/2017 (the bond) executable, and costs of the application on the attorney and client scale including the costs of senior counsel. Where necessary, and if required to be distinguished from any other application, it shall be referred to as the main application.

[2] The court a quo was also faced with a counter application[1] brought by the appellants. The court a quo seemingly proceeded on the basis that the fate of the counter application would follow that of the main application. It did not issue a separate order in respect of the counter application.

[1] The relief claimed in the counter application is set out in para 49 below.

[3] There was also an application by the appellants to strike out certain allegations in and annexures to the respondent's replying affidavit as inadmissible evidence with costs. No separate order was made by the court a quo in respect of this application to strike out either.

[4] The present appeal lies against the whole of the judgment of the court a quo with the leave of that court. According to the appellants' notice of appeal they seek an order 'dismissing the main application, granting the counter application, and the strike out application, all with costs, including the costs of senior counsel'. The grounds in respect of which leave to appeal was granted by the court a quo, following the application for leave to appeal, however only included that the court a quo had erred in the main application: in adopting the interpretation of the loan agreement which it did, and in not concluding that agreement of loan had been varied by the exchange of the two emails; and in respect of the counter application, in not finding that the respondent frustrated the sales of the properties mortgaged in the bond. There was no reference to the application to strike out in the application for leave to appeal.

[5] The application to strike out accordingly does not form part of this appeal and will not be considered in this judgment. The counter application, in respect of which the court a quo made no separate order shall be considered, as it was covered by the leave to appeal.

The judgment of the court a quo

[6] It is common cause that the amount of the judgment debt, being the 'initial loan' amount, of €1.5 million, advanced in terms of the loan agreement as amended by two subsequent addenda, together with interest thereon at the rate of 5% per annum capitalized annually in arrears from 24 January 2017 to date of payment, is owing.[2] What is in dispute is whether this debt had become due and payable.

[2] To date the appellants have not made any payment towards settlement of their admitted liability in the sum of €2.5 million to the respondent.

[7] The appellants argued that on a proper interpretation of the loan agreement, as amended by two subsequent addenda, the debt would only become due and payable from the proceeds of the immovable properties which are subject to the bond, in accordance with and to the extent provided by clause 6.2 of the loan agreement, 'as and when a sale[3] takes place' of any of the properties hypothecated in terms of the bond.[4] Alternatively, the appellants submitted that the terms of the loan agreement as varied by two addenda, were varied by two emails dated 31 July 2020 and 22 October 2020 which were exchanged between the parties. The respondent contended that the debt became due and payable on or before 1 March 2021, as provided in clause 5 of the loan agreement as amended by the second addendum. The court a quo agreed with the contention of the respondent and rejected that of the appellants.

Relevant background facts

[8] The respondent and the appellants on 18 January 2017 concluded the written loan agreement in terms of which the respondent agreed to lend an amount of up to €2.5 million to the first appellant. The loan would be drawn down in two tranches of €1.5 million ('the Initial Loan') and €1 million ('the Loan Balance'). On 24 January 2017 and 27 March 2017, respectively, the first appellant advanced the Initial Loan of €1.5 million and the Loan Balance of €1 million. The second appellant bound himself jointly and severally as surety and co-principal debtor in favour of the respondent for the first appellant's obligations in terms of the loan agreement. The first appellant furthermore provided security in the form of the bond, as required and set out in clause 6 of the loan agreement.

[9] The express terms of the written loan agreement material to this judgment include the following:

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[3] It is significant that the reference is to the sale of the property, and not the transfer thereof.

[4] A slightly nuanced interpretation was also at one stage contended for, namely that even if the loan amount was due on the specific dates contended for by the respondent, that what would be due would only be the portion due by that date from proceeds that might have been realized from the sale of properties, and hence if none had been sold, no payment would be due, even if the date for payment had arrived. This argument will suffer the same fate as that which determines whether the payments were due in the first place.

(a) The written agreement constituted the whole agreement between the parties containing all the express provisions agreed on with regard to the subject matter of the loan agreement;

(b) No agreement varying, adding to, deleting from, or cancelling the loan agreement, and no waiver of any right thereunder would be effective unless this was done in writing and signed by or on behalf of the parties;

(c) Clause 5.1 provided that the Initial Loan (€1.5 million) plus interest would be repayable in an instalment of €1 million plus interest on or before 31 January 2022, and the balance of €500 000 plus interest in instalments of €150 000 per month commencing on 1 July 2018, and thereafter on the first of every following month.[5]

(d) Clause 5.2 provided that the Loan Balance (€1 million) plus interest would be repayable in instalments of €150 000 per month commencing on 31 January 2018, and thereafter on the last day of every following month.

