

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2022/26666

Date of Judgment?	13 November 2023
Reportable?	No
Of interest to other judges?	No

In the matter between:

THE NATIONAL HOUSING FINANCE CORPORATION SOC LTD Plaintiff

and

CLARE WATER (PTY) LTD First Defendant

ASHRAF AMEEN Second Defendant

JUDGMENT

GREEN AJ:



Ian Green AJ

- 1 The First and Second Defendants have noted an exception to the Plaintiff's particulars of claim on the basis that they lack averments necessary to sustain a claim.
- 2 In its particulars of claim the Plaintiff has claimed payment of an amount which it alleges is owing in terms of a Facility Agreement, as amended, concluded between the Plaintiff and the First Defendant. The Second Defendant is sued as the surety.
- 3 Clause 7 of the Facility Agreement is headed "*Suspensive Conditions*". Clause 7.1 sets out 28 separate suspensive conditions and provides "*This agreement is subject to the following suspensive conditions*".
- 4 Clause 7.2 of the Facility agreement provides:

"7.2 The suspensive conditions shall be deemed not to have been fulfilled if-

7.2.1 the NHFC gives written notice to the borrower recording the fact that the suspensive conditions or any one of them have not been fulfilled and requiring that such condition or conditions be fulfilled within a period of 1 (one) month from the date of the said notice.

Provided that the NHFC shall not give the notice envisaged in this clause 7.2 to the Borrower prior to the expiry of a period of 1 (one) month after the Signature Date.”

- 5 Clause 7.3 of the Facility Agreement provides that the suspensive conditions have been inserted for the benefit of the Plaintiff and that the suspensive conditions may be waived by the Plaintiff by giving written notice of such waiver.
- 6 Clause 7.4 of the Facility Agreement provides that if any of the suspensive conditions are not timeously fulfilled, or waived, then the Facility Agreement and all of its annexures shall be of no force and effect. There is a caveat to this which provides *“save for a claim which may result from a breach of the provisions of clause 10 of Appendix 2 below.”*
- 7 To the clauses set out above must be added the definition of *“Availability Date”* which is *“the first business day following the date on which the last of the suspensive conditions are fulfilled or waived in accordance with the provisions of this agreement or such other date as the parties may agree to in writing.”* This is the date when the Plaintiff can advance money to the first Defendant in terms of the Facility Agreement.
- 8 The First and Second Defendants’ exception is directed at paragraph 14 of the particulars of claim. Paragraph 14 of the particulars of claim provides:

“After the fulfilment of the suspensive conditions to the satisfaction of the plaintiff, the plaintiff duly performed its obligations in terms of the Facility Agreement...”

- 9 The point of the exception is that the Plaintiff's pleading that the suspensive conditions were fulfilled to its "*satisfaction*" is not in accordance with the terms of the Facility Agreement. The First and Second Defendants say that in terms of clause 7 of the Facility Agreement the Suspensive Conditions must either be fulfilled in an absolute and objective sense, or they must be waived; and there is no room for the Plaintiff to apply a subjective assessment to the fulfilment of the Suspensive Conditions.
- 10 The approach to exceptions is well known and it is unnecessary to repeat that in detail with reference to authority. The approach is: When exceptions are considered, the allegations set out in the particulars of claim must be accepted as being correct. Further, the particulars of claim must be assessed as a whole and every reasonably possible interpretation of the particulars of claim must be considered.
- 11 The exception raises the meaning of the Facility Agreement which involves its interpretation. The interpretation of the Facility Agreement is a question of law.
- 12 The approach to interpretation of agreements is now well established by cases like *Endumeni*¹ and *Blaire Athol*².
- 13 In the recent Constitutional Court judgment in *University of Johannesburg*³, the present approach to interpretation was captured as follows:

"This approach to interpretation requires that 'from the outset one considers the context and the language together, with neither

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

² *City of Tshwane Metropolitan v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA).

³ *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC).

predominating over the other’. In Chisuse, although speaking in the context of statutory interpretation, this Court held that this ‘now settled’ approach to interpretation, is a ‘unitary’ exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.”

14 The general approach to interpreting contracts may be summarised as follows:

14.1 Interpretation is objective, not subjective⁴. It does not involve a search for the intention of the contracting parties.

14.2 A document must be considered by always having regard to the text, context and purpose at the same time (a unitary interpretation exercise).

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14.3 Context and purpose are informed by “*material known to those responsible*” for the production of the contract.⁶

14.4 “*Context*” is not an open invitation for evidence that adds to, or modifies, words in a contract.⁷

14.5 Insensible and unbusinesslike results should be avoided, where the text allows.⁸

⁴ *Endumeni* at para 18, fn 21; See also *Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); para 18.

