

THE REPUBLIC OF SOUTH AFRICA



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

CASE NO: A2023-053951

[1] REPORTABLE: NO  
[2] OF INTEREST TO OTHER JUDGES: NO  
[3] REVISED: NO

Date:

04/09/2024

M. JORDAAN

In the matter between:

**CROSSMOOR TRANSPORT (PTY) LTD**

Appellant  
(Defendant *a quo*)

And

**CLOSETRADE 200074 CC t/a ILCOR ENGINEERING  
SERVICES**

Respondent  
(Plaintiff *a quo*)

*This judgment was handed down electronically by circulation to the parties/and or parties' representatives and uploading on CaseLines. The date and time of hand-down is deemed to be 04 September 2024 at 10h00.*

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## JUDGMENT

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### JORDAAN AJ (TWALA J Concurring)

- [1] Discontented with the judgment and orders<sup>1</sup> granted by the court *a quo* (per Modiba J) on 6 October 2020 and its subsequent refusal to grant leave to appeal on 28 June 2022<sup>2</sup>, the Appellant petitioned the Supreme Court of Appeal. On 9 March 2023, the Supreme Court of Appeal granted the Appellant leave to appeal to the Full Court of this division<sup>3</sup> -which is the appeal at hand. For ease of reference, the Parties will be referred to as they appear in this appeal, in that the Appellant was the Defendant in the court *a quo* and the Respondent was the Plaintiff.
- [2] The Appellant assails the judgment and order of the court *a quo* on various grounds as encapsulated in the notice of appeal and I do not intend to repeat them in this judgment.
- [3] The Respondent, on the other hand, oppose the appeal on the basis that the evidence led in regard to storage costs accords with the parameters set by the pleadings. The Respondent had a discretion in regard to the dimensions of the trailer approved by the Department of Transport (DOT), it did not affect the validity of the agreement and the timing of the approval from the DOT was irrelevant to the parties considering the manner they conducted themselves. The Respondent assert that the agreements make a distinction between a deposit payment and a finance payment which has no timeline, thus the agreement was in operation having regard to the subsequent conduct of the Appellant.

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<sup>1</sup> Paginated Bundle: Volume 12 pages 1125-1168

<sup>2</sup> Paginated Bundle: Volume 12 pages 1169- 1173

<sup>3</sup> Paginated Bundle: Volume 12 page 1176

- [9] In Claim B, the Respondent similarly claimed the purchase price in respect of the five-axle trailer and the storage costs occasioned by the Appellants' repudiation of the agreement in respect thereof.
- [10] The Respondent had started the manufacturing process of the five-axle trailer but stopped when the Appellant failed to furnish a bank guarantee or pay a 50% deposit in terms of this agreement (the five-axle agreement). It similarly considered these actions as a repudiation which were accepted.
- [11] Therefor, the Respondents' loss in respect of the five -axle trailer is a claim for the actual costs incurred up until the date of cessation of all work on it and the loss of profit which is calculated at 35% on the cost price of a completely manufactured five-axle trailer, if the Appellant complied with the five-axle agreement.
- [12] The Respondent in Claim B also claimed storage costs in respect of the five-axle trailer. It quantifies storage costs for the five-axle trailer at R45 000,00 per month, reckoned from the date it stopped manufacturing the trailer, to the date of payment of the monetary order in respect of the purchase price.
- [13] The Appellant defended the action. It initially pleaded that the Respondent was not entitled to perform in terms of the agreement until it (the Appellant) had paid a deposit or furnished a guarantee issued by a South African bank. For that reason, the Appellant contended, the agreements were not enforceable. In the alternative, the Appellant pleaded that the agreements were subject to a suspensive condition and since the suspensive condition was not fulfilled, the agreements have lapsed.
- [14] The Respondent contended in the court *a quo* that should the court find that the suspensive conditions indeed exist, then the Respondent submit that it waived the conditions.



- [15] The court *a quo* found that in respect of the five-axle trailer, the payment of the 50% deposit constitutes a suspensive condition, and the Respondent was accordingly not entitled to commence manufacturing of the trailer until the Appellant paid the 50% deposit. However, the court *a quo* found that the Appellant was aware that the Respondent commenced manufacturing and did not contest the Respondent's entitlement to commence manufacturing and Mr Flynn, the Respondent's witness, persistently followed up in requesting payment of the deposit and the Appellant undertook to pay.
- [16] The court *a quo* further found, that having regard to these circumstances, the Respondent waived the suspensive condition. The Appellant was accordingly held liable.
- [17] In respect of the four-axle trailer the court *a quo* found, based on Mr Flynn's evidence, that the trailer would be financed and that a guarantee would be forthcoming, which contextually construed does not specify a time frame by when the Appellant would furnish the guarantee. According to the court *a quo* the Appellant was aware that the Respondent started manufacturing and never contended that they were not entitled to do so. Accordingly, the Appellant was held liable.
- [18] In this court, the Appellant contends that the agreements were subject to a suspensive condition that manufacturing of the trailers in the respective agreements could not commence prior to the payment of the 30% or 50% deposit respectively where the trailer was not financed by a South African Financial Institution, or a guarantee for the purchase price is to be provided by the Appellant to the Respondent if the trailer is financed by a South African Financial Institution.