(e) Clause 5.3 provided that should the first appellant default in making payment of any of the instalments referred to in clauses 5.1.2 and 5.2 of the loan agreement, and should such payment not be made within fourteen days of receipt of written notice from the respondent, the respondent would be entitled to declare the entire loan plus interest repayable immediately without further notice.

(f) Clause 6.1 provided that the bond would be registered as security for the loan.

(g) In terms of clause 6.2 the first appellant was obliged to *'use its best endeavours to sell'* the immovable properties subject to the bond and, as and when sales take place, to utilise a portion of the nett proceeds towards settlement of the loan. If the Initial Loan and Loan Balance had

> 'been drawn down, Euro 125 0000 of the nett proceeds of every sale [had] to be paid to the [respondent] in return for [him] releasing the security on that Property on the basis that Euro 75 000 is allocated to the Initial Loan and Euro 50 000 to the Loan Balance.'

(h) Clause 5.5 provided that to the extent that any of the properties which are subject to the bond were sold in terms of clause 6.2 of the loan agreement, the amounts payable to the respondent in terms of clause 6.2 would be deemed to have settled those instalments covered by the payments (clause 5.5).

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[5] These payments in respect of the balance of the initial loan were dealt with in clause 5.1.2.

[10] Two written addenda to the loan agreement were concluded subsequently.

[11] In terms of the first addendum signed by the parties on 12 February 2018 clauses 5.1.2 and 5.2 of the loan agreement were deleted and substituted. Clause 5.1.2 henceforth provided that the balance of €500 000 of the Initial Loan plus interest would be payable in instalments of €150 000 per month commencing on 1 July 2019 and thereafter on the first day of every following month. Clause 5.2 henceforth provided that the Loan Balance plus interest would be repayable in instalments of €150 000 per month commencing on 31 January 2019 and thereafter on the last day of every following month.

[12] In terms of the second addendum signed by the parties concluded on 12 May 2019, clauses 5.1, 5.2 and 5.3 of the loan agreement were deleted and substituted with the following:

‘5.1 The Initial Loan plus interest is repayable on or before 1 March 2021 and the Loan Balance plus interest is repayable on or before 1 July 2022.

5.2 The interest payable on the Initial Loan and the Loan Balance must be capitalized annually in arrear.

5.3 Should Skema fail to repay either the Initial Loan or the Loan Balance timeously the Lender may take such legal action as he deems appropriate.’

[13] On 31 July 2020 the respondent in an email to the second appellant stated:

‘Dear Fred

Hopefully things are going well.

Let me confirm that our common understanding of the payback of the two loans over 2,5 Mio Euro given from me to SKEMA was and is that this loans will be payed back from SKEMA by selling the properties.

The 2,5 Mio will not be paid back by the MINING business.

This is already proven by my agreement to the APENDIX[6] of the loan contract in postponing the pay back. Understanding that the first date was not a good timing for selling the properties.

With best regards

Robert.’

[6] This could only have referred to the addenda as there is no other ‘appendix’ to the loan agreement.

[14] On 22 October 2020 the second appellant in an e-mail addressed to the respondent stated inter alia:

'Whilst, I am sorry to hear that there are some delays with the SLV sale, which has caused you certain liquidity problems, it has always been our understanding that the Euro 2,5m loan would be repaid from property sales. In fact, when we needed confirmation of this for our Covid loan application in July, you confirmed that this was indeed the arrangement, and that the loan would not be repaid by the industrial business.

During our meeting on Tuesday, you however requested that we apply to Absa for a loan re-advance in order to repay the Euro 1,5m a portion of the loan plus interest, repayable in March 2021, and that you would be prepared to offer securities for the loan, either in South Africa or Germany, in addition to Absa's first bond.

. . .

Robert, this is unfortunately not possible for the following reasons:

. . .

- Nedbank, as the company's banker, will not allow any new Skema Holdings loan to be repaid out of the industrial business – this is why they require confirmation that your loan will be repaid from property sales and not by the industrial business, prior to granting the Covid loan.
- Skema Mining Components has Neil as a 26% shareholder, and Neil is not involved in Skema Holdings.'

