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NATIONAL HOME BUILDERS' REGISTRATION COUNCIL v XANTHA PROPERTIES 18 (PTY) LTD

Analysis of the provisions of section 14, read with the definition of 'home' and 'housing consumer' in section 1 of the Housing Consumers Protection Measures Act (no 95 of 1998)

Judgment given in the Supreme Court of Appeal on 21 June 2019 by Leach JA (Saldulker JA, Van der Merwe JA, Gorven AJA and Weiner AJA concurring)

Xantha Properties 18 (Pty) Ltd owned fixed property in Cape Town. It was in the process of developing 223 residential apartments, as well as two ground-floor retail shops, on the property. Xantha stated that it would not be selling any of the residential apartments to third parties but would retain ownership of the entire building, including the residential apartments. It also stated that it intended to earn rental income from these residential apartments by renting them out upon completion.

During February 2017 Mr Smith, a D director of Xantha, made enquiries with the National Home Builders Registration Council about the requirement for the enrolment of the residential apartments. Employees of the Council, advised him that the Council required every construction project undertaken by a registered home builder to be enrolled, irrespective of whether or not there was a third-party housing consumer involved. In addition to this, the Council's legal advisor telephonically advised Xantha that it would not be able to apply for exemption under section 29 of the Housing Consumers Protection Measures Act (no 95 of 1998).

Smith submitted the application for enrolment of the residential apartments to the Council on 22 February 2017. An employee of the Council advised him on 14 March 2017 that the application was incomplete. She requested him to submit a schedule of prices in respect of all the residential apartments, as well as a completed form. In response Smith advised the employee that there were no individual schedules of prices in respect of the residential apartments as Xantha did not intend selling them. Smith also pointed to the fact that the Council did not have forms designed for the enrolment of the type of residential apartments under construction. The Council did not respond to the issues raised by Smith, but on 6 April 2017 forwarded a 'pro forma' invoice to him requiring payment of the enrolment fee in the sum of R1 583 143,90. Xantha paid the enrolment fee on 11 April 2017.

In enrolling the residential apartments, Xantha did so without prejudice to its right to challenge the lawfulness of the requirement for the enrolment of the apartments.

Xantha challenged the lawfulness of the requirement to register the

residential apartments on the basis that, properly interpreted, the relevant provisions of the Act, read with the relevant provisions of the Regulations, did not require the enrolment of the residential apartments under construction. The Council and the Minister of Human Settlements contended that the relevant provisions of the Act and Regulations required the enrolment of the residential apartments.

Xantha sought an order declaring that the provisions of section 14 of the Act, read with the relevant provisions of sections 1, 10 and 10A of the Act, and regulations 1(2) and 1(4) of the Regulations, do not require the enrolment of the proposed construction of a home in circumstances where the home builder is constructing such home solely for the purposes of leasing or renting out.

Held—

Crucial to the decision in this case were the definitions in section 1 of 'home builder' and 'business of a home builder'. A home builder is defined, inter alia, as meaning 'a person who carries on the business of a home builder'. Such business is defined as meaning: (a) to construct or to undertake to construct a home or to cause a home to be constructed for any person, (b) to construct a home for the purposes of sale, leasing, renting out or otherwise disposing of such a home, (c) to sell or to otherwise dispose of a home contemplated in paragraph (a) or (b) as a principal, or (d) to conduct any other activity that may be prescribed by the Minister.

Section 14(1) of the Act provides that a home builder shall not commence the construction of a home unless the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner, the Council has accepted the submission , and the Council has issued a certificate of proof of enrolment.

These provisions provide for a person who wishes to construct a home for the purposes of 'leasing, renting out' and thereby carry on the 'business of a home builder' as defined, to first register as a home builder. This will entail showing that the proposed building specification will not be sub-standard and will meet the necessary specifications.

The Act was designed to afford adequate housing for residents by ensuring that their homes were constructed by competent builders to approved standards. These objectives were sought to be achieved, first, by section 10 (to ensure that homes are constructed by persons having the necessary competence) and, secondly, by section 14 (to enrol such homes and ensure that they are built to a prescribed level of structural and technical quality). These provisions are supplemented by section 19 of the Act

Without homes being enrolled under section 14, inspectors would be unable

to identify them or to fulfil their duties or obligations under this section. In itself this is a clear indication that it was intended that all homes were to be enrolled.

In the light of this, and the fact that the fundamental underlying premise of the Act is to guard against builders constructing sub-standard homes and that the definition of a home builder's business was amended to specifically include building homes for purposes of being let or rented out, there was no reason why the legislature would have intended to treat homes built for leasing purposes any differently from those constructed for sale. There was certainly nothing in the structure of the Act which indicated that to be the case.

On the contrary, there was every reason to think that the legislature would have wished homes built for sale to be treated the same way as homes built for lease. Circumstances often change, and it would take little imagination to envisage how a home being constructed for rental purposes might end up being sold rather than let. Requiring both categories of home to be enrolled would not only avoid a sub-standard home being sold in those circumstances, but would also serve to mitigate against the abuse of unscrupulous developers building inferior homes allegedly for leasing purposes, then professing to change their minds and selling them.

Taking all of this into account, it was clear that section 14(1) applies to homes being built for lease and rental purposes. In these circumstances the order sought by Xantha had to be refused.

Advocate A G Sawma SC and Advocate N T Mayosi instructed by Werksmans Attorneys, Cape Town, appeared for the first appellant
Advocate T Madima SC and Advocate R Matsala instructed byThe State Attorney, Cape Town, appeared for the second appellant
Advocate J G Dickerson SC and Advocate P S van Zyl instructed by Smith Tabata Buchanan Boyes, Cape Town, appeared for the respondent

Leach JA:

[1] The issue in this case is whether the respondent, who is registered as a 'home builder' as defined in s 1 of the Housing Consumers Protection Measures Act 95 of 1998 (the Act), is obliged to comply with the provisions of s 14(1) of the Act in respect of homes being built solely for the purpose of being let. The Western Cape Division of the High Court, Cape Town decided that the section was of no application in those circumstances and issued an order declaring that to be the case.

The appeal against that order is with the leave of the court a quo.

[2] The first appellant (the Council) is the National Home Builders' Registration Council established in terms of s 2 of the Act. It is composed of at least seven members appointed by the second appellant, the Minister of Human Settlements, who is obliged to ensure that it consists of persons who are 'representative of the interests' of various parties in the home building industry[1]. Section 3 of the Act provides the objectives of the Council. Those include the regulation of the home building industry[2]; the establishment and promotion of ethical and technical standards[3]; and the improvement of structural quality in the interest of the industry[4].

[3] The respondent, Xantha Properties 18 (Pty) Ltd, carries on business in the building construction industry. It embarked upon the construction of a property development in Wynberg, Cape Town consisting of shops and 223 residential apartments. It averred that it had no intention of selling these apartments or developing them in terms of a sectional title scheme but intended to rent them to tenants. In these circumstances, the respondent disputed being obliged to enrol the project with the first appellant or to pay the prescribed enrolment fee as prescribed by s 14(1) of the Act, to which provisions I shall return in due course.

[4] The respondent took the matter up with the Council, arguing that the Act was intended to provide a form of housing insurance in favour of housing consumers against errant home builders. It contended that where, as in the present case, there was no third party but the home builder was, itself, the effective end user of the apartments which it intended to rent out, it was absurd to expect it to insure against itself. The Council did not agree and advised the respondent to enrol the apartments. This it ultimately did, and paid the assessed enrolment fee (a sum in excess of R1.5 million) but did so under protest. It then

[1] Section 4 of the Housing Consumers Protection Measures Act 95 of 1998 (the Act).

[2] Section 3(b) of the Act.

[3] Section 3(d) of the Act.

[4] Section 3(e) of the Act.

applied to the high court for an order declaring that s 14(1) did not require a home builder to enrol houses being constructed solely for the purpose of being let. As mentioned at the outset, that court decided in its favour.

[5] In considering the interpretation of the Act, it is necessary to remind oneself, as this court recently pointed out in Adendorf[5], that the Act is consumer-protection legislation designed to offer protection against incompetent builders and the construction of homes having structural defects, and that to achieve those aims it requires registration of home builders and the enrolment of the homes they build. Bearing that in mind, I turn to the relevant provisions of the Act.

[6] As a starting point, a 'home' is defined in s 1 of the Act as meaning

> '. . . any dwelling unit constructed or to be constructed by a home builder, after the commencement of this Act, for residential purposes or partially for residential purposes, including any structure prescribed by the Minister for the purposes of this definition or for the purposes of any specific provision of this Act, but does not include any category of dwelling unit prescribed by the Minister.'

(I must immediately mention that the respondent accepts that apartments being constructed by the respondent fall within this definition as read with the regulations as they currently stand, so that such issue need not be debated further for purposes of this judgment.)

[7] Crucial to the decision in this case are the further definitions in s 1 of 'home builder' and 'business of a home builder'. The two are inter-related. A home builder is defined, inter alia, as meaning 'a person who carries on the business of a home builder' whilst such business is defined as meaning:

> '(a) to construct or to undertake to construct a home or to cause a home to be constructed for any person;
>
> (b) to construct a home for the purposes of sale, leasing, renting out or otherwise disposing of such a home;
>
> (c) to sell or to otherwise dispose of a home contemplated in paragraph (a) or (b) as a principal; or

[5] National Home Builders Registration Council v Adendorf & others [2019] ZASCA 20 para 6.

> (d) to conduct any other activity that may be prescribed by the Minister for the purposes of this definition.'

The words 'leasing, renting out' contained in sub-para (b) of this definition were not included in the Act as originally passed but were inserted with effect from 9 April 2008 by way of the Housing Consumers Protection Measures Amendment Act 17 of 2007 (the Amendment Act). I mention this as it forms part of the respondent's argument, as shall become apparent in due course.

[8] Section 10 of the Act goes on to require 'home builders' to be registered as such, and prescribes that no person may carry on the business of a home builder unless so registered. Section 10(3) further provides that the council may only register a home builder if satisfied that the person seeking registration meets various criteria, will comply with a home builder's obligations in terms of the Act, and has the appropriate financial, technical, construction and management capacity to do so[6].

[9] Importantly, s 14(1) of the Act, which lies at the heart of this appeal, provides:

> 'A home builder shall not commence the construction of a home falling within any category of home that may be prescribed by the Minister for the purposes of this section unless-
>
> (a) the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner;
>
> (b) the Council has accepted the submission contemplated in paragraph (a) and has entered it in the records of the Council; and
>
> (c) the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder.'

[10] **At first blush these provisions, as they currently stand, therefore provide for a person who wishes to construct a home for the purposes of 'leasing, renting out' and thereby carry on the 'business of a home builder' as defined, to first register as a home builder under s 10 – after satisfying the council that it meets the necessary requirements – and then, before commencing construction, to enrol the home with the Council, pay the prescribed fee and otherwise fulfil the requirements**

[6] Section 10(3).

laid down in s 14(1) – which will entail showing that the proposedn building specification will not be sub-standard and will meet the necessary specifications.

[11] The respondent, however, contends that this is not so, and that despite the definition of 'business of a home builder' containing specific reference to homes constructed for the purpose of being let, s 14(1) has no application in such a case. Its argument as to why the Act should not be afforded what appears to be its clear meaning, is somewhat convoluted. It commences with the definition in s 1 of the Act of 'housing consumer' as meaning 'a person who is in the process of acquiring or has acquired a home and includes such person's successor in title'. In the light of this, it was argued that the word 'acquire' used in this definition is generally understood as buying or obtaining ownership of something which, in the context of the Act, would mean obtaining ownership of a home. Therefore, a person who rents a property without becoming its owner cannot be said to have 'acquired' the property and, by definition, can thus not be a 'housing consumer'. Accordingly, so the argument went, as s 14(1) is in chapter 3 of the Act which is headed 'PROTECTION OF HOUSING CONSUMERS', and as housing consumers are limited to persons who either purchase homes or have homes built for them, the Act and its regulatory scheme were not intended to apply to properties being constructed for the purpose of rental; and s 14(1) thus did not apply in such a case.

[12] Although this reasoning appears to have been accepted by the court a quo, it seems to me to stumble at the first hurdle. The Concise Oxford English Dictionary[7] does not restrict the word 'acquire' to the concept of becoming an owner. Instead it provides its primary meaning to be to 'come to possess (something)'. The suggestion that persons who have rented their places of permanent residence have not 'acquired a home' as that phrase is understood in common parlance, is untenable. It is also significant that even prior to the amendment brought about by the Amendment Act in April 2008, the business of a home builder was by definition not restricted solely to the construction of a home for the purposes of sale but also for 'otherwise disposing of such a home'.

[7] The Concise Oxford English Dictionary 12 ed (2011) at 11.

[13] Be that as it may, it is in my view unnecessary to decide whether the definition of housing consumer embraces a tenant. For present purposes, but without deciding the issue, I intend to accept in favour of the respondent that it does not. But for the reasons that follow, and even if a tenant is not to be regarded as a housing consumer, the respondent cannot succeed.