⁵ *University of Johannesburg* at para 65.

⁶ *University of Johannesburg supra, Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA).

⁷ *University of Johannesburg supra, Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA).

⁸ *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited* 2012 JDR 1734 (SCA) at para 15.

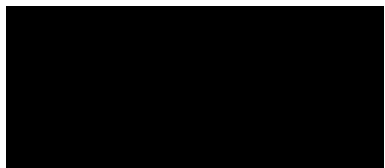
- 14.6 The way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term.⁹
- 15 The Facility Agreement sets out 28 separate suspensive conditions that must be fulfilled. Most, but not all, require an objective assessment of whether they have been fulfilled. Clause 7.1.12 is different and it requires Plaintiff to exercise a judgment in respect of fulfilment.
- 16 The real point raised by the exception is whether, in the absence of the fulfilment of the suspensive conditions the Facility Agreement could be implemented, and money advanced to the First defendant.
- 17 Mr Felgate, who appeared for the excipients, argued that where an agreement is subject to suspensive conditions those conditions must be fulfilled, and fulfilment must be pleaded before the contract can be relied on as a cause of action. Mr Felgate is undoubtedly correct in that submission, as a general proposition. But the question is not what the general proposition is, but rather what does the Facility Agreement provide. It is to that end that the Facility Agreement must be interpreted. Because this is an exception the focus is on looking for a reasonably possible interpretation, not the more probable interpretation.
- 18 The Plaintiff's claim, stripped of unnecessary detail, is that it loaned and advanced money to the First Defendant in terms of the Facility Agreement. The Facility Agreement regulates when the Plaintiff will advance money to the First

⁹ Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited 2012 JDR 1734 (SCA) at para 15.

Defendant by defining the “*Availability Date*”. This definition has two parts to it. Firstly, it provides that money will be advanced by the Plaintiff if the suspensive conditions are fulfilled or waived. Secondly, it provides that money will be advanced by the Plaintiff on a date different to fulfilment of the suspensive conditions if the parties agree to that in writing.

- 19 In my view a reasonably possible interpretation of the Facility Agreement is that the Plaintiff may advance money to the First Defendant notwithstanding that the suspensive conditions have not yet been fulfilled.
- 20 Mr Felgate made the point that the particulars of claim do not plead the written agreement required by the definition of Availability Date to allow money to be advanced before fulfilment of the suspensive conditions. That is correct, but that is not a point raised in the exception and is not for me to decide.
- 21 A further relevant consideration is clause 7.2 of the Facility Agreement which regulates the time by when the suspensive conditions must be fulfilled. This clause is unusual; instead of setting a date by when the suspensive conditions must be fulfilled, it creates an open-ended time period within which the suspensive conditions can be fulfilled. That open ended time period is limited only when the Plaintiff issues a notice to the First Defendant requiring it to fulfil the suspensive conditions. When such a notice is issued the First Defendant has a period of one month within which to fulfil the suspensive conditions.
- 22 What is then to be made of paragraph 14 of the particulars of claim? That paragraph is undoubtedly inelegantly framed. But exceptions are not intended to act as “*pleading lessons*” to make that which is inelegant more elegant. The point is to see if there is a cause of action.

- 23 Paragraph 14 of the particulars of claim is only relevant if it is necessary to sustain a cause of action. Stated differently, if paragraph 14 of the particulars of claim is not required to establish a cause of action, then its inclusion will not operate to destroy the existing cause of action.
- 24 Because I have found that a reasonably possible interpretation of the Facility Agreement is that the Plaintiff could advance money to the First Defendant before the suspensive conditions are fulfilled, it follows that it was unnecessary for the Plaintiff to plead the fulfilment of the suspensive conditions in order to found a complete cause of action on the Facility Agreement.
- 25 For the reasons set out above it is my view that, for the purpose of deciding the exception, the plaintiff's particulars of claim, read in the context of a reasonable interpretation of the Facility Agreement, disclose a cause of action. The exception must therefore fail.
- 26 There is no reason that the costs of the exception should not follow the result.
- 27 For the reasons set out above, I make the following order:
1. The First and Second Defendants' exception is dismissed.
 2. The First and Second defendants, jointly and severally, are to pay the costs of the exception.



Ian Green

Acting Judge of the High Court
13 November 2023

On behalf of the Plaintiff:

Advocate L Kotze

Instructed by:

GMI Attorneys

On behalf of the Defendants:

Advocate N Felgate

Instructed by:

Raymond Druker Attorneys