[15] On 16 November 2020 the appellants' attorney, Mr. David Warmback, in an e-mail to the respondent commented as follows regarding the repayment of the Initial Loan and the Loan Balance and the due dates of such repayment:

'The second addendum provides that the Initial Loan (Euro 1.5m) plus interest on the Initial Loan is repayable on or before 1 March 2021 and the Loan Balance (Euro 1m) plus interest on the Loan Balance on or before 1 July 2022. It is therefore the Euro 1.5m plus the capitalised interest on the Euro 1.5m which is due by 1 March 2021.

. . .

In the event of Skema not being able to pay you timeously, and you do not conclude a further addendum to the Loan Agreement, you will be entitled to call up the Bond and proceed against the properties. The properties would be the subject of an auction sale. In the event that your

claim exceeds Euro 3 000 000, being the sum of the capital amount and additional amount covered by the Bond, you will still be entitled to proceed legally against Skema for any shortfall.
I understand from my client that it intends selling a number of properties as soon as possible to assist you with your interest issue with the German tax authorities, and our client is fairly confident of achieving this by 1 March 2021, based on feedback from agents.
The balance of Euro 1m (ie Loan Balance) plus interest on the Loan Balance is due to be paid by Skema to you on or before 1 July 2022.'

[16] On 24 November 2020 Mr Coetzee, another of the appellants' attorneys, addressed an e-mail to the respondent in response to the respondent's enquiry in respect of Mr Warmback's e-mail of 16 November 2020 stating:

'1. I am back from leave and David Warmback has passed on to me your email of 19 November 2020 for reply.
2. You are correct that the loans are repayable in Euros and that the exchange which would apply will be the rate applicable at the time of repayment.
3. Quite simply, as a result of the weakening of the Rand against the Euro, it is going to be necessary for Skema to sell more properties to repay the loans plus capitalised interest. Skema is however not precluded from selling its properties at a predetermined price. . .'

The principal issue

[17] As will be apparent from the above, the principal issue in this matter is whether the sum of €1.5 million claimed by the respondent fell due for payment on 1 March 2021. The respondent contends that on a proper interpretation of the terms of the loan agreement, the addenda and the bond, and having due regard to the conduct of the parties during and subsequent to the conclusion of the agreements, the payment claimed was due and payable on 1 March 2021.

Discussion

The principles governing the interpretation of a written loan agreement

[18] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[7] held that:

[7] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176, 2014 (2) SA 494 (SCA) para 12.

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".' (footnote omitted)

[19] More recently in *Capitec Bank Holdings v Coral Lagoon Investments 194 (Pty) Ltd*[8] it was said, specifically in regard to a written contract, the requirement of contextualising the words used, and the application of the parol evidence rule, that:

'[39] In the recent decision of *University of Johannesburg v Auckland Park Theological Seminary and Another (University of Johannesburg)*, the Constitutional Court affirmed that an expansive approach should be taken to the admissibility of extrinsic evidence of context and purpose, whether or not the words used in the contract are ambiguous, so as to determine what the parties to the contract intended. In a passage of some importance, the Constitutional Court sought to clarify the position as follows:

"Let me clarify that what I say here does not mean that extrinsic evidence is always admissible. It is true that a court's recourse to extrinsic evidence is not limitless because 'interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses". It is also true that "to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible". I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight."

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[8] *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] ZASCA 99; 2022 (1) SA 100 (SCA); [2021] 3 All SA 647 (SCA), citing *University of Johannesburg v Auckland Park Theological Seminary and another* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC).

[43] . . . If then, on this view, a written contract has a plain meaning and the writing is the exclusive memorial of the contract, the parol evidence rule excludes extrinsic evidence that would alter, add to or vary that plain meaning.' (footnotes omitted)

The interpretation of the written loan agreement

[20] Turning then to an application of the above principles to the facts, the plain meaning of the express wording of clauses 5, as amended, and 6, which was never amended, of the loan agreement should be taken as the point of departure. Regard should be had to the facts and circumstances, to the knowledge of the respondent and the appellants, under which the loan agreement and addenda thereto were concluded, and their intention in exchanging the emails relied upon by the appellants.