[14] Prior to the amendment, the construction of homes for the purposes of leasing or renting out did not fall within the definition of 'the business of a home builder'. A person building such a home was accordingly neither a home builder nor carrying on the business of a home builder, and was therefore not obliged to be registered under s 10 and did not have to comply with s 14(1) before commencing construction. However, as the definition of business of a home builder was amended by the Amendment Act to specifically include homes constructed for the purposes of leasing or renting out, thereafter a builder constructing a house for those purposes also became obliged to register as a home builder under s 10. This the respondent conceded, but argued that the relevant definitions and regulations as they were at the time of their original enactment continued to apply in respect of s 14(1). This would mean that a home builder constructing a home for purposes of rental would be obliged to register as a home builder but not to enrol the home under s 14(1), despite the obvious intention of the legislature having been to broaden the scope of operation of the Act to embrace homes built for the purposes of sale or rental. As s 1 provides for the amended definition to apply throughout the Act 'save where the context indicates otherwise', this would require a clear indication from the legislature that such a deviation was necessary in respect of s 14(1). As appears from what follows the contrary is the case.

[15] In attempting to support that this somewhat incongruous situation was indeed what the lawgiver had intended, the respondent relied on the argument which it had put forward to the council at the outset of their dispute; namely that the Act was intended to provide a form of insurance in favour of housing consumers and that it was absurd to expect it to insure against itself. It also argued that, in cases of lease, tenants would have the normal rights of a tenant faced with defective premises; that the protection to be afforded by s 14(1) was consequently unnecessary in respect of property to be leased; that this

distinguishes such property from property to be sold; and that this was a clear indication that the legislature would not have intended the Act to be applied to properties being built for purposes of being let.

[16] This latter argument may be swiftly disposed of. A purchaser also has contractual remedies in respect of latent defects or misrepresentations in respect of property it purchases, and the fact that they may be different to those of a lessee is neither here nor there. But the purpose of the Act is designed to attempt to avoid contractual disputes, either in sale or lease, having to be resorted to by ensuring that homes are built which comply with the Council's standards and specifications. The fact that a lessee may have contractual remedies is no reason to think that the legislature must have intended not to afford the Act's protection to homes which were constructed for rental purposes.

[17] In any event, legislation falls to be interpreted by having regard to the words used by the legislature, and not by taking account of what a party feels the legislature should have said. It simply does not lie in the mouth of the respondent to argue that the legislature did not intend the Act as amended to apply to homes being built for 'purposes . . . of leasing, renting out' when that is exactly what the definition provides shall be the business of a home builder. Moreover the fact that s 14 is situated in a chapter which bears a heading relating to 'housing consumers' acquired before the Act was amended, is no reason for its provisions not to apply to the amended definition.

[18] In any event, **the underlying purpose of the Act clearly trumps the respondent's argument. The Act was designed to afford adequate housing for residents by ensuring that their homes were constructed by competent builders to approved standards. These objectives were sought to be achieved, first, by s 10 (to ensure that homes are constructed by persons having the necessary competence) and, secondly, by s 14 (to enrol such homes and ensure that they are built to a prescribed level of structural and technical quality). These provisions are supplemented by s 19 of the Act** which, inter alia, provides:

'Inspectors

(1) The Council shall for the purposes of this Act-

(a) appoint inspectors in terms of section 6; and

(b) enter into agreements or liaise with local government bodies or other bodies or persons for the inspection of homes.

(2) An inspector may, for the purpose of inspecting a home during its construction, enter and inspect the premises constituting the site of the construction at any reasonable time.

(3) For the purposes of an investigation, an inspector may-

(a) require the production of the drawings and specifications of a home or any part of a home, including plans approved by the local authority and plans and specifications prescribed in the Rules or the Home Building Manual, for inspection from the home builder and may require information from any person concerning any matter related to a home or any part of a home;

(b) be accompanied by any person employed or appointed by the Council who has special or expert knowledge of any matter in relation to a home or part of a home; and

(c) alone or in conjunction with any other person possessing special or expert knowledge, make any examination, test or enquiry that may be necessary to ensure compliance with the Home Building Manual.'

Without homes being enrolled under s 14, inspectors would be unable to identify them or to fulfil their duties or obligations under this section. In itself this is a clear indication that it was intended that all homes were to be enrolled.

[19] In the light of this, and when one remembers that the fundamental underlying premise of the Act is to guard against builders constructing sub-standard homes and that the definition of a home builder's business was amended to specifically include building homes for purposes of being let or rented out, I can think of no reason why the legislature would have intended to treat homes built for leasing purposes any differently from those constructed for sale. There is certainly nothing in the structure of the Act which indicates that to be the case.

[20] On the contrary, there is every reason to think that the legislature would have wished homes built for sale to be treated the same way as homes built for lease. Circumstances often change, and it takes little imagination to envisage how a home being constructed for rental purposes might end up being sold rather than let. And requiring both categories of home to be enrolled would not only avoid a sub-standard home being sold in those circumstances, but would also serve to mitigate against the abuse of unscrupulous developers building inferior

homes allegedly for leasing purposes, then professing to change their minds and selling them.

[21] Taking all of the above into account, it is clear to me that s 14(1) does apply to homes being built for lease and rental purposes. In these circumstances the court a quo incorrectly reached the contrary conclusion and ought not to have issued the order it did.

[22] In the alternative to the declaratory order that was granted, the respondent sought an order in the court a quo that should it be held that s 14 did require the enrolment of a proposed construction of a home being built solely for the purposes of leasing or renting out, various sections of the Act and the regulations promulgated thereunder should be declared 'unconstitutional, unlawful and invalid to the extent that they compel such enrolment'. Counsel for the respondent, in their heads of argument filed in this court, persisted in this argument. They contended that those provisions were irrational, and in that respect again relied on the contention that it is irrational to expect a home builder in the respondent's position to insure itself against itself.

[23] This argument was not advanced with any enthusiasm in this court, understandably as in my view it is devoid of merit. Whilst it is so that enrolment carries with it the necessity to pay amounts that are levied, those sums are used to fund the activities of the Council and to ensure that all homes, whether constructed for resale or for rental, are up to scratch. This will include the costs which will be incurred by inspectors doing their duty to ensure this is the case. I see nothing arbitrary, irrational or discriminatory in the legislation. The respondent's argument in that regard must also be rejected.

[24] For these reasons the respondent's application ought to have been dismissed in the court a quo and the appeal must succeed.

[25] In civil litigation, the general rule is that costs should follow the result. Counsel for the respondent however invoked the so-called principle in Biowatch[8] in arguing that should the appeal be upheld, the respondent had sought a declaratory order to interpret statutory provisions relevant to its constitutional right to freely conduct its trade and occupation enshrined in s 22 of the Constitution, and should

[8] Biowatch Trust v Registrar, Genetic Resources, & others [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

therefore not have to pay the appellants' costs in both courts.

[26] The general rule laid down in Biowatch applies in constitutional matters involving organs of state, and operates to shield unsuccessful litigants from paying costs to the State in order 'to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights'[9]. But as has previously been stressed, the mere labelling of litigation as 'constitutional' is insufficient. For the rule to apply the issues should be genuine and substantive and raise constitutional considerations relevant to their adjudication. The rule thus does not mean 'risk-free constitutional litigation'[10] and a court in the exercise of its discretion must consider the scope and character of the litigation.

[27] In the present case, the respondent sought a declaratory order freeing it from the obligation to pay a substantial sum of money. The litigation has, in truth, been nothing more than a commercial dispute in which the respondent sought to evade the clear provisions of the Act. Constitutional considerations played no part and I see no reason for the respondent not to bear the costs of the proceedings.

[28] It is ordered as follows:

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

2 The order of the court a quo is set aside and substituted with the following:

'The application is dismissed with costs, including the costs of two counsel.'

[9] Harrielall v University of KwaZulu-Natal [2017] ZACC 38; 2018 (1) BCLR 12 (CC) para 11.

[10] Lawyers for Human Rights v Minister in the Presidency & others [2016] ZACC 45; 2017 (1) SA 645 (CC) para 18.

INTECH INSTRUMENTS v TRANSNET LIMITED

Determination of party repudiating obligations under a contract

Judgment given in the Supreme Court of Appeal on 31 May 2019 by Majiedt JA (Dambuza JA, Mathopo JA, Makgoka JA and Plasket AJA concurring).

Transnet Ltd awarded a contract to Intech Instruments for the refurbishment and upgrade of two of its bulk handling terminals. The contract ran into hundreds of pages, and contained Transnet's standard general conditions of contract known as its 1997 General Conditions of Contract, the GCC 97, and special conditions of contract. Neither Intech, nor any one of Intech's senior representatives ever read the documents or the contract

In the early stages of performance of the contract, problems arose in connection with coordination with subcontractors. Then, safety issues arose, culminating in 'stop-works' orders being issued against Intech based on general non-compliance with the Occupational Health and Safety Act (no 85 of 1993).

Intech abandoned the works, and cancelled the contract on 13 August 2007, based on Transnet's alleged repudiation in the form of the issuing of the 'stop works' orders. In response, on 14 August 2007 Transnet's attorneys wrote to Intech's attorneys, alleging a number of breaches on the part of Intech and cancelling the contract.

The project was eventually completed several years later at a much higher cost. Intech sued Transnet for: (a) payment of retention monies; (b) unpaid invoices; (c) interest on the late payment of two invoices; and (d) damages for the alleged loss of profits on the balance of the contract. Transnet counterclaimed for: (a) a claim based on a final certificate, alternatively a claim for damages and for repayment of certain amounts allegedly paid in error; and (b) penalties for late completion of the works.

Held—

The contract was a 'design and build' contract. The ambit of the invitation to tender and its general envisaged outcome; the specific deliverables stipulated in the contract; and Intech's tender comprising specified items and outcomes, all pointed to the contract as a performance specification contract. The fact that neither Intech, nor any one of Intech's senior representatives had ever read the documents or the contract, rendered the question of the nature and the scope of the contract somewhat artificial.

The question was at whose instance was the contract was lawfully cancelled. The 'stop works' orders were lawful and justified. This was conceded by Intech which knew exactly what had to be done to remedy the shortcomings

to have the orders lifted.. Intech failed to remedy the shortcomings. Ultimately the non-compliance with the statutory prescripts remained until Intech finally abandoned the plant. Intech's purported cancellation on the basis of repudiation by Transnet's 'stop works' orders was therefore unsustainable in law. The purported cancellation was itself unlawful and was correctly regarded by Transnet as an act of repudiation. Transnet thus lawfully cancelled the contract on 14 August 2007, on the basis of this and other grounds, including Intech's refusal to perform under the contract and its final abandonment of the site.

Intech's claims were dismissed and the counterclaim upheld.

Advocate K J Kemp SC instructed by Anand-Nepaul Attorneys, Durban, appeared for the first appellant

Advocate G S Myburgh SC and Advocate D M B Watson instructed by Hogan Lovells (SA) Inc, Johannesburg, appeared for the second respondent

Majiedt JA:

Introduction

[1] The respondent, Transnet Limited (Transnet), through one of its internal divisions, South African Port Operations (SAPO), is responsible for the operation and management of South Africa's seven ports. There are 13 terminals in these seven ports. Saldanha Bay and Port Elizabeth ports have bulk handling terminals. Iron ore is exported from Saldanha Bay and manganese ore from Port Elizabeth.

[2] During early 2006 the appellant, Intech Instruments (Intech), a sole proprietorship, was awarded a tender for the refurbishment and upgrade of these two terminals. Disputes in respect of the execution of the tender arose between the parties, culminating in litigation in the Kwazulu-Natal Division of the High Court in Durban (the high court). By agreement between the parties, the trial in the high court before Koen J was confined to the Port Elizabeth project and an order was made to that effect.

[3] Intech alleged repudiation of the contract by Transnet, cancelled same and sued Transnet for various amounts. Transnet, in turn, alleged repudiation on the part of Intech, cancelled the contract and counterclaimed for various amounts. After a protracted trial, Koen J dismissed Intech's claim with costs and upheld Transnet's

counterclaim, together with interest and costs. This appeal is with the leave of the high court.

Condonation

[4] Intech's attorneys filed the record out of time. Condonation was sought at the hearing, but was opposed by Transnet. Its main ground of opposition was that the application was based entirely on inadmissible hearsay. There is considerable merit in this submission. And it is true that, as was contended on behalf of Transnet, the application contains inadequate averments in the founding affidavit and the replying affidavit was filed late without an accompanying condonation application. We nonetheless granted condonation in the interests of justice. This matter originates from events in 2006 and involves millions of Rands. Moreover, as stated, the dispute between the parties relating to the Saldanha Bay works is standing over, presumably until finality is reached in the present dispute. It is in our view in the interest of all concerned that this appeal should be finalised on the merits.

The factual matrix

[5] The background facts are largely common cause or not seriously disputed and are as follows. A global increase in demand for bulk commodities, particularly for iron and manganese, during the mid-2000's prompted Transnet, in consultation with mining houses, to re-assess its export capacity. The demand for iron and manganese was largely fuelled by a demand for steel by China's rapidly expanding economy[1]. Transnet consequently decided to effect significant expansion to its export capacity in respect of, amongst others, iron ore and manganese ore. This entailed the expansion of both its rail network (operated by its division, Spoornet, in respect of bulk commodities) and its export terminals at the ports. There is a dedicated iron ore rail network on Transnet's Sishen-Saldanha line and manganese ore is transported by rail from the Northern Cape mines to the Port Elizabeth port. Given the circumscribed dispute in the high court, I will restrict the further discussion to the latter.

[6] After initial studies, Transnet decided to invite tenders to refurbish its plant at the Port Elizabeth manganese ore terminal (the plant). An

[1] Steel is manufactured mostly from iron ore. Manganese forms roughly 10% of its composition.

option to tender, in addition, for the upgrade of the plant was included in the invitation. Transnet's invitation to tender; Intech's response thereto by way of its letter of tender; and Transnet's acceptance of the tender (collectively, the tender documents), are crucial to the determination off the dispute. Before I deal with them, however, it is necessary to explain in broad outline how the plant at the terminal operated.