[21] The terms of clauses 5.1, 5.2 and 5.3 of the loan agreement as amended by the second addendum, in the context of the loan agreement, are clear and unambiguous. They do not lend themselves to the appellants' interpretation that the loans would be paid only from the proceeds of the sale of the immovable property subject to the bond, and only as and when a sale takes place. If that was so, then there would have been no need for the two amendments to clause 5 which were introduced by the addenda.

[22] As regards the addenda, the appellants knew that the first appellant was experiencing cash flow problems which would make payment of the first instalment on the date initially fixed in the loan agreement problematic. Such knowledge was conveyed by the second appellant to the respondent. It was in those circumstances and with that knowledge that the parties concluded the first addendum in terms of which the payment date of the first instalment in respect of the Initial Loan was extended from 1 July 2018 to 1 July 2019, and the payment date of the first instalment in respect of the Loan Balance was extended from 31 January 2018 to 31 January 2019. The first addendum simply extended the commencement dates for payment of the instalments by one year. Consistent with the initial terms of the loan agreement which provided that repayments would be due by specific dates, repayment in terms of the first addendum would still be due on specified dates.

[23] The first appellant failed to pay the monthly instalments of €150 000 which fell due in terms of the first addendum when agreed. Its inability and failure to pay was within the knowledge of the appellants and the respondent. In addition, the second appellant informed the respondent that the first appellant's cash flow problems had not been resolved, and that the first appellant would be unable to pay the further monthly instalments. The second appellant, who had the best knowledge of the first appellant's financial situation, prepared a further addendum and proposed a repayment date of 1 March 2021 for the Initial Loan. It is in that context, with knowledge of the aforementioned facts, that the parties concluded the second addendum.

[24] The second addendum dispensed with the payment of monthly instalments, and provided for the repayment of the Initial Loan in full on or before a specified date (i.e. 1 March 2021) and the repayment of the Loan Balance in full on or before a specified date (i.e. 1 July 2022). Again, consistent with what had happened in the past, specific dates for payment were fixed. There would have been no need to do so if the time for payment would be determined in terms of the provisions of clause 6.

[25] Thus the initial provisions of the loan agreement and the addenda, all provided that the obligation to repay the loan had to occur by fixed future dates expressly agreed upon between the parties. Repayment was always time-based, not event based. Clause 5.3 (as amended) expressly provided that should there be a failure to repay the Initial Loan or the Loan Balance timeously, the respondent could take such legal action as he deems appropriate.

[26] In each instance, the addenda were concluded to extend the due dates for repayment of the Initial Loan and the Loan Balance. In paragraph 21 of their answering affidavit, the second appellant tellingly states:

'Furthermore, the effect of the addenda was to extend the time for repayment.'

This statement carries the implied admission that there was a fixed time for repayment of the loan, in other words a fixed due date. On the appellants' version, there would be

no need to extend these dates for payment as the loan agreement had no specific dates for repayment of the loans.

[27] On 22 October 2020, which is after the conclusion of the second addendum, the second appellant in his e-mail to the respondent confirmed that the Initial Loan of €1.5 million plus interest was 'repayable in March 2021.'

[28] On 16 November 2020 the appellants' attorney, Mr Warmback, in his e-mail recounted the terms of the loan agreement as amended by the addenda, and clearly expressed a conclusion, denoted by the introductory words 'It is therefore. . .', when explaining:

'It is therefore the Euro 1.5m plus the capitalised interest on the Euro 1.5m which is due by 1 March 2021.'

[29] Mr Warmback's e-mail of 16 November 2020 was also addressed to *inter alia* the second appellant and the appellants' attorney of record, Mr Coetzee. On 24 November 2020 Mr Coetzee addressed an e-mail to the respondent in response to the respondent's enquiry in respect of Mr Warmback's e-mail of 16 November 2020. Mr Coetzee did not distance the appellants from the statements in Mr Warmback's e-mail regarding the due dates for repayment of the Initial Loan and the Loan Balance.

[30] The appellants' interpretation of the agreement is accordingly also not supported by the evidence as to how the obligations in terms of the agreement were viewed and implemented by the appellants and their attorneys.