The Port Elizabeth terminal plant

[7] The plant has two lines, referred to as 'A' and 'B'. On the import side, the manganese ore would arrive by train at tipplers A and B. The tipplers would tilt (or tip) the ore onto conveyors which would transport the ore to the stackers. Along the lines one conveyor would discharge the ore into another conveyor at transfer points which are located at 90 degree angles on the lines. These transfer posts are referred to as T1, T2 and so forth until T9. The ore is poured onto stockpiles by the two stackers, A and B, through conveyors.

[8] The export side commences when ore is reclaimed from the stockpiles by the reclaimers. The ore is reclaimed from a specific stockpile as is required by the ship to be loaded. Once reclaimed from the stockpile, the ore runs along the two lines on conveyors past the transfer points in the direction of shiploaders A and B. Transfer points T8 and T9 are the closest to the shiploaders. The shiploaders have bogies which run on wheels and a gantry-like structure on top. Conveyors would transport the ore within the gantry towards the loading boom from where it drops into the hold of the ship.

[9] Three important features of the operation of the plant bear mention. First, the stackers, reclaimers and the shiploaders are huge structures (in evidence the shiploaders were referred to as 'superstructures'). They consist of complex machinery, operated individually from control rooms located on the various structures. Central monitoring and control is effected from a central control room from which the entire import and export operation can be monitored. Second, the entire operation ran on an expansive conveyor system past the various transfer points, first to the stockpiles and then to the ships. And third, due to the large machinery and conveyors with moving parts, the manganese dust and the need to work at height, safety was paramount at the plant.

The tender and its execution

[10] Transnet issued the tender during September 2005. As stated, it called for the refurbishment, alternatively the refurbishment and upgrade of the plant. In respect of the refurbishment, Transnet's main requirement was to '. . . maintain the current handling rate of 1 500 tons per hour, and alignment of the complete system so that at least the mandatory requirements pertaining to safety of personnel and equipment engaged in the terminal are met. The objective is to complete the project within 12 months but not exceeding 18 months'. In respect of the refurbishment and upgrade option Transnet's invitation to tender stipulated, as main requirement, to '. . . refurbish and upgrade the manganese bulk plant to 2 500 tons per hour, and alignment of the complete system so that at least the mandatory requirements pertaining to safety of personnel and equipment engaged in the terminal are met. The objective is to complete the project within 12 months but not exceeding 18 months'. The tender notice informed prospective tenders of a compulsory site inspection at the terminal on 3 October 2005. It also stipulated that '[t]enderers shall give a clause-by-clause comment where called for, as to whether or not their tender complies, if not, how it differs from the specification. Failure to do so may preclude a tender from consideration'. The invitation set out the scope, general requirements and conditions (including occupational health and safety requirements), codes and standards and specific requirements in respect of individual items such as the chargers, tipplers, stackers, conveyors, reclaimers and shiploaders.

[11] Intech's sole proprietor, Mr Inderan (Rajen) Pillay, accompanied by Mr Dean Richards, Intech's operations manager, and Dr Don Glass, Intech's projects manager at Saldanha Bay[2], attended the site inspection. At that time Intech was a small electrical and instrumentation firm which had no experience at all in the execution of projects of the size and scope of the proposed tender. According to Mr Pillay, he had no intention of submitting a bid for the entire project. His intention was to submit a tender for the electrical and instrumentation part only. He testified that:

> 'My intention was never to do the refurbishment nor the upgrade *because I was not qualified to do either. I know almost nothing about stackers and reclaimers*, I knew – you know, whatever little I knew about it was what I saw at Saldanha, but I did not work with them, so I thought that I would go in there and meet other contractors that were going to be there and I would give them a price as a sub-contractor because one of the criteria was that you needed to have a BEE contingent. . . .' (Own emphasis).

[2] The Saldanha Bay project commenced before the Port Elizabeth project.

[12] Mr Pillay met other contractors at the site inspection. They persuaded him to submit a tender as the main contractor. The idea was to subcontract out the other specialized work to firms which had the requisite specialist skills and experience. One of these subcontractors was Langa Sandblasting & Painting (Langa), which specialized in painting and sandblasting. Another one was Alstom, a large French multinational, which was interested in the instrumentation and software part of the project. Mr Pillay stated that it came as somewhat of a shock to him that a huge multinational enterprise such as Alstom was not interested in tendering for the entire project. And a third was Lorbrand, a Gauteng based company which specialized in the manufacture of conveyor components. There were other subcontractors as well, but these three featured prominently in the case.

[13] On this basis, Intech submitted on 17 November 2005 a comprehensive tender for the refurbishment and upgrade of the plant at a consideration of R27 656 350 and R17 631 726 respectively. Intech's tender proposal consisted of a covering letter, Transnet's pro forma tender document, duly completed and signed, a scope of works, details of options, technical data and brochures. A tender clarification meeting was held on 7 December 2005, attended by Mr Pillay and Dr Glass on behalf of Intech and various Transnet representatives. Numerous technical aspects were clarified and Intech's representatives set out in broad terms how they proposed executing the tender. On 12 January 2006 Transnet advised Intech that the tender had been awarded to it. In awarding the tender, Transnet accepted Intech's proposed scope of works and specifications. It accepted only one of the numerous additional options proposed by Intech, namely the addition of a slew ring at extra cost. The tender price was adjusted to make provisions for the addition of the slew ring.

[14] The tender period was stipulated as 10 months, commencing from 16 January 2006 and Transnet designated its Mr Andries Gouws as

project manager. It is common cause that an agreement came into existence upon Transnet's acceptance of Intech's proposed tender on 12 January 2006. The tender form provided that, pending the execution of a formal contract document, Intech's tender together with the covering letter, subsequent correspondence and SAPO's acceptance would constitute a binding contract. A comprehensive written contract was later signed by Mr Pillay for Intech. That document, which runs into hundreds of pages, contained Transnet's standard general conditions of contract (more particularly, for present purposes, its 1997 General Conditions of Contract, the GCC 97) and special conditions of contract. Transnet was unable to produce a copy of the contract bearing a signature on its behalf, but the contract and its terms were common cause on the pleadings.

[15] Problems arose at an early stage of the execution of the tender. Their genesis is to be found in the parties' differing interpretations of the contract. These problems became progressively worse over time. The difficulties were exacerbated by the serious disagreement which arose early on between Intech and its main subcontractor, Lorbrand. Transfer points T8 and T9 were key sections on the export side of the operation. The work entailed that the entire plant had to be shut down when work was done at T8 and T9. The proposed shutdown dates had to be carefully planned and determined long in advance. The shutdown work had to be completed within the designated period, so as to avoid ships charging demurrage against Transnet for delays in loading the ore.

[16] The relationship between Transnet and Lorbrand eventually broke down, to the extent that it became clear that Intech would not be in a position to achieve the planned shutdown. Given the importance of the shutdown deadline, Transnet exercised its contractual right of excising the structural and mechanical work on T8 and T9 from the scope of the contract. It awarded that part of the work to Lorbrand to execute in terms of a direct contract between it and Lorbrand. At that time Transnet Capital Projects (TCP), a division of Transnet, took over the supervision and management of the shutdown work. TCP performed this duty in conjunction with a joint venture of three professional engineering and project management firms, Hatch Africa, Mott McDonald and Goba, referred to at the trial as 'HMG' (collectively,

TCP and HMG will be referred to as the 'JV'). At the helm of this work was Mr Dan Reddy for TCP and Mr Piet Pretorius for HMG. After the successful completion of the shutdown work, the mandate of the JV was extended to include the remaining work on the terminal. The JV thus effectively became interposed between the parties in respect of the management of the project.

[17] On 15 December 2006 Mr Reddy instructed Intech to hold all further work on the plant. This was to give Transnet an opportunity to re-assess the future of the terminal. There appears to have been a preliminary view by Transnet at that stage that the terminal's export capacity might require expansion substantially beyond the 2 500 tons per hour envisaged in the scope of the Intech tender. Mr Reddy's concern was that any further work done by Intech would then, in the circumstances, amount to wasteful expenditure. He requested in writing that Intech should indicate the cost of 'closing out' (ie terminating) the contract at that stage. Intech reverted with an amount of R14 million, which Mr Reddy considered as too high, being in effect fruitless expenditure. He consequently instructed Intech to complete the remaining scope.

[18] In the early part of 2007, safety issues arose on the plant. It came to the JV's attention that one of Intech's subcontractors, Langa, was engaged in unsafe working practices on the site. Following investigations, a 'stop works' order was issued on 14 February 2007 to Intech (as main contractor), setting out the instances of non-compliance and the required remedies. After Intech gave certain undertakings in this regard, which the JV accepted, the 'stop works' order was lifted and work resumed.

[19] On 2 March 2007, the JV became aware that one of Alstom's employees had suffered a 'lost time injury' on site which necessitated the employee to be booked off from work. The injury had not been reported by Intech as it was statutorily obliged to do as the main contractor. This precipitated a further investigation by the JV into safety aspects relating to Intech's work. As a consequence, the JV, on behalf of Transnet, on 5 March 2007 issued a 'stop-works' order based on general non-compliance with the Occupational Health and Safety Act 85 of 1993 (the OHS Act). Another 'stop works' instruction was issued on 8 March 2007. It differed from the previous one only in

respect of its limited reference to OHS Act requirements which had been incorporated into the contract and was thus less onerous than the previous one. At this time very little work was being done by Intech – there was mostly sandblasting and painting being done by Langa and Alstom was performing critical work on the computer software in the control room.

[20] In the meantime, disputes regarding payments were raised by Intech. A standoff ensued as Transnet disputed Intech's demands for payments on various grounds. The impasse was never resolved and Intech finally left the site at the end of May 2007. Correspondence was thereafter exchanged between Intech's attorneys and Mr Hamilton Nxumalo, SAPO's general manager, concerning the disputed payments. After further correspondence, Intech, via its attorneys, cancelled the contract on 13 August 2007, based on Transnet's alleged repudiation in the form of the issuing of the 'stop works' orders. In response, on 14 August 2007 Transnet's attorneys wrote to Intech's attorneys, alleging a number of breaches on the part of Intech and cancelling the contract.

[21] The project was eventually completed by the JV several years later at a much higher cost (some R600 million). Intech sued Transnet for: (a) payment of retention monies; (b) unpaid invoices; (c) interest on the late payment of two invoices; (d) standing time costs (subsequently abandoned); and (e) damages for the alleged loss of profits on the balance of the contract. For its part, Transnet counterclaimed for: (a) a claim based on a final certificate, alternatively a claim for damages and for repayment of certain amounts allegedly paid in error; and (b) penalties for late completion of the works.

[22] The counterclaim on a final certificate emanated from a certificate compiled by Mr Adrian Young, HMG's senior project manager, on 25 August 2014. The final certificate derived from clause 37(3)(v) in GCC 97 which stipulated that the project manager shall issue a final certificate upon Transnet's instructions. In terms thereof, Intech was liable to Transnet in respect of work done by other contractors (supervised and managed by the JV) to complete the work which Intech had undertaken to perform (including the rectification of Intech's defective work) in the sum of R204 187 750 (VAT included). At the trial Transnet abandoned a large part of this claim and confined its claim to R50 million.

The issues

[23] The main issues which require determination are:

(a) The precise nature of the contract, with particular reference to what exactly Intech's scope of obligations was. Intech contended that it only had to do certain items of work, whereas Transnet's case was that this was a 'lump sum' contract, based on a performance specification. According to Transnet's interpretation, the contract required Intech to perform all the work that was required to achieve the outcomes stipulated in the invitation to tender.

(b) The lawfulness of the respective cancellations by the parties.

(c) The consequent effect of a valid cancellation by Transnet on Intech's claims as pleaded.

(d) The counterclaim.

What was the exact nature of the contract?

[24] The correct approach to the interpretation of contracts is well established. We must give meaning to the words used in the contract applying the normal rules of grammar and syntax, viewed within the attendant factual context, in order to determine what the contracting parties intended[3]. In addition, contracts must be interpreted in a manner that makes commercial sense[4].

[25] It is striking that this contract did not contain a bill of quantities quantifying the works in detail. Instead, the scope of work set out in Transnet's invitation to tender as far as refurbishment and upgrade was concerned, read as follows:-

'1. SCOPE:

1.1 This specification covers the designs, manufacture, and commissioning and all other work necessary for the refurbishment and upgrade of Manganese Bulk Plant to 2500 tons per hour, and alignment of the complete system so that at least the mandatory

[3] North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013] ZASCA 76; 2013 (5) SA 1 (SCA) para 24; Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 28.

[4] Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13; Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18.

requirements pertaining to safety of personnel and equipment engaged in the terminal are met. The objective is to complete the project within 12 months but not exceeding 18 months.

1.2 All existing belt conveyors will be upgraded to convey Sinter and Manganese Ore continuously at 1 250 tons per hour per conveying stream, peaking at 1 500 tons per hour, from rail tipper to the stockyard and from the stockyard to the ship-loaders.

1.3 All the mechanical equipment including, belting, splices, rollers, belt cleaners, pulleys (nip guards) and take-up units should all be checked, upgraded, repaired, replaced and refurbished as required to support the operational requirement.

1.4 The integrity of the truck tipplers, truck positioner, stacker, loaders and reclaimer machines, should be analysed in line with new required handling rate, mandatory requirements to safety of personnel and equipment, reliability and availability specifications and upgraded to meet these requirements. The machines shall be adequately protected against corrosion where applicable as per specification HE9/2/B, to ensure that the structure life is maintained until 2011.