[31] Indeed, the above evidence and the conduct by the appellants and their attorneys, are diametrically opposed to the appellants' now reliance on clause 6.2 of the Loan agreement, that payments would only fall due from the proceeds of sales of the immovable properties subject to the bond, and its corollary, that in the absence of any such sales, notwithstanding the best endeavours of the first appellant, no payment would be due to the respondent. Such an interpretation is furthermore in direct conflict

with the clear express terms of clauses 5.1 and 5.3 (as amended), as well as the contents of the e-mail addressed by the appellants' attorney, Mr Warmback to the respondent on 16 November 2020, and the second appellant's e-mail of 22 October 2020 to the respondent. The appellants' interpretation would render clauses 5 and 6 mutually exclusive and destructive, and would render clauses 5.1, 5.2 and 5.3 (whether in the original or as amended) unnecessary. That would violate the basic principle of interpretation that the preferred interpretation of a written agreement must account for all the words in the document.

[32] Clause 6, in its original form without any amendment, always remained a part of the loan agreement. If the appellants' version was correct, there would have been no need to re-negotiate new dates for payment, as was done in the first and second addenda. It would mean that on the appellants' version, the two addenda were negotiated and concluded for no reason whatsoever. That would, with respect, be an absurd interpretation. Clearly the purpose of the addenda, on each occasion, was to extend the due dates fixed for repayment of the Initial Loan and the Loan Balance. On the appellants' interpretation there would have been no need to extend the dates for payment.

[33] If the appellants' version is correct then repayment of the loan was conditional upon the sale of the immovable properties subject to the bond, and if there were no such sales, or insufficient sales to settle the loan there would be no due date of repayment, no obligation to pay the outstanding balance, the loan would accordingly never be repayable, and the respondent would not be entitled to enforce payment of the balance of the loan. That would offend against the following basic principle of our law that:

'A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'[9]

The appellants' interpretation would not make business sense. Accordingly, it cannot be sustained.

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[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA), [2012] 2 All SA 262 (SCA) para 18.

[34] In summary, the correct legal position was that the Initial Loan had to be repaid on or before 1 March 2021 and the Loan Balance on or before 1 July 2022 Pending payment, the first appellant's indebtedness was secured by the bond registered over the immovable properties. As and when the immovable properties were sold, a portion of or the entire proceeds of such sale would be utilised towards part settlement of the first appellant's obligations arising from the €2.5 million loan advanced by the respondent to the first appellant, as the value of the respondent's security would be reduced by the release of individual subdivisions transferred to purchasers. Such an interpretation would make business and commercial sense, because if the indebtedness was reduced on the sale of each unit and the obligation to make payment was left entirely to a fixed due date, then the first appellant might no longer have those funds available when the due date arrives. The fact that the proceeds of the sale of the immovable properties would be used towards settlement of the first appellant's indebtedness to the respondent, would not however detract from the first appellant's obligation to repay the full Initial Loan on or before 1 March 2021 and the Loan Balance on or before 1 July 2022. Such an interpretation gives certainty to the parties and business efficacy to the loan agreement.[10]

The appellants' contention that the loan agreement was varied by the exchange of the emails of 31 July 2020 and 22 October 2020

[35] The contents of these emails have been set out in paragraphs 13 and 14 above.

[36] In the alternative to the interpretation that the loan agreement provided for repayment in accordance with clause 6, the appellants argued that the exchange of these e-mails between the respondent and the second appellant on 31 July 2020 and 22 October 2020 varied the terms of the loan agreement to provide that repayment of the loan agreement would only fall due from the proceeds of the sales of the immovable properties,.

[10] *Mittermeier v Skema Engineering (Pty) Ltd* 1984 (1) SA 121 (A) at 128A – B.

[37] The first conceptual difficulty with this argument is that if clause 6 meant what the appellants say it did, there would be no need for a variation. And if it is accepted that a proper interpretation of the loan agreement accords with that which the court a quo had found, then the variation would in fact require that the provisions of clause 5 of the loan agreement, as amended by the two addenda, were effectively to be deleted from the loan agreement and/or ignored.

[38] Insofar as the alleged variation would amount to a deletion of the dates fixed for repayment by clause 5 of the loan agreement as amended, it would amount to a waiver of those rights. The appellants would bear the onus to prove the waiver.[11] Whether there is a waiver, is invariably a question of fact.[12]

[39] The appellants focused mainly on whether such variation or waiver of the terms of the loan agreement complied with the non-variation provision in the loan agreement requiring it to be written and signed by the parties thereto. They relied on the provisions of section 13(3) of the Electronic Communications and Transactions Act (the Act)[13] read with various definitions in the Act, notably the definitions of 'electronic communication', 'data message', 'electronic signature', and 'transaction.' Section13(3) of the Act provides:

'(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if –

(a) a method is used to identify the person and to indicate the person's approval of the information communicated; and

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.'