1.5 All transfer points and shutes must be completely re-engineered and modernized to eliminate the spillage and resulting damage to the equipment.'

[26] The expected outputs for the upgrade option stipulated as follows:

'5. EXPECTED OUTPUTS:

5.1 The end result of the project must ensure that all systems and structures is upgraded to ensure a further plant life at design capacity of at least 7 years assuming 4000 machine working hours per annum. The quality of the upgrade must ensure that a 98% plant availability is maintained for the projected lifespan of 28 000 machine hours. Calculated as follows:

Total Running Hours – Plant/Stoppages X 100%

Total Running Hours

5.2 A complete maintenance plan, to maintain the required outputs for the specified period, shall be provided for the equipment by the successful tenderer. This plan shall include all scheduled, unscheduled and predictive maintenance tasks with their respective triggers.

5.3 The continued handling rate should be 1 250 ton per hour per belt allowing for 20% surges in the handling rate due to the nature of the feeding system.

5.4 The plant will be operational during the upgrade process and planning must be such that a plant availability of 85% is maintained during this period. The successful contractor would be required to establish his side work such that it does not interfere with the terminal's operations.'

[27] Intech's tender covering letter is instructive. It reads as follows:

'Attached please find ONE FILE containing our Tender proposal for the specified work at the Manganese Ore Terminal in Port Elizabeth.

1. File Containing – Published Tender document. Signed and completed as required, Scope of Works, details of Options, technical data and brochures.

REFURBISHMENT.

As specified, we offer a professionally managed project – with full compliance of all safety, legal, engineering and SAPO specifications and standards – to refurbish the Ore Terminal such that it will remain fully operational for 5 to 7 years at a throughput rate of 1,500Te/hr at acceptable operation and maintain levels post handover.

Price: R 26,352,730 excluding VAT

Warranty: A twelve month Warranty is offered on all completed & inspected work.

Scope of Work: A detailed schedule of work to be completed is contained in this file

Summary Scope of Work: Refurbishment

Detailed cleaning of the entire facility

Full Inspection of all operating components

Cleaning, greasing, re-sealing and re-compaction of all shafts, bearings, gears and pivots

Installation of new lighting to OSHACT standards

Installation of Cable Reelers on Stackers, Reclaimers & shiploaders

Sandblasting, inspection & painting of structures & steelworks

Replacement of sectional degenerated steelwork to ensure safe operation for up to 7 years

Hot Seam welds on Conveyor belts

Replacement of 750mtrs of damaged belting

Electronic scales on Import & Export lines

Basic SCADA and conveyor PLC system

Full refurbishment of the CCR Substation and MCC

Make good the existing operations of the tipplers, stackers, reclaimers and shiploaders

Full refurbishment of the Charger units

Technical Specificaitons: Contained in this file

UPGRADE

An additional cost of R 17,631,726 is included in schedule of prices.

TIMESCALES

A basic time schedule is included in this file. Intech will provide a detailed planning schedule as specified within two weeks of being awarded the contract.

CONTRACTORS

Intech has experience as a Project Management & co-ordination group. Intech also has specific experience with Electrical, Instrumentation, SCADA, PLC, Mechanical and Structural construction work.

To support Intech in this project, a relationship has been structured to include:

Intech Instruments – Prime Contractor – Electrical 7 Instrument Design & installation – Professional (GCC) Engineers, Project Management and SCADA / PLC

Lorbrand – Conveyor System Manufacturers and Installers

Scorpio Martin Engineering – Transfer, Chute & Liner specialists: Dust suppression designers

Dave Brown Engineering – Gearbox & Slew gear manufacture and refurbishing

Langa Sandblasting – Corrosion & structural Engineering

Alstom Controls – Control (PLC & SCADA)

Bellco – Network, radio communication

OPTIONS

Various Options are offered to SAPO by Intech – Enclosed are ten detailed optional items.'

[28] Detailed specifications were outlined in respect of the items of plant and machinery in the terminal and an overview of the operation and technical codes were also included. The site inspection of 3 October 2005 had as its objective an opportunity for prospective tenderers to examine the plant closely with a view to determining precisely what work was required in respect of the various items on the plant to achieve the outcomes required by Transnet. Prospective tenderers themselves had to calculate the cost of the work in this regard. It is against this background that Intech successfully tendered. It was the only compliant tender – two other tenderers submitted tenders only in respect of investigative studies to determine the precise scope of work required. Included in the tender submitted by Intech was a signed declaration that the tenderer had acquainted himself with all the tender documents. Intech's tender thus complied with all the requirements of the invitation to tender.

[29] In its particulars of claim Intech appears to accept, at least impliedly, that the contract required of it to achieve the deliverables stipulated in the invitation to tender. Thus, it pleaded that:

'(a) The contract was concluded pursuant to [Intech's] submission of a tender dated 17 November 2005 and [Transnet's] confirmation of the award of the tender to [Intech] by way of a telefax dated 12 January 2006.

(b) In terms of the contract [Intech] undertook to refurbish the manganese bulk plant at Port Elizabeth for the sum of R27 656 350, excluding VAT and undertook to upgrade the said manganese bulk plant for an additional cost of R17 631 726.'

Importantly, Intech also pleaded that it had 'agreed to comply inter alia with the [OSH Act]'. These averments were admitted in the plea.

[30] Furthermore, Mr Pillay, the driving force behind Intech, appeared to accept that Intech was required to achieve the stipulated outcomes. He testified as follows:

'So the – what you're saying is that work is listed in the options which is not in fact required in order to achieve the stipulated items? – No, it was not. And we've been over this and you accept that he spoke of contract which – there was no [scope] required but the output which was required were, well as you stipulated in

refurbishment, it's

1 500 tons per hour which is 750 x 2 belts and then the upgrade is to the 1 250 tons per hour? – That is correct'.

Intech thus appeared to have understood the contract the same as Transnet did.

[31] Over and above the unambiguously stated expected outcomes (which, as stated, Intech via Mr Pillay appeared to accept), the contract also contained detailed specifications which incorporated specified codes and standards. Upholding Intech's interpretation of the contract would in my view render these detailed performance specifications meaningless. In the context of what Transnet required for the refurbishment and upgrade of the plant, to accept the contention that Intech could simply do whatever work it wanted to, at whatever standard it chose to, would not make commercial sense.

[32] Contracts of this type are often referred to as 'design and build' contract[5]. They are meant to save costs and time. In effect, they merge a first pre-tender phase of commissioning investigative studies to determine the precise scope of work, with the second phase of the tender for the work itself. In such circumstances, self-evidently there is then a far greater responsibility on prospective tenderers to make a proper assessment of what the tender required and what it would cost to meet those requirements. [6]

[33] **The ambit of the invitation to tender and its general envisaged outcome; the specific deliverables stipulated in the contract; and Intech's tender comprising specified items and outcomes, all point to this being a performance specification contract. This conclusion is fortified by the fact that it appears to be common cause on the pleadings and by Mr Pillay's apparent acceptance during oral evidence of this interpretation. En passant, I must agree with the submission by Transnet's counsel that the fact that neither Mr Pillay nor any one of**

[5] See Stephen Furst and Vivian Ramsey Keating on Construction Contracts 9 ed, (2011) at 11 para 10-27.

[6] Many of the problems encountered by Intech can be traced back to this onerous requirement in circumstances where Intech had never executed a contract of this nature.

Intech's senior representatives had ever read the documents or the contract, renders the debate about the nature and the scope of the contract somewhat artificial. Astoundingly, Mr Pillay conceded that, even at the time of the cancellation of the contract by his attorneys on 13 August 2007, he had still not read the contract, despite his attention on more than one occasion having been drawn to important provisions in GCC 97. His attorneys, too, had not read the contract when they cancelled. Be that as it may, Koen J cannot be faulted in coming to the conclusion that this is, as Transnet contended, a performance specification contract with stipulated outcomes.

At whose instance was the contract lawfully cancelled?

[34] Central to this issue is the question regarding safety on the site in general and Intech's alleged non-compliance with the OHS Act in particular. This is so because Intech pleaded that it lawfully cancelled the contract solely on the basis of Transnet's alleged unlawful conduct in issuing the two 'stop works' orders in March 2007 and thereafter failing to furnish reasons to enable Intech to remedy its shortcomings. Moreover, its purported cancellation through its attorneys on 13 August 2007 was only based on Transnet's alleged repudiation through the alleged unlawful 'stop works' orders. Thus the only issue before the high court in this regard was the lawfulness of the 'stop works' orders. It was submitted on behalf of Intech that regard must also be had to the averments on this aspect in its replication and in its plea to the claim in reconvention. The submission is ill-conceived – it is trite that a party is obliged to make out its case in the papers founding its claims, here, the particulars of claim. It cannot seek to do so in its replication. And, equally well-established, is the principle that a party cannot plead one particular issue and then attempt to raise others at the trial[7]. That principle applies even more so on appeal.

[35] It will be recalled that there had been a 'stop works' order issued on 14 February 2007 on account of Langa's non-compliance with safety prescripts in the OHS Act. Intech furnished undertakings to remedy the non-compliance. On this basis, the 'stop works' order was lifted and work resumed. Thus, the non-compliance in March 2007,

[7] See generally Minister of Agriculture and Land Affairs & another v De Klerk & others [2013] ZASCA 142; 2014 (1) SA 212 (SCA) para 39.

relating to the failure to report the lost time injury sustained by an Alstom employee, was a second serious transgression within a matter of weeks. Intech correctly accepted that, as main contractor, it bore full responsibility for the failures regarding safety aspects (in particular non-compliance of the OHS Act) of its subcontractors. Intech specifically agreed in its contract with Transnet to comply with its duties and obligations set out in the OHS Act. It also accepted in terms of the General Conditions of Contract and the OHS Act, that it bore responsibility for its own employees and for all other persons under its control. Dr Willem du Toit, Transnet's expert witness on safety, described the plant as a particularly hazardous environment. The potential hazards included those associated with working in close proximity to live machinery, in confined spaces and at height, and the risk posed by falling objects, drowning and electrocution. Then, of course, there was the potentially hazardous manganese dust.

[36] Both Mr Pillay and Intech's safety expert, Mr Schorne Darlow, conceded that there was non-compliance with the OHS Act and its Regulations in several material respects. These included not even having a copy of the OHS Act on site, the absence of a health and safety plan, no appointments having been made as required by the OHS Act and Regulations and no risk assessments having been carried out. As stated, the plant was a highly hazardous site and safety was paramount. Mr Pillay made the following two important concessions:

> 'First of all, Intech was non-compliant. Their operation was not in accordance with the Occupational Health and Safety Act, construction regulations or any other --- (indistinct) regulations, including SABS. Do you accept that? --- yes. There were serious non-conformances. The second part --- (intervention) --- We are talking about the site, just the site --- On the site yes.
>
> The second part of this is that and we will deal in due course with the events as they unfolded, but there was a joint audit or an audit at which Intech had a representative and scores were agreed. Intech was at that time told, this is around about the 20 March, told what the issues were and in fact it appears from various records which we have only had access to in the context of these proceedings, that Intech did set about trying to get itself compliant following March. Would you agree with that? --- Correct.'

[37] Later during cross-examination, the following crucial concession was made:

> 'What I am saying to you is that it is part of Intech's case, it has been pleaded that Intech did not know what its shortcomings were or what it needed to do in order to become compliant. What I am saying to you is there is no truth whatsoever in that. --- No, that is not true at all. We knew what to do, we know about safety, we work every day with safety, but I brought in the expert to guide us the first time, to do everything right the first time, because instead of us doing a document and going and giving it to SAPO and they don't accept it. All right, then we are agreed on the second part, that Intech did in fact know what to do. --- Yes, absolutely.'

[38] The 'expert' referred to by Mr Pillay in the passage above, is Mr Schorne Darlow. He conceded in evidence that 'there was no doubt in my mind that Intech were not complying there was no doubt at all'. Mr Darlow explained that his brief was to help Intech become compliant, but he was not asked to help draw up a health and safety plan or to do a risk assessment for Intech. He said that had he been instructed to do so, he would have been able to assist Intech to do those things. At some point, when questioned by Koen J, Mr Darlow conceded that Transnet's 'stop works' orders were justified in the circumstances:

> 'Just let me understand that. If there was no safety plan then you couldn't see whether what was being done was in accordance with the safety plan and then the remedy if you like is you must then stop the construction work until a risk assessment has been done – it can be done maybe in a few days or whatever. --- The risk assessment, Your Honour, is only part of it, it's a small part of it.
>
> So risk assessment and whatever else is required but in the interim the appropriate thing is just to stop the work, am I correct in that? --- Until the plan is put into place. This was how many months? What date did the contract start?'

But, later on, Mr Darlow appeared to suggest that the 'stop works' orders were excessive and that it was not necessary for Transnet to have ordered the stoppage of the entire works. Indeed, Intech's case regarding the alleged unlawfulness of the 'stop works' orders (which it contended amounted to repudiation on the part of Transnet) appears to have mutated into the alleged excessiveness of the orders. This

contention is fundamentally flawed on both a factual and a legal level.

[39] Firstly, Mr Darlow conceded that he was not conversant at all with the factual situation which existed at the time of the orders on 5 and 8 March 2007 as far as work on the site was concerned. As a matter of fact, very little work was being done at that time – only Langa was working, doing painting and sandblasting on the gantries and Alstom was performing critical work in the control room. When pressed by Transnet's counsel in cross-examination on how he could express an opinion on this when he did not know what work was being done on the site, he conceded the point:

> 'All I'm saying is before we can decide whether or not an instruction was excessive you have to know what its actual impact was. --- Well I was under the impression that all work, full stop, no work was allowed to carry on that they were only allowed to stay in their site offices they were not allowed to go off site.'

Later he conceded that he was not in a position 'to debate this issue'. This concession, and that made by Mr Pillay, controvert the contentions before us that the orders were arbitrary and unjustifiably excessive.

[40] Secondly, Intech was in law bound to comply with the statutory requirements contained in the OHS Act, the OHS Regulations and the Construction Regulations. It bound itself thus in the contract. Moreover, even if it purported to do so, Intech could not in law contract out of liability to comply with statutory requirements. Those requirements are peremptory. Section 8 of the OHS Act provides as follows:

> '(1) Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.'

The section is clearly peremptory and the only proviso contained therein is that measures must be taken 'as far as is reasonably practicable'. Intech's case was not that it was not reasonably practicable to comply. Construction Regulation 4(1)(e) requires an employer like Transnet to 'stop any contractor from executing construction work which is not in accordance with the principal contractor's health and safety plan'.

[41] Central to compliance with the statutory requirements is a comprehensive health and safety plan, which had to be kept available

on site in a health and safety file. As pointed out by Dr du Toit, such a plan would encompass the assessment of risks in the work to be executed, together with detailed method statements regarding the management of those risks. Thus, in the present instance, the health and safety plan would have entailed, amongst others, a fall protection plan[8], lockout procedures and personal protection equipment. Absent a health and safety plan, Transnet was not only entitled, but indeed obliged, to stop the work until an appropriate plan had been put in place. This, said Dr du Toit, emanates from the peremptory provisions of s 8(1) of the OHS Act and Construction Regulation (4)(1)(e). A failure to comply with s 8 constitutes a criminal offence[9].

[42] It was argued on Intech's behalf, albeit somewhat faintly, that Transnet acted mala fide and with ulterior motive in the issuance of the 'stop works' orders. These orders were a smokescreen to disguise Transnet's true motive, namely to get Intech off the project, so the argument went. Counsel referred to it as 'a contractual pretext to effectively terminate [Intech's] contract'. This argument is ill-conceived and directly controverted by the facts. The evidence of Mr Reddy and Mr Nxumalo, supported by numerous letters and e-mails written by them, are indicative of a concerted attempt by Transnet to engage Intech with a view to getting it to complete the outstanding work. And, more importantly, it is trite that motive is irrelevant as far as the repudiation of a contract is concerned. A contract can only be repudiated by conduct[10]. Where the 'stop works' orders were justified on the facts, as conceded by Mr Pillay and Mr Darlow, and compulsory by law (s 8(1) of the OHS Act and Construction Regulation 4(1)e)), it matters not what Transnet's motive may have been. It is an objective test and intention or belief plays no role whatsoever[11].

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[8] According to Dr du Toit, statistically most accidents in the construction industry occur with people falling from height or with objects falling on people.

[9] Section 38(1)(a) of the OHS Act.

[10] G B Bradfield Christie's Law of Contract in South Africa 7 ed, (2016) at 612; Van Huyssteen et al Contract General Principles 5 ed, (2016) at 10.

[11] Ibid.

[43] To sum up under this rubric: the 'stop works' orders of 5 and 8 March 2007 were lawful and justified. This was conceded by both Mr Pillay and Mr Darlow. Intech knew exactly what had to be done to remedy the shortcomings to have the orders lifted; this too became common cause in the evidence. Intech concededly failed to remedy the shortcomings. On the facts, ultimately the non-compliance with the statutory prescripts remained until Intech finally abandoned the plant at the end of May 2007. Intech's purported cancellation on the basis of repudiation by Transnet's 'stop works' orders is unsustainable in law. The purported cancellation is itself unlawful and was correctly regarded by Transnet as an act of repudiation. Transnet thus lawfully cancelled the contract on 14 August 2007, on the basis of this and other grounds (including Intech's refusal to perform under the contract and its final abandonment of the site at the end of May 2007). As an aside, it bears mention that the contract became deadlocked not because of the 'stop works' instructions, but rather due to the irresoluble dispute regarding Intech's demand for payments and by Intech's intransigence and refusal to complete the outstanding work. Despite his attention being drawn on more than one occasion to possible remedies under GCC 97, Mr Pillay failed to utilise the dispute resolution mechanisms in the contract. This is perhaps explicable by the fact that neither he, nor any one of Intech's other senior representatives, had ever taken the trouble of reading the contract.

Intech's claims

[44] As stated, Intech sued for:

(a) The refund of all sums held in retention by Transnet. Its case was that it was entitled to this refund '(b)y virtue of the termination of the contract'.

(b) Unpaid invoices, also on the basis that it was entitled to full payment by virtue of the cancellation of the contract.

(c) Interest on invoices paid late.

(d) Loss of profit sustained as a consequence of Transnet's 'unlawful repudiation of the contract and the subsequent cancellation thereof.'

(e) Standing money in respect of the 'hold works' order. This claim was expressly abandoned at the trial and was recorded as such by Koen J in his judgment. It could not be revived on appeal, as counsel sought to do in this court.

[45] Intech's claims for unpaid invoices and retention monies are bad in law. As stated, the present contract was one of performance specification, without a bill of quantities, often referred to as a 'lump sum' contract. It was an entire contract where entire performance by the contractor (Intech) was a condition precedent for the client's (Transnet's) liability. Intech's right to payment was thus dependent upon full performance of the contract on its part. Partial performance by Intech did not render Transnet liable for partial payment. As Somervell LJ put it in *Hoenig v Isaacs*[12]:

> 'the builder can recover nothing on the contract if he stops work before the work is completed in the ordinary sense - in other words abandons the contract'.

[46] In order to mitigate hardship to a contractor in the form of, for example cash flow problems, construction contracts often make provision for periodical interim payments to the contractor, prior to completion of the entire works. That was also the case here. These interim payments would usually be structured against interim certificates, sometimes called 'progress certificates'. As the name depicts, these certificates are issued from time to time as the works progress, certifying that a certain amount of work has been done. They are issued in the expectation that the entire works will be completed. Although they are made against separate parts of the work being done (usually expressed as an estimation of the percentage of work which has been completed), these interim payments are not payments for separate completed parts of the works. They are provisional only and subject to continuing revision through the issuance of further certificates, be they interim or final certificates. As interim provisional progress payments, they do not through the issuing of interim certificates signify acceptance of the work done.

[47] The issuance of an interim certificate is 'simply a contractual mechanism or method to enable the contractor to finance the

[12] Hoenig v Isaacs [1952] 2 All ER 176 at 178.

continuation and finalisation of his work'[13]. Where a client lawfully terminates a construction contract, as is the case here, the contractor's claims for retention monies and unpaid invoices are not self-standing claims, separate and independent from the remainder of the contract. And, upon such termination, the interim certificates cease to be of any force and effect. They cannot sustain a basis for payment where there can be, in view of the cancellation, no further expectation of a completion of the works[14]. In order to succeed on the interim certificates, Intech had to have acquired an accrued right to payment prior to the termination of the contract, ie a right 'which is accrued, due and enforceable as a cause of action independent of any executory part of the contract.'[15]

[48] The interim payments, made to Intech during the subsistence of the contract, did not render the contract divisible. Intech's remedy for its incomplete performance was to claim a quantum meruit, based on the principles of enrichment[16]. In the premises, Intech's claims for unpaid invoices and retention monies are bad in law and were correctly dismissed by the high court.

[49] Intech's claim for interest on the late payment of invoices 1290 and 1321 was dismissed by Koen J on the basis that they were not proved on a balance of probabilities. Intech's counsel did not seek to persuade us that this finding was wrong. The high court cannot be faulted in this regard. Moreover, this claim is in any event extinguished by Transnet's counterclaim through the operation of set-off.

[50] As far as the claim for the loss of profit is concerned, the finding

[13] Per Nienaber JA in Martin Harris en Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens; Qwa Qwa Regeringsdiens v Martin Harris en Seuns OVS (Edms) Bpk 2000 (3) SA 339 (SCA) para 34 (my translation).

[14] Thomas Construction (Pty) Ltd (In liquidation) v Grafton Furniture Manufacturers (Pty) Ltd 1988 (2) SA 546 (A) at 563F-G.

[15] Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk 1972 (2) SA 863 (A) at 870 G-H.

[16] BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) at 424 C.

that Intech's purported cancellation was unlawful destroys the substratum of this claim. That purported cancellation constituted repudiation on the part of Intech, which entitled Transnet to cancel the contract. There were other grounds of cancellation relied upon by Transnet, but nothing more need be said about them. The loss of profit claim, premised on the basis of Intech completing the works if it had 'been given a proper opportunity to complete the contract' is therefore unsustainable in law.

Transnet's claim in reconvention

[51] As stated, Transnet sued for a reduced sum of R50 million on a final certificate issued by Mr Young in terms of clause 37(3)(v) in GCC 97[17]. It will be recalled that the JV's brief was extended to manage the work to upgrade and refurbish the entire plant (import and export lines) to 1250 tons per hour per line (ie 2500 tons per hour in total). After initial inspections, first by the JV and thereafter by other experts, extensive repair, refurbishment and upgrade work was done. In drawing up the final certificate, Mr Young used the JV's deliverables according to its extended brief as a starting point. He computed the costs incurred by Transnet to have the works completed and made free of defects following cancellation of the Intech contract as R192 171 916.41. Various contractors were employed to do this work, supervised and managed by the JV. Detailed evidence concerning this work was led, setting out what exactly was done and the cost thereof. The refurbishment and upgrade were completed only in 2014 at a total cost of R600 million. This increased cost related to the expansion of the terminal to extend its life to a longer period than initially set out in the tender from seven years to 15 years.

[52] The figures in the final certificate were contentious. But no controverting evidence was led by Intech. Mr Young's evidence was challenged only on the basis that he misunderstood what Intech's

[17] In relevant part clause 37(3)(v) reads as follows:
'. . . after the said work has been completed by such other person and such other person has been paid therefor, the Project Manager shall issue the Final Certificate when so authorized by the Executive Officer. Should any money be shown to be due by the Contractor to Transnet, the contractor and/or his guarantor shall forthwith pay such money to Transnet failing which Transnet may recover the said amount from the contractor.'

deliverables were in terms of the contact. The basis of his calculations of what work had to be done by other contractors to complete Intech's work and to remedy its defective workmanship, was misconceived, so the cross-examination purported to show. This line of argument was vigorously pursued in this court. It was contended on behalf of Intech that extensive work which fell outside Intech's original scope, such as repairing reclaimers, fixing a gantry and other maintenance work, was wrongly included in the computation. Much was made in the heads of argument about the so-called LSL report which contained a pre-tender engineering assessment commissioned by Transnet. But reliance on that report is misplaced. It was never part of the evidence and was not confirmed under oath on affidavit. The same applies to the Chapelow report. As Koen J correctly found, the criticism levelled against Mr Young's final certification and his evidence is unfounded. As far as the scope of works is concerned, this criticism departs from the flawed premise that Intech only had to do certain items of work. As set out above, its brief was to achieve the outcomes stipulated by Transnet in the tender.

[53] Mr Young's evidence was also challenged on the basis of an allegation that Transnet had failed to properly maintain the plant. Apart from the fact that this was nothing more than a speculative probe, Mr Young persuasively demonstrated various instances where he had excluded from the computation items which fell outside Intech's scope of work, or where damage was caused by Transnet itself. If anything, Mr Young's figures were on the conservative side.

[54] It may at first blush appear strange that a tender for work in the initial sum of some R44 million ended up costing just over R200 million for the work to be completed and defective work remedied. Upon closer analysis though, it is plain that Intech had hopelessly underestimated the scope and concomitant cost of the works. That can largely be ascribed to its lack of experience in executing tenders of this nature and size. It explains why the other two tenderers were not prepared to tender for the entire project itself, but only for initial investigative studies to determine precisely what work the refurbishment and upgrade entailed. And it comes as no surprise that a large multinational company such as Alstom was only prepared to bid for the instrumentation and software part of the tender. As an aside, it

appears as if Transnet itself was in the dark about what the work entailed. But that is the nature of a 'lump sum' performance specification contract – a prospective tenderer carries the risk and is thus required to make a careful, informed assessment of what exactly is required to achieve the stipulated outcomes, before submitting its tender.

[55] Transnet claimed penalties in the sum of R10 786 031, excluding VAT. Clause B of the Special Conditions of Contract provided that penalties may be imposed for the late completion of the works for every day beyond the completion date at a rate of one fourteenth percent of the total value of the contract. This was also set out in the earlier invitation to tender. Intech was warned during September 2006 and again at a meeting on 21 February 2007 that Transnet reserved its right to impose penalties. This warning was repeated in subsequent correspondence. Clauses 17 and 28 of GCC 97 made provision for Intech to apply to Transnet for the extension of the completion date where delays occurred, but Intech did not avail itself of this option. Again, it may be ascribed to the fact that neither Mr Pillay not his senior Intech colleagues had ever read the contract.