[40] The respondent however contended that the exchange of the e-mails was not an 'electronic transaction' as contemplated in section 13(3) of the Act, as, and because the

[11] *Borstlap v Spangenberg en andere* 1974 (3) SA 695 (A).
[12] *Laws v Rutherford* 1924 AD 261.
[13] Electronic Communications and Transactions Act 25 of 2002.

parties, or certainly the respondent, in exchanging the e-mails, neither contemplated, nor intended that such exchange would constitute a transaction or an agreement varying or waiving the repayment terms of the loan agreement.

[41] It is clear from the established facts that the purpose of the respondent's e-mail of 31 July 2020 was not to vary or waive the terms of the loan agreement but to provide confirmation, following a request by the appellants, that the loan forming the subject of the loan agreement would not be repaid by Skema Mining, but by the first appellant from the sale of the property it owns. The second appellant in his email of 22 October 2020 confirmed that Nedbank had required confirmation, prior to granting the Covid loan, that the source for repayment of the loan would be from property sales, and not from the industrial business. The respondent's email of 31 July 2020 simply provided the confirmation requested by the appellants. The email went no further, and was not intended to convey any more than that. In the words of the second appellant in his replying affidavit in the counter application:[14]

'[50] Nedbank was simply asking for confirmation of what the correct position was.

[51] I telephoned the (respondent) prior to him sending the email of 31 July 2020 and at the time he was driving somewhere in northern Germany, according to him. I explained the position to him and asked him simply to confirm what is in fact the truth of the matter.

[52] He had no objection to doing so and that was the genesis of his email of 31 July 2020.'

[42] The aforesaid is dispositive of the appellants' contention that a variation was effected by the exchange of the emails. It is accordingly not necessary to consider further the provisions of the Act, or the decisions in inter alia *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash*,[15] or *Borcherds v Duxbury,*[16] or *Global & Local Investment Advisors (Pty) Ltd v Fouché*.[17]

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[14] I.e. the second respondent's (in the court a quo) replying affidavit of 9 June 2021.
[15] *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and another* [2014] ZASCA 178, 2015 (2) SA 118 (SCA).
[16] *Borcherds and another v Duxbury and others* [2020] ZAECPEHC 37, 2021 (1) SA 410 (ECP).
[17] *Global & Local Investments Advisors (Pty) Ltd v Fouché* [2019] ZASCA 8, 2021 (1) SA 371 (SCA).

[43] There was no evidence that the respondent transmitted the e-mail of 31 July 2020 with the intention to vary the terms of the loan agreement by effectively waiving compliance with the provisions of clause 5 thereof. As was said in *Sonfred (Pty) Ltd v Papert*[18]

'It is . . . axiomatic that a person is not bound by the mere fact that his signature appears upon a document of debt. The chief significance of a signature to a document of obligation is that it is evidence of the fact of consent by the signatory, and in order that he may be bound it is necessary that he shall have affixed his signature with the intention of binding himself.'

[44] If the intention was to amend the dates for repayment fixed in the second addendum, then the emails would have said so. To the contrary, in his e-mail of 31 July 2020, the respondent specifically referred to the addendum to the loan agreement in terms whereof he agreed to postpone repayment of the loan, as the first date for repayment was not 'good timing for selling the properties.' In his e-mail of 22 October 2020 the second appellant expressly confirmed that the €1.5 million portion of the loan plus interest (in other words the Initial Loan plus interest) was repayable in March 2021. Shortly after the exchange of the emails, the appellants' attorney, Mr Warmback, on 16 November 2020 confirmed that the Initial Loan was repayable on or before 1 March 2021 and the Loan Balance on or before 1 July 2022 (as agreed in the second addendum). These facts are inconsistent with the parties intending to achieve a variation to the express terms of the loan agreement. Had the parties intended to vary the loan agreement as contended by the appellants, then they would have concluded an addendum to that effect, as with the previous two addenda which were concluded when they contemplated and intended to change the dates for repayment of the loan, or at the very least, they would have said that the provisions of clause 5 were varied or waived.

[45] The appellants have failed to establish a variation of the terms of the loan agreement by the exchange of the emails.