[56] In its plea to the claim in reconvention, Intech raised three defences to the claim for penalties, namely waiver, repudiation and a time at large defence. All of these defences were rejected by the high court, correctly so in my view. I have already dealt with the repudiation aspect. Waiver, being an unequivocal abandonment of rights, was not proved at all. I agree with Koen J that the agreed rescheduling from time to time of work programmes does not amount to a formal extension in terms of the contract, nor does it affect the agreed completion date. The facts pleaded regarding the time at large defence were not proved at the trial:

(a) There was no evidence that Transnet had rescheduled the shutdown, as alleged. But in any event, as the high court correctly found, rescheduling of the shutdown was permitted by the contract and Intech's remedy in that instance was to apply for an extension of time.

(b) The allegation that Transnet had frustrated the completion of the contract by inducing Lorbrand to refuse to perform in terms of its subcontract with Intech, was not borne out by the evidence. It became

clear from the evidence of Mr Granich of Lorbrand that the relationship with Intech had broken down as a result of the latter seeking to renegotiate the terms of the subcontract and for failing to make payment to Lorbrand timeously.

(c) There was no evidence of extra work after 16 November 2006 which Intech had to perform, as it alleged. And the 'hold works' order of December 2006 could have been remedied by Intech availing itself of the contractual option of seeking an extension of time. It did not do so. In any event, Transnet has given Intech the benefit of this delay from 15 December 2006 to 21 February 2007 (71 days) in the computation of its claim. Transnet has thus reduced its claim for penalties to R6 982 600.

Conclusion

[57] For these reasons, the high court was correct in its findings on the issues outlined above. The appeal must consequently fail and costs must follow the outcome.

[58] The following order issues:

1 The appellant's late filing of the record is condoned. The appellant is ordered to pay the costs of the application for condonation, including the costs of two counsel where so employed.

2 The appeal is dismissed with costs, including the costs of two counsel.

ESKOM HOLDINGS SOC LTD v MASINDA

The mere existence of a supply of services to a property insufficient to establish a right constituting an incident of possession of the property

Judgment given in the Supreme Court of Appeal on 18 June 2019 by Leach JA (Wallis JA Mocumie JA, Mokgohloa AJA and Weiner AJA concurring)

Regarding itself obliged to take steps to avoid harm occurring due to dangerous and unauthorised connections to its grid, on 8 August 2017, Eskom Ltd sent a team made up of members from its various departments to hold an inspection of properties in Tsolo. On doing so, various illegal connections to the Eskom grid were identified and then disconnected. One of the properties identified as having an illegal connection was that of Ms Masinda.

Eskom averred that the electrical supply installation included equipment of incorrect sizes, did not meet prescribed standards, had been erected by an unauthorised contractor, and constituted an immediate danger to the public. For this reason, the supply to Ms Masinda's property was disconnected.

What had been installed on Masinda's property was a prepaid system using a meter box that someone had wired into Eskom's grid. This system was used in conjunction with a prepaid card in order to effect the supply. Electricity was purchased using the individual number of the meter reflected on the card. The receipt issued in respect of the transaction bore a coded number which, once typed into the meter, registered a credit in respect of the amount of electricity purchased. The supply of electricity to Masinda's property was therefore dependent upon it being paid for in advance.

Masinda brought urgent proceedings against Eskom seeking, inter alia, an order obliging it to forthwith restore the electricity supply to her home. In seeking this relief she relied upon the mandament van spolie (a spoliation application).

Held—

Depending upon the circumstances, the supply of electricity or water may be recognised as being an incorporeal right, the possession of which is capable of protection under the mandament. In such cases, the right to the supply flows from the exercise of possession of the immovable property. Whoever is in lawful possession of the relevant portions of land is entitled to receive such services.

This however, is not authority for the proposition that the mere supply of water or electricity to a property, in itself and without more, constitutes an incident of the possession of that property, protectable by the mandament. The mere existence of such a supply is, in itself, insufficient to establish a right

constituting an incident of possession of the property to which it is delivered. In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession. Rights bestowed by servitude, registration or statute are obvious examples of this. On the other hand, rights that flow from a contractual nexus between the parties are insufficient as they are purely personal and a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a respondent is precluded from disproving the merits of the applicant's claim for possession. Consequently, insofar as previous cases may be construed as holding that such a supply is in itself an incident of the possession of property to which it is delivered, they must be regarded as having been wrongly decided.

Masinda said no more than that Eskom's officials had unlawfully disconnected the supply of electricity to her house and the prepaid meter, and asked that it be reconnected to the national grid. There was no attempt to show that such supply was an incident of her possession of the property. She relied solely upon the existence of the electrical supply to justify a spoliation order. This was both misplaced and insufficient to establish her right to such an order.

In addition, Masinda purchased her electricity on credit through the prepaid system. In these circumstances, her right to receive what she had bought flowed not from the possession of her property, but was a personal right flowing from the sale. Her claim was essentially no more than one for specific performance. This personal, purely contractual right, could not be construed as an incident of possession of the property. As the mandament does not protect such a contractual right, for this reason too her claim had to be dismissed.

Advocate T J M Paterson SC instructed by Makaula Zilwa Inc, Sandton, appeared for the appellant
Advocate J L Hobbs instructed by L Jikela Attorneys, Mthatha, appeared for the respondent

Leach JA:

[1] The issue we are called upon to decide in this appeal is whether the respondent (Ms Masinda) was entitled to a spoliation order when the appellant, Eskom Holdings SOC Limited (Eskom), disconnected the supply of electricity to immovable property she owns and possesses in Tsolo, Eastern Cape. The court a quo decided she was, and ordered that

the electrical supply to her property be reconnected. The appeal against that order is with leave of this court.

[2] Eskom is a public company with its entire share capital held by the State[1]. It is the national generator and distributor of electricity and is licensed to provide electricity directly to customers in the area in which Ms Masinda's property is situated. Illegal electricity connections to Eskom's power grid, which by their very nature are fraught with peril, appear to have become a substantial problem in the area. Regarding itself obliged to take steps to avoid harm occurring due to dangerous and unauthorised connections to its grid, on 8 August 2017, Eskom sent a team made up of members from its various departments to hold an inspection in Tsolo. On doing so, various illegal connections to the Eskom grid were identified and then disconnected.

[3] One of the properties identified as having an illegal connection was that of Ms Masinda. The alleged defects in the supply installation on her property were unfortunately not set out in Eskom's papers with the clarity one would have expected. Rather it adopted a procedure, previously criticised by this court[2], of adducing evidence by way of hearsay allegations in its main answering affidavit, supported by so-called 'confirmatory affidavits' by the witnesses who should have provided the necessary details, but who merely sought to confirm what had been said in the main affidavit 'in so far as reference [has been] made to me'. Despite this slovenly practice, it can be accepted that Eskom averred that the electrical supply installation included equipment of incorrect sizes, did not meet prescribed standards, had been erected by an unauthorised contractor, and constituted an immediate danger to the public.

[4] For this reason, the supply to Ms Masinda's property was disconnected. On doing so, certain Eskom officials approached Ms Masinda to ask her about her prepaid electricity meter and its connection to the national grid. Instead of providing the details requested, she began shouting at them, stating that she had applied for

[1] Sections 2 and 3 of the Eskom Conversion Act 13 of 2001.

[2] See eg Drift Supersand (Pty) Ltd v Mogale City Local Municipality & another [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) para 31.

electricity and now that someone else had connected her, Eskom should not disconnect her. Ms Masinda denied these allegations, but as the matter is to be decided on the affidavits, they must be accepted for present purposes.

[5] Ms Masinda alleged in her replying affidavit that her meter and connection had been installed by a contractor whom she understood was Eskom's agent. This, according to Eskom, was inconsistent with what she had said at the time of the disconnection. It further alleged that it had quoted Ms Masinda for a 60 amp prepaid meter installation which she had not accepted. Whatever may have happened, it does appear that she was purchasing electricity which was then being drawn through a meter installed on her property. Unfortunately for her, according to Eskom, this was being done through an illegal and dangerous installation which led to her supply being disconnected.

[6] Ms Masinda was not prepared to take this lying down. By way of notice of motion dated 18 August 2017, but filed only on 1 September 2017, she launched urgent proceedings against Eskom in which she sought, inter alia, an order obliging it to forthwith restore the electricity supply to her home. In seeking this relief she relied, first, upon the mandament van spolie (commonly known as a spoliation application) and, secondly, upon an allegation that the decision to disconnect her electrical supply constituted administrative action as envisaged by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In respect of the former she contended that Eskom's officials had unlawfully disconnected the supply of electricity without her consent 'and without recourse to due legal process'. In respect of the latter she sought to review the respondent's action on the basis that it had been procedurally unfair or decided upon arbitrarily and capriciously in breach of the provisions of PAJA.

[7] Nothing really needs to be said in respect of the claim brought under PAJA. It was abandoned in the court a quo and not only was there no attempt to resurrect it in this court, but counsel for Ms Masinda specifically eschewed all reliance upon PAJA in attempting to support the order obtained below. The matter was therefore argued solely in respect of the spoliation, to which issue I now turn.

[8] The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be

permitted to take the law into their own hands to seize property in the possession of others without their consent. Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property 'as a preliminary to any enquiry or investigation into the merits of the dispute'[3] as to which of the parties is entitled to possession. Thus a court hearing a spoliation application does not require proof of a claimant's existing right to property, as opposed to their possession of it, in order to grant relief. But what needs to be stressed is that the mandament provides for interim relief[4] pending a final determination of the parties' rights, and only to that extent is it final. The contrary comment of the full court in *Eskom v Nikelo*[5] is clearly wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute[6].

[9] As I have mentioned, Ms Masinda sought restoration of her electricity supply on two alternative bases. In respect of the first, the spoliation, an investigation into the merits of her claim to receive such a supply would ordinarily not be called for. In respect of the second, the review under PAJA, she was required to establish that she had such a right to electricity which had been unlawfully taken away from her. The two alternative claims are the very antithesis of each other. Possibly as a result of this, the matter appears to have morphed into an application in which Ms Masinda sought and obtained a permanent order from the court a quo requiring Eskom to restore an electricity supply to Ms Masinda.

[10] Presumably the court did not intend for such electrical supply to be restored by way of an installation that was unlawful and a danger to the public but rather one which complied with the necessary requirements of safety – something, according to Eskom, the original

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[3] Nino Bonino v De Lange 1906 TS 120 at 122 confirmed by this court in Bon Quelle (Pty) Ltd v Otavi Municipality 1989 (1) SA 508 (A) at 511H-I (Bon Quelle).

[4] See eg D G Kleyn Die Mandament Van Spolie In Die Suid-Afrikaanse Reg LLD dissertation University of Pretoria (1986) at 300-301 and the cases there mentioned.

[5] Eskom v Nikelo [2018] ZAECMHC 48 (21 August 2018).

[6] Bon Quelle at 513H-I.

installation had lacked. In this respect its order was immediately problematic as it seemingly went beyond requiring the re-establishment of what there was before, whereas spoliation only requires the status quo ante to be restored[7]. (This was probably the product of the court a quo applying the principles of spoliation in circumstances where, effectively, final relief was being sought.) In Tswelopele[8] Cameron JA dealt with the nature of the mandament and said[9]:

> 'its object is the interim restoration of physical control and enjoyment of specified property – not its reconstituted equivalent. To insist that the mandament be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives (including a peace-keeping function).'

For that reason he had earlier in the judgment accepted that the mandament is a preliminary and provisional order.[10]

[11] The obvious difficulty standing in the way of relief being granted was that the supply that was sought to be restored was said to be unlawful and constituted a danger to the public. This notwithstanding, the respondent's counsel argued that, as in spoliation proceedings the legality or otherwise of an applicant's possession is not an issue to be decided, the supply had to be reconnected before any dispute as to its legality could be determined.

[12] Although it is correct that spoliation requires restoration of

[7] This may include doing more than simply restoring possession. It requires restoration of the property to its former state. See Zinman v Miller 1956 (3) SA 8 (T).

[8] Tswelopele Non-Profit Organisation & others v City of Tshwane Metropolitan Municipality & others [2007] ZASCA 70; 2007 (6) SA 511 (SCA) affirmed in Ngomane & others v City of Johannesburg [2019] ZASCA paras 18-20. See also Rikhotoso v Northcliff Ceramics 1997 (1) SA 526 (W) at 535B-C.

[9] Paragraph 24. This may cast doubt on the grounds of the judgment, but not the result, in Fredericks & another v Stellenbosch Divisional Council 1977 (3) SA 113 (C).

[10] Paragraph 23.

possession as a precursor to determining the existence of the parties' rights to the property dispossessed, there may well be circumstances in which a court will decline to issue a spoliation order. Thus in Ngqukumba[11], a case involving the spoliation of a motor vehicle, the engine and chassis numbers of which had been altered, the Constitutional Court stated[12]:

> '. . . in this case we are not concerned with objects the possession of which by ordinary individuals would be unlawful under all circumstances. Had we been concerned with objects of that nature, then the mandament van spolie might well not be available; but that issue is not before us and need not be decided. The fact that we are here concerned with an article that may be possessed quite lawfully makes all the difference . . . At the risk of repetition, the simple point of distinction is that an individual can possess a tampered vehicle if there is lawful cause for its possession.'

[13] This dictum raises the possibility of a court refusing to order the return of property to a person who may not lawfully possess it, although to do so would require reconsideration of a line of authority in this court that has not hitherto been questioned[13]. In any event, Eskom was undoubtedly under a common law duty to take steps to guard against its electrical supply constituting a hazard to the public (I leave out of the reckoning certain regulations, the applicability of which are in dispute)[14] and the fact that the electrical installation that was removed did not meet required specifications and constituted a

[11] Ngqukumba v Minister of Safety and Security & others [2014] ZACC 14; 2014 (2) SACR 325 (CC).

[12] Paragraph 15.

[13] Yeko v Qana 1973 (4) SA 735 (A) at 739D-G; Bon Quelle fn 3 at 512A-B; Ivanov v North West Gambling Board & others [2012] ZASCA 92; 2012 (6) SA 67 9SCA) paras 23-25. But see Parker v Mobil Oil of Southern Africa (Pty) Ltd 1979 (4) SA 250 (C).

[14] It is presumed to have been negligent if anyone suffers damage or injury caused by means of electricity generated, transmitted or distributed by it. See s 25 of the Electricity Regulation Act 4 of 2006 and Grootboom v Graaff-Reinet Municipality 2001 (3) SA 373 (E).

public danger, might well be sufficient for a court to decline to issue a spoliation order. After all, directing it to restore the electricity connections that were removed would compel it to commit an illegality[15]. In the light of my view on this matter, however, no final decision on this aspect of the case need be taken as, for the reasons that follow, the appeal must succeed.

[14] It is necessary to undertake a more detailed examination of the principles applicable to the mandament. Although it originally protected only the physical possession of movable or immovable property, this court pointed out in *Telkom v Xsinet*[16] that in the course of scientific development it was extended to provide a remedy to protect so-called 'quasi-possession' of certain incorporeal rights, such as those of servitude[17]. But not all incorporeal rights may be the subject of spoliation. As was explained in *Firstrand v Scholtz*[18]:

> 'The mandament van spolie does not have a "catch-all function" to protect the quasi-possessio of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of quasi-possessio of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterised to establish whether its quasi-possessio is deserving of protection by the mandament. Kleyn seeks to limit the rights concerned to "gebruiksregte" such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is real or personal. That explains why possession of "mere" personal rights (or their exercise)

[15] Cf Zulu v Minister of Works, KwaZulu Natal & others 1992 (1) SA 181 (DC) at 190I-J.

[16] T elkom SA Ltd v Xsinet (Pty) Ltd 2003 (5) SA 309 (SCA) para 9.

[17] See further Bon Quelle fn 3 at 514D-516E.

[18] FirstRand Limited t/a Rand Merchant Bank & another v Scholtz NO & others [2006] ZASCA 99; 2008 (2) SA 503 (SCA) para 13.

> is not protected by the mandament. The right held in quasi-possessio must be a ["right of use"][19] *or an incident of the possession or control of the property*.'(Emphasis added.)

[15] **Depending upon the circumstances, the supply of electricity or water may be recognised as being an incorporeal right, the possession of which is capable of protection under the mandament. That this is so is apparent from the decision of this court in *Impala Water v Lourens*[20] in which the respondents sought and obtained a spoliation order directing the appellant, a supplier of water, to restore the flow of water to reservoirs on their farms.** There had been a dispute concerning the legality of certain water charges levied by the appellant and, although proceedings to recover these charges were pending, the appellant exercised its powers under the National Water Act 36 of 1998 to restrict the flow of water to the respondents by closing certain sluices. The respondents' rights to receive water were not mere personal rights but were linked to and registered in respect of certain portions of each of the respondents' farms that were dependent on the supply of the water. This court, in dismissing an appeal against an order that the appellant restore the flow, held that such rights were an incident of the possession of each farm, and that the mandament was therefore available.

[16] **Importantly, it was clear from the facts in that case that the right to the supply flowed from the exercise of possession of the immovable property. Put somewhat differently, whoever was in lawful possession of the relevant portions of land was entitled to receive water from the appellant.** This has not always been recognised in previous decisions in which the courts have at times seemed to regard the mere supply of water or electricity, without more, as constituting an incident of possession – see eg *Eskom v Nikelo*[21]. In *Naidoo v Moodley*[22] and

[19] The judgment used the Afrikaans word 'gebruiksreg'.

[20] Impala Water Users Association v Lourens NO & others 2008 (2) SA 495 (SCA); [2004] 2 All SA 476 (SCA).

[21] Footnote 5.

[22] Naidoo v Moodley 1982 (4) SA 82 (T) at 84A-E.

Froman v Herbmore Timber[23] it appears that the electricity was cut off with a view to forcing the applicants to vacate immovable property, so that, as with *Nienaber v Stuckey* 1946 AD 1049, where the complaint was of interference with access to a property, it was the possession of that immovable property that was being protected. *Nisenbaum v Express*[24], which is sometimes referred to as an instance of the spoliation of a water supply, was rather an order for specific performance of a lease.

[17] The decision in *Painter v Strauss*[25] was cited as authority for that proposition in these latter cases but, on closer scrutiny, it is not. It involved a farmer who, after having rented out land, revoked the authority he had given to his tenant 'to arrange with the Department of Irrigation for the supply of water to the land'. The precise nature of the right revoked does not appear from the judgment, although at first blush it appears to have been contractual – which, if it was, would not have been protected by the mandament. (Counsel for the landowner, however, appears to have conceded that the right was capable of spoliation.) In any event, whatever the nature of the right revoked may have been, the court appears to have regarded it, rightly or wrongly, as similar to that of a servitude. The latter is of course capable of being registered, and would clearly be an incident of the possession enjoyed by the holder of a dominant tenement[26]. If that was so, it is a far cry from a mere personal right extended by contract which in no way attaches to property. **The decision is thus not authority, as appears to have been accepted by the subsequent decisions which referred to it, for the proposition that the mere supply of water or electricity to a property, in itself and without more, constitutes an incident of the possession of that property, protectable by the mandament.**

[18] Furthermore, examination of recent decisions of this court shows

[23] Froman v Herbmore Timber and Hardware (Pty) Ltd 1984 (3) SA 609 (W) at 610G-611D.

[24] Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd 1953 (1) SA 246 (W).

[25] Painter v Strauss 1951 (3) SA 307 (O) at 318F-H.

[26] See the judgment in Bon Quelle, fn 3 above.

the fallacy of such a proposition. Spoliation was granted in Bon Quelle not because of the mere existence of the supply of water, but because such supply had been received in the exercise of the rights of a servitude holder. And in *Impala Water v Lourens*[27], which I have already mentioned, the mandament was available as the right to receive water was not a mere personal right.

[19] However, in the further decision already mentioned, *Firstrand v Scholtz*, it was held that the mandament was not available to enforce the re-establishment of a water supply. In that matter the first appellant had supplied water through a pipeline to several farmers within an irrigation area. The right to receive water through the pipeline was governed by agreements concluded with the farmers and was provided pursuant to payment of a fee for a period ending 31 December 2004. Because the parties were unable to agree on a fee payable thereafter, the appellants ceased to deliver water from 1 January 2005. The respondents, who owned properties that had been serviced by the pipeline, brought spoliation proceedings for restoration of the supply. They succeeded in the court of first instance but failed in an appeal to this court, which held that they had not been deprived of quasi-possession of any statutory water rights which they were entitled to exercise, but mere contractual rights relating to the use of the pipeline, which had expired.

[20] In these cases the mere existence of the water supply which was terminated, was held in itself to be insufficient to constitute an incident of the possession of the properties, and that more than a purely personal right was required in order to show that to be the case.

[21] This was echoed in *Telkom v Xsinet*[28], a case which is probably the most comparable to the present in that it involved the supply by Telkom of electronic impulses to the Xsinet's premises, thereby providing the telephone and bandwidth system used by it to conduct its business as an internet service provider. Alleging that Xsinet was indebted to it in respect of another service, Telkom disconnected the supply. This court did not accept that the use of the bandwidth and telephone services constituted an incident of the possession of the

[27] Footnote 12.

[28] Telkom fn 8.

property, even though those services were used on Xsinet's premises. It observed that it would be both artificial and illogical to conclude that the use of the telephone, lines, modems, or electrical impulses had given Xsinet possession of the connection of its property to Telkom's system[29]. It also rejected the contention that Telkom's services could be restored by the mandament as those services constituted 'a mere personal right and the order sought is essentially to compel specific performance of the contractual right in order to resolve a contractual dispute'[30].

[22] As was pointed out in Zulu, the occupier of immovable property usually has the benefit of a host of services rendered at the property[31]. However the cases that I have dealt with above graphically illustrate how, in the context of a disconnection of the supply of such a service, spoliation should be refused where the right to receive it is purely personal in nature. **The mere existence of such a supply is, in itself, insufficient to establish a right constituting an incident of possession of the property to which it is delivered. In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession. Rights bestowed by servitude, registration or statute are obvious examples of this. On the other hand, rights that flow from a contractual nexus between the parties are insufficient as they are purely personal and a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a respondent is precluded from disproving the merits of the applicant's claim for possession. Consequently, insofar as previous cases may be construed as holding that such a supply is in itself an incident of the possession of property to which it is delivered, they must be regarded as having been wrongly decided.**

[23] In the light of this conclusion, it is necessary to revert to the facts of the present case. It is common cause that what had been installed on

[29] Paragraphs 12 and 13.

[30] Paragraph 14.

[31] Zulu at 186E-190G.

Ms Masinda's property was a prepaid system using a meter box that someone had wired into Eskom's grid. This system was used in conjunction with a prepaid card in order to effect the supply. Electricity is purchased using the individual number of the meter which is reflected on the card. The receipt issued in respect of the transaction bears a coded number which, once typed into the meter, registers a credit in respect of the amount of electricity purchased. The supply of electricity to Ms Masinda's property was therefore dependent upon it being paid for in advance.

[24] **In seeking restoration of her electricity supply, Ms Masinda's claim could hardly have been more terse. She said no more than that Eskom's officials had unlawfully disconnected the supply of electricity to her house and the prepaid meter, and asked that it be reconnected to the national grid. There was no attempt to show that such supply was an incident of her possession of the property. She relied solely upon the existence of the electrical supply to justify a spoliation order. In the light of what is set out above, this was both misplaced and insufficient to establish her right to such an order.**

[25] In addition, there is the common cause fact that Ms Masinda purchased her electricity on credit through the prepaid system which I have described. In these circumstances, her right to receive what she had bought flowed not from the possession of her property, but was a personal right flowing from the sale. Similar to the case in Xsinet, her claim was essentially no more than one for specific performance (and to the limited extent of a supply worth no more than the unused credit still due after her last purchase). This personal, purely contractual right, cannot be construed as an incident of possession of the property. As the mandament does not protect such a contractual right, for this reason too the claim ought to have been dismissed.

[26] This conclusion renders it unnecessary to decide the further ancillary issue, namely, whether Eskom was entitled to invoke the provisions of reg 7 of the Electrical Installation Regulations, 2009[32] in order to remove the installation on Ms Masinda's property. It was argued on her behalf that the regulations operated solely in an industrial

[32] Occupational Health and Safety Act, 1993 Electrical Installation Regulations, GN R242, GG 1975, 6 March 2009.

and not a domestic environment. The full court in *Eskom v Nikelo* expressed its reservations as to their applicability in circumstances such as the present[33]. But as it is an issue unnecessary to decide, it is undesirable to comment further on the matter.

[27] For these reasons the following order will issue:

1 The appeal is upheld, with costs.

2 The order of the court a quo is set aside, and substituted with the following:

'The application is dismissed, with costs.'

[33] Paragraph 28.

GRAVITEK CC v CARTMEL INVESTMENTS CC

Interpretation of condition as resolutive

Judgment given in the Kwazulu Natal Division, Durban, on 21 June 2019 by Henriques J

Cartmel Investments CC sold fixed property to Gravitek CC. In terms of clause H4 of the agreement, the parties agreed that registration of transfer would take place by the 30 June 2014.

Registration of transfer did not take place by that date.

Cartmel took the view that on a proper interpretation of the clause, it was a resolutive condition and upon the fulfilment of such condition, the purchase and sale agreement fell away.

Held—

The clause clearly envisaged a specific date when transfer of the property was to be effected. For all intents and purposes it met the criteria of a resolutive condition.

A finding that the clause was a resolutive condition meant that the purchase and sale agreement did in fact fall away upon the fulfilment of the condition. However, the effect of the clause and the finding that it was a resolutive condition was not dispositive of the dispute between the parties because the conduct of the parties and specifically the sellers, had to be investigated to ascertain whether such conduct deliberately or intentionally caused the fulfilment of the resolutive condition thereby rendering the purchase and sale agreement pro non-scripto.

The matter was referred to the hearing of oral evidence.

Advocate G M Harrison instructed by Sanjay Lorick & Partners, Durban, appeared for the applicant

Advocate N D Hollis SC instructed by B Maharajh Attorneys, Durban, appeared for the respondents

Henriques J

Introduction

[1] The opposed application that serves before me is comprised of two parts namely:-

(a) the re-registration of a company, being the first respondent, which

was de-registered by the third respondent, and;

(b) the subsequent enforcement of a purchase and sale agreement relating to the sale of an immovable property described as Section No. 6 in the Sectional Scheme known as Wentworth Park, by the first respondent to the applicant.