The *exceptio non adimpleti contractus*

[18] *Sonfred (Pty) Ltd v Papert* 1962 (2) SA 140 (W) at 145.

[46] There was also some suggestion that the appellants were excused from making payment of the loan because the respondent had failed to co-operate, and had indeed frustrated the sale of the subdivisions subject to the bond. Invoking the *exceptio non adimpleti contractus* the argument would be that the appellants would therefore be excused from making payment.

[47] Having concluded above that the loans were repayable on fixed dates, in accordance with the provisions of clause 5 as amended by the addenda, this argument must fail, as the due date for repayment of the loans had no reciprocal connection to the properties being sold, or their sale allegedly being frustrated. The first appellant's obligation to repay the Initial Loan was neither conditional upon, nor undertaken in exchange for the respondent consenting to the release of the immovable properties from the bond.[19] That ends this enquiry.

[48] In any event, the argument must also fail because as a matter of fact, the respondent had not frustrated the sale of the subdivisions. This will be considered in more detail below when dealing with the appellants' counter application.

The counter application

[49] The appellants launched a counter application in which the following relief was claimed:[20]

'[1] The Applicant is ordered to comply with clause 6.2.2 of the loan agreement a copy of which is annexure 'RF1' to the founding affidavit by releasing his security on each property sold as contemplated in that clause on payment of the nett proceeds of the sale until the full amount of the loan amount and lawful interest thereon is paid to him on the basis that:

[a] Each such property may be sold for not less than R 2 million (or such lesser amount as may be agreed to in writing by the Applicant);

[b] an amount equivalent to Euro 75,000 of each such sale shall be allocated to the initial loan referred to therein until payment in full thereof together with any lawful

[19] See *ESE Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805(C) at 809D–E and *Grand Mines (Pty) Ltd v Giddey N.O.* [1998] ZASCA 99, 1999 (1) SA 960 (SCA) at 965E–I**.**

[20] I.e. the respondents' (in the court a quo) notice of counter application of 5 May 2021.

interest, and the balance of the said proceeds up to the amount of Euro 125 000 shall be allocated to any loan balance owing to the Applicant until payment in full thereof together with any lawful interest.

[2] The Applicant is ordered to pay the Respondents' costs of the counter application, including the costs of senior counsel.

[3] The Respondents are awarded further, other or alternative relief.'

[50] The appellants advanced as the basis for their counter application, that the respondent has frustrated the sale of the properties, specifically, that the respondent had refused to agree to the sale of the properties below a certain price.

[51] The answering affidavit is however very sparse on identifying the factual evidence on which reliance would be placed to support this relief. We were referred only to some general allegations with reference to certain 'correspondence.' For example, in paragraph 28 of the answering affidavit, the second appellant simply states:[21]

'Moreover, as is reflected in the correspondence, the Applicant has frustrated sales by refusing to agree to the proposal by SKEMA that it reduces the prices of the property. In this regard SKEMA was attempting to use its *"best endeavours*" to facilitate as many sales as possible by lowering the price.'

[52] The correspondence on which reliance is seemingly placed by the appellants is attached to the end of the answering affidavit as annexures. But there are no allegations in the body of the affidavit seeking to explain the relevance of this correspondence, or setting out on which parts thereof reliance is placed. Such an approach, referring simply to the factual basis for relief claimed, 'as reflected in the correspondence' without identifying the particular contents relied upon is irregular. It is not permissible for a deponent simply to annex documentation to his papers without identifying the portions of such documentation upon which reliance is placed.[22] Courts and opposing litigants are not required to trawl through lengthy annexures to an affidavit to identify what might

[21] I.e. the respondents' (in the court a quo) notice of counter application of 5 May 2021.

[22] *Derby-Lewis and another v Chairman, Amnesty Committee of the Truth and Reconciliation Commission, and others* 2001 (3) SA 1033 (C) at 1052C-E, *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) para 43.

or might not be the relevant allegations upon which reliance might be placed and which they would be required to address.

[53] The aforesaid defect notwithstanding, on being invited nevertheless to point to the relevant parts of the correspondence on which reliance was placed, counsel referred to the following:

(a) In the email from Mr Warmback dated 16 November 2020 he recorded that:

> 'I understand from my client that it intends selling a number of properties as soon as possible to assist you with your interest issue with the German tax authorities, and our client is fairly confident of achieving this by 1 March 2021, based on feedback from agents.'