The relief sought in the applicant's notice of motion

[2] The applicant sought in its notice of motion a rule nisi returnable on 29 October 2015, calling upon all interested persons to show cause why an order should not be made in the following terms:-

'1.1 declaring the dissolution of the First Respondent to have been void in terms of Section 83(4) of the Companies Act, 71 of 2008;

1.2 directing that the Second Respondent to sign all documents, and pay all fees to the Third Respondent and do all things necessary in order to give effect to re-registration of the First Respondent;

1.3 directing the Third Respondent to restore the First Respondent's name into the register of close corporations;

1.4 the assets of the First Respondent are no longer declared to be bona vacantia and are re-vested in the close cooperation;

1.5 the liabilities of the First Respondent immediately prior to its dissolution are declared to re-invest in the close cooperation;

1.6 pursuant to the re-registration of the First Respondent, and upon confirmation by the Third Respondent that the re-registration has taken place and that the records of the Third Respondent have been updated to reflect the correct status of the First Respondent, that the First Respondent be ordered to transfer the immovable property more fully described as:

"Section no. SIX (6) as shown and more fully described on Sectional Plan No. SS 359/97, in the Scheme known as WENTWORTH PARK in respect of the land and buildings situate at Wentworth, in the eThekwini Municipality of which section the floor area, according to the said sectional plan, is ONE HUNDRED AND FORTY SEVEN (147) square metres in extent AND an undivided share in the Scheme apportioned to the said section in accordance with the participation quota as endorsed on the said Sectional Plan"

be effected to the Applicant in accordance with the deed of sale of immovable property concluded between the First Respondent and the

Applicant on 28 May 2014.

1.7 directing the Second Respondent to sign the necessary documents and take any such steps required to give effect to the transfer of the immovable property;

1.8 that the sheriff, Durban Coastal, be and is authorized to sign all documents and do all things necessary in order to comply with this order;

1.9 that the First Respondent be and is hereby directed to pay the costs of this application on an attorney and client scale.'

[3] On 29 October 2015, the application was adjourned sine die, in view of the first and second respondents' opposition and the rule nisi was extended until confirmed or discharged.

Re-registration of first respondent

[4] It is clear from the contents of the affidavits filed of record, and specifically the first and second respondents' heads of argument, that the orders sought by the applicant for the re-registration of the first respondent and the concomitant orders as set out in sub-paragraphs 1.1 to 1.5, are not in dispute.

[5] The first respondent has further conceded its liability for paying the applicant's costs occasioned by the grant of such orders.

[6] As the parties are ad idem that the first respondent must be re-registered, it is apposite to mention that the effect of re-registration of the first respondent has a complete and automatic retrospective effect on all activities of the first respondent. *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) paras 22 and 29.

Issue

[7] The remaining issue is accordingly whether the applicant is entitled to enforce the purchase and sale agreement concluded with the first respondent and whether the applicant is entitled to the ancillary relief as set out in sub-paragraphs 1.6 to 1.9 of the applicant's notice of motion.

[8] The first and second respondents, in opposing such relief relating to the enforcement of the purchase and sale agreement, raised various disputes and advanced various reasons as to why the first respondent should not be bound by the provisions of the purchase and sale

agreement.

[9] **At the hearing of the application, they however constrained their opposition and were in agreement with the applicant, that the only issue for determination was the interpretation of the construction of clause H4 of the purchase and sale agreement, which reads as follows:-**

> **'The seller and purchaser agree that the registration of transfer herein shall take place by the 30 June 2014 only.'**

[10] The first and second respondents advanced the argument that on a proper interpretation of the said clause H4, same is a resolutive condition and upon the fulfilment of such condition, the purchase and sale agreement falls away.

[11] The applicant contended to the contrary that clause H4 did not in itself create a default position of invalidity of the purchase and sale agreement and emphasised that it is evident from the first and second respondents' own conduct that they viewed the transaction as valid and binding well after the date when transfer was to be registered as stipulated in clause H4.

[12] Accordingly the essence of the dispute between the parties is the limited issue of the interpretation of clause H4. The resolution of such dispute is dependent upon the analysis of clause H4 and the effect of same.

Analysis

[13] There are a number of standard clauses and conditions generally included in contracts, and invariably the precise consequences of the different classes of conditions are often unknown to the parties themselves resulting in unanticipated consequences when the contractual relationship between the parties unravels.

[14] In this regard, there are two diametrically opposed conditions that are often included in purchase and sale agreements in respect of immovable properties.

[15] Given the issue to be determined in this matter, it is useful at this juncture to deal with these two conditions.

Suspensive Conditions

[16] Suspensive conditions suspend the rights and obligations of contracting parties until an uncertain future event occurs. Upon the occurrence of the event, the contract is brought into existence and the rights and obligations of the parties become enforceable.

[17] The effect of the non-fulfilment of a suspensive condition is that the suspended rights and obligations of the contracting parties never come into existence. The following dictum in *Mia v Verimark Holdings (Pty) Ltd* [2010] 1 All SA 280 (SCA) para 1 concisely sets out the legal effect of a suspensive condition.

> 'The conclusion of a contract subject to a suspensive condition creates "a very real and definite contractual relationship" between the parties. Pending fulfilment of the suspensive condition the exigible content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its terms. No action lies to compel a party to fulfil a suspensive condition. If it is not fulfilled the contract falls away and no claim for damages flows from its failure. In the absence of a stipulation to the contrary in the contract itself, the only exception to that is where the one party has designedly prevented the fulfilment of the condition. In that event, unless the circumstances show an absence of dolus on the part of that party, the condition will be deemed to be fulfilled as against that party and a claim for damages for breach of the contract is possible.'

[18] To summarise, the general effect of the non-fulfilment of a suspensive condition in a contract is that such contract is unenforceable. To quote Shakespeare 'life cannot be breathed into a corpse'.

Resolutive Conditions

[19] A resolutive condition is the antithesis of a suspensive condition. The contract concluded between the parties is immediately binding with all rights and obligations coming into existence at the inception of the contract and will remain binding subject to the future event in the stipulated condition being fulfilled.

[20] If a resolutive condition is subsequently fulfilled, the agreement will terminate immediately with retrospective effect, with the contracting parties being lawfully required to be restored to the position they were in prior to the conclusion of the agreement, that is the status quo ante.

[21] In this regard the following authorities are of benefit: *Sealed Africa (Pty) Ltd v Kelly & another* 2006 (3) SA 65 (W)*; Philmatt (Pty)*

Ltd v Mosselbank Developments CC 1996 (2) SA 15 (A) and *Johnston v Leal* 1980 (3) SA 927 (A).

Applicant's Submissions

[22] The applicant's counsel, Mr Harrison was at pains to persuade the court to dispose of the matter on the papers and relied primarily on the basis of the principle espoused in Fax Directories (Pty) Ltd vs SA Fax Listings CC 1990 (2) SA 164 (D). At 167H-J the court held the following

> 'Brave indeed is the advocate who will be prepared to gamble that the Court shares his view of the law and the facts. This means counsel will almost invariably opt for the safer but more expensive course of asking that the matter be referred to evidence. In so doing he would still be able to argue the legal point but at what cost to his client, both in respect of time and money. There are, it seems to me, cases where the legal issues are so crisp and so far removed from the conflict of fact that it would be fair to both parties to allow argument thereon in initio. If the applicant loses the legal battle he should not then be penalised for having tried to save the costs involved in hearing viva voce evidence. (Provided of course that his efforts were bona fide and well considered and not merely frivolous.)'

[23] Mr Harrison further contended that the interpretation of the condition in clause H4 should be interpreted in the context of the whole agreement and relied on the now well-known dictum of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) 593 (SCA) specifically para 18 of the judgment, where the court said the following:

> '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.'

[24] In addition Mr Harrison submitted that the context in which one must interpret the clause is to have regard to the fact that the documents had been lodged for registration at the deeds office and they had to be withdrawn for reasons contained in annexure 'GAT8', a letter from the respondents attorney to the conveyancing attorney,that is, on the basis that 'the Close Corporation has been deregistered hence all contracts entered into and documents signed are null and void'.

[25] If one has regard to annexure 'GAT14', a letter from the respondents attorney to the applicants attorney, the second respondent required the applicant to pay the arrear levies in order for the transfer to proceed. Mr Harrison submitted that essentially one was dealing with an issue of 'seller's remorse'. Never before had the issue of the interpretation of clause H4 been raised, nor the fact that the contract was null and void.

[26] He submitted therefore that the court ought to reject the first and second respondents' version on the papers as they stand. One has to accept that the clause was never mentioned before in correspondence but was only raised in the answering affidavit. In addition, if one has regard to pages 44 and 51 of the indexed papers, correspondence exchanged by the parties attorneys of record in relation to the re-registration of the first respondent, there was no response to these.

[27] One must then look at the probabilities namely that if one has regard to the correspondence and the fact that this issue as to the effect of the clause was only raised at a late stage, then the attitude of the first and second respondents to the letters exchanged meant that the parties could not consider clause H4 to put an end to the contract. It also accords with clause J which is a non-variation clause.

[28] Applicant's counsel further referred to the decision of *Kiloverter Sales (Pty) Ltd v MacKenzie's Garage (Pty) Ltd* 1975 (1) SA 223 (N) at 225E-F where Miller J dealt with the issue of probability and held as follows:

> 'I accept that "quiescence is not necessarily acquiescence". . . and that a party's failure to reply to a letter or to repudiate or protest against conduct which is inconsistent with such party's rights, does not always justify an inference adverse to such party, for his silence may be due to negligence. But in general where, according to ordinary commercial practice, firm reaction to the negation of the

party's contractual rights would be the norm, such party's silence or inaction, unless it is satisfactorily explained, would constitute an important factor in assessing the probabilities and in the final determination of the dispute.'

[29] Consequently, Mr Harrison submitted that on the probabilities this defence was an afterthought and is indicative of 'seller's remorse' and is not a genuine defence. He submitted that one must uphold the contract concluded between the parties so as to ensure businesslike behaviour.

Respondent's Submissions

[30] Mr Hollis SC on behalf of the first and second respondents limited his argument to the submission that the effect of clause H4 is a resolutive condition which, if fulfilled, rendered the purchase and sale agreement ineffective with the result that the agreement fell away, hence the need for a formal cancellation of the agreement nugatory and unnecessary.

Analysis

[31] In analysing the authorities and submissions by both counsel, I cannot find merit in the applicant's submissions regarding the nature and exigency of clause H4. **The said clause clearly envisaged a specific date when transfer of the property was to be effected and for all intents and purposes meets the criteria of a resolutive condition.**

[32] It is instructive to note that **clause J of the purchase and sale agreement specifically excluded suspensive conditions, and not resolutive conditions, hence it cannot be reasonably concluded that clause H4 is not a resolutive condition.**

[33] A finding that clause H4 is a resolutive condition means that the purchase and sale agreement did in fact fall away upon the fulfilment of the condition. However, the effect of clause H4 and the finding that same is a resolutive condition is not dispositive of the dispute between the parties because the conduct of the parties and specifically the sellers, being the first and second respondents, needs to be investigated to ascertain whether such conduct deliberately or intentionally caused the fulfilment of the resolutive condition thereby rendering the purchase and sale agreement pro non-scripto.

[34] Conduct of the parties is an integral requirement and a party's obligation to perform in terms of its contractual obligations cannot be excused or suspended in circumstances where such party obtains an unfair advantage from its own unlawful conduct. The decision in *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust* (182/13) [2014] ZASCA 22 (28 March 2014) para 12, is instructive in this regard:

'The rationale for this rule is twofold: A party to a contract should not by its own unlawful conduct be allowed to obtain an advantage for himself to the disadvantage of his counterpart. "It is a fundamental principle of our law that no man can take advantage of his own wrong" and "to permit the repudiating party to take advantage of the other side's failure to do something, when that failure is attributable to his own repudiation, is to reward him for his repudiation". The converse is that the innocent party is not expected to make the effort or incur the expense of performing some act when, by reason of the repudiation, "it has become nothing but an idle gesture". This is consistent with the general principle that the law does not require the performance of a futile or useless act. These principles are of general application and may find application in a variety of circumstances. The doctrine of fictional fulfilment of contractual terms is, for example, similarly based on the principle that a contractant cannot take advantage of its own wrongful conduct to escape the consequences of the contract.' (Footnotes omitted)

[35] There are clearly irresolvable disputes of fact regarding the conduct of the first and second respondent, from inception of the purchase and sale agreement, as to whether the second respondent had knowledge of the de-registration of the first respondent at the time of concluding the purchase and sale agreement and their conduct in the performance of the obligations in terms of the agreement.

[36] The dispute of facts on the papers relates further to the delay in the conveyancing process as evident by the correspondence from the conveyancing attorney, the unresolved issue of outstanding levy payments owed by the first respondent, and the conduct of the parties subsequent to the date of fulfilment of the resolutive condition.

[37] In my considered view, it is both necessary, pragmatic and in the interests of justice that such disputes be resolved in a forum enjoying the benefit of hearing the evidence of the parties.

Costs

[38] Whilst the applicant and first and second respondents were in agreement that the latter should be directed to pay the costs of the confirmation of the rule in respect of prayers 1.1 to 1.5, it would not be practical in my view to deal with the issue of costs on a piecemeal basis.

[39] In view of the referral of the issues relating to the relief sought in paragraphs 1.6 to 1.9 in the rule nisi to the hearing of oral evidence, it would be appropriate that the court hearing the oral evidence determines holistically the issue of costs. Costs should accordingly be reserved.

[40] In view of the aforegoing, the following orders will issue:-

(a) The rule nisi is confirmed in respect of prayers 1.1 to 1.5 of the applicant's notice of motion.

(b) The issues pertaining to the orders sought in paragraphs 1.6 to 1.9 are referred for the hearing of oral evidence to determine whether the conduct of the first and second respondents deliberately or intentionally caused the fulfilment of the resolutive condition. The rule nisi in respect of paragraphs 1.6 to 1.9 of the applicant's notice of motion is extended until confirmed or discharged.

(c) The costs occasioned by this application, are reserved for the court hearing oral evidence.