(b) In the email from Mr Coetzee dated 24 November 2020 he recorded that

> '. . . It is going to be necessary for Skema to sell more properties to repay the loans plus capitalised interest. Skema is however not precluded from selling its properties at a predetermined price. . . Finally, I am instructed that you advised Fred that you are prepared to reduce the interest rate on the loans if he agreed not to sell the properties. However, as pointed out to you, it would not be possible for the company to repay the loans plus capitalised interest unless it sells the properties so your proposal would not make any sense.'

(c) In the email of 8 January 2021 addressed to the second appellant the respondent stated that in 2015 he had paid R4 560 000 for portion 14 and that he was very unhappy

> 'with the current "Black Friday" deal indicating sites for sale at 2.000.000 ZAR (excl VAT) each. This clearly demonstrates that we paid far too much for our site and that now a very different customer profile is being targeted too.'

(d) Finally reliance was placed on a draft order which the respondent had proposed to resolve the counter application.

[54] The aforesaid portions quoted from email correspondence does not establish a frustration of sales. The respondent was unhappy about the prices charged for the properties, but it did not go beyond that.

[55] As regards the respondent's proposed alternative draft order to resolve the counter application, the draft order annexed to his replying affidavit was not annexed as a concession of the relief claimed by the appellants in their counter application. Indeed the respondent in the replying affidavit expressly records in regard to the draft order proposed by him that:

'My consent to the grant of the abovementioned Draft Order and the terms of the Draft Order are not to be construed as an admission by me of the Respondents' [that is, the appellants in the appeal] interpretation of the agreements and the mortgage bond.'

The respondent prayed that no cost order should be made in respect of the appellants' counter application if his proposal was to be adopted.

[56] As already pointed out earlier, no order was made by the court a quo in respect of the counter application, whether as claimed by the appellants, or suggested by the respondent as a possible compromise. The appellants however, as part of the relief on appeal, pray for an order 'granting the counter-application . . . with costs.' They have not sought an order in respect of the order proposed as a compromise of the counter application by the respondent, with no order as to costs. The issue for determination in the appeal before us is accordingly purely whether, as a matter of law, the appellants had established that they were entitled to an order in terms of the relief claimed in their counter application.

[57] The loan agreement did not contain any provision that the respondent had to agree on the price at which properties included in the bond could be sold. They could be sold by the first appellant in its discretion at whatever price. If the payment of €125 000 per sale required to be paid for the release of individual properties from the bond were not paid, the respondent would not have been obliged to release the property from the bond, but that is a different issue. Indeed sales at a price of R2 million per property would at the present exchange rate not result in sufficient gross, leave aside nett, proceeds being realized to cover a payment of €125 000 per property. Obviously the position might change depending on the Rand/Euro exchange rate as it has fluctuated from time to time.

[58] Sales were not being frustrated, but the transfer of individual properties unless 'Euro 125 000 of the nett proceeds of every sale must be paid to the Lender [ie the respondent] in return for the Lender [ie the respondent] releasing the security on that Property', might have become a problem for the first appellant if the properties were not released from the security afforded by the bond. But that would be as a result of the appellants having anticipated a more lucrative market for the properties, to leave sufficient nett proceeds upon transfer of individual properties to cover payments of €125 000 per property. What the appellants more correctly might possibly have wanted to achieve, is not that sales would be permitted at R2 million (or a lesser amount as may be agreed), but that the amount required to be paid to the respondent in respect of the transfer of individual properties, for those properties to be released from the operation of the bond, be reduced to below €125 000 per property.

[59] That is however not what the counter application sought to achieve. Indeed, paragraph [1][b] of the counter application essentially repeated the terms of clause 6.2.2 of the loan agreement. And that is not surprising, because to compel the respondent, in the absence of the respondent voluntarily agreeing to accept a lesser payment in respect of the transfer of each property for the release of the security afforded by that property for the outstanding indebtedness of the appellants to the respondent, would amount to the court making an agreement for the parties and foisting it upon the parties. That a court will not do.

[60] The appellants had failed to put up evidence that the respondent had frustrated sales which, in law, would entitle them to any relief in terms of the counter application. The counter application accordingly fell to be dismissed with costs.

Order

[61] The following order is granted:

1. The appeal is dismissed with costs.

2. The order of the court a quo is supplemented by the addition of the following order:
   'The counter application is dismissed with costs.'

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KOEN J

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