- [19] The Respondent in contrast refuted that the agreements are subject to suspensive conditions, stating that both agreements specifically make a distinction between a deposit payment prior to manufacture if the unit is not financed by a South African Financial Institution and in a separate paragraph provides that in the event of the unit being financed by a financial institution the Respondent will require guarantees from the institute in question.
- [20] For the reasons advanced, the Appellant submits that the court *a quo* erred and requested that the appeal be upheld. The Respondent in opposition submitted that the court *a quo* was correct and that the appeal should accordingly be dismissed with costs.
- [21] Having regard to the grounds of appeal, the essence of this appeal is rooted in two written agreements from which the various grounds of appeal arose. It is thus apposite for this court to first determine whether these agreements are enforceable, whether they were subject to suspensive conditions and if so, whether those conditions were met, if not, whether were they waived.
- [22] The main issues of contention in the four-axle trailer agreement “POC1”<sup>4</sup> and the five-axle trailer agreement “POC4”<sup>5</sup> arise from the manner the terms are couched; it is therefore apt to have regard to these terms which read as follows:
- “POC1
- A DEPOSIT OF 30% OF THE PURCHASE PRICE IS PAYABLE PRIOR TO COMMENCEMENT OF MANUFACTURE IN THE EVENT OF THE UNIT NOT BEING FINANCED BY A SOUTH AFRICAN FINANCIAL INSTITUTION.*
- IN THE EVENT OF THE UNIT BEING FINANCED BY A FINANCIAL INSTITUTION WE WILL REQUIRE GUARANTEES FROM THE INSTITUTE IN QUESTION,*

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<sup>4</sup> CaseLines 01-39 to 01-41

<sup>5</sup> CaseLines 01-51 to 01-53

POC4

*A DEPOSIT OF 50% OF THE PURCHASE PRICE IS PAYABLE PRIOR TO COMMENCEMENT OF MANUFACTURE IN THE EVENT OF THE UNIT NOT BEING FINANCED BY A SOUTH AFRICAN FINANCIAL INSTITUTION.*

*IN THE EVENT OF THE UNIT BEING FINANCED BY A FINANCIAL INSTITUTION WE WILL REQUIRE GUARANTEES FROM THE INSTITUTE IN QUESTION,”*

[23] It is thus incumbent on this court to embark on the interpretation of the agreements in dispute.

[24] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>6</sup> it was stated:

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

[25] The approach to interpretation was set out in *North East Finance Pty Ltd v Standard Bank of South Africa Ltd*<sup>7</sup> wherein the court stated that context and

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<sup>6</sup> 2012 (4) SA 593 SCA.

<sup>7</sup> 2013 (5) SA 1 SCA.

purpose must be taken into account as a matter of course whether or not the words used in the contract are ambiguous.

- [26] I wish to reiterate in brief that in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>8</sup> it was held that a court interpreting a contract has to from the onset, consider the contracts factual matrix, its purpose, the circumstances leading up to the conclusion, and the knowledge at the time of those who negotiated and produced the contract.
- [27] The opening paragraphs of the agreements *in casu* state that TAC Line Haul, a division of the Appellant, accept the quote for the manufacturing of the lowbed trailers, the purchase price under the name of the company, the name of responsible person and the date. This text grounds the contracts in their context and purpose.
- [28] The contracts were entered into to provide for the manufacture and sale of the quoted lowbed trailers, which are the four-axle and five-axle trailers, manufactured by the Respondent for sale to the Appellant and the purpose was to regulate the manufacture, sale and collection of the trailers.
- [29] It provides under the terms and conditions and further delineated in a subheading termed Payment that:
- “A deposit of 30% in the four-axle agreement and 50% in the five-axle agreement of the purchase price is payable prior to commencement of manufacture in the event of the unit not being financed by a South African Financial Institution.
- In the event of the unit being financed by a financial institution we will require guarantees from the institute in question.”

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<sup>8</sup> 2012 (4) SA 593 SCA



- [30] The singular purpose of the payment provisions under the terms and conditions, is clearly to provide for payment which is linked to the manufacturing of the unit, in accord with the text, context and purpose.
- [31] This court must interpret the payment provision in light of its context in its entirety as a unit. The payment provision provides for payment which is financed and payment which is not financed.
- [32] The rights that flow from these payment provisions are that the Respondent is assured of and entitled to payment for the manufacture of the unit albeit in a 30% or 50% of purchase price deposit or a guarantee from a financial institution, while the obligations flowing from it is that the Appellant bore the duty to make the 30% or 50% of purchase price deposit payment or obtain and provide a guarantee from a financial institution. These rights and obligations are grounded in the context and purpose of the agreement.
- [33] If the proposed separation of the guarantee provision is to be accepted, the question would arise which unit as there is no reference to the manufacturing of the unit in that sentence, concomitantly the sentence, as it would now stand on its own, would also not contextually and purposively find grounding in the agreement. The ordinary reading on the unitary payment provision sentences must be read contextually, otherwise as demonstrated it would be bereft of meaning.
- [34] In this regard, though the interpretation of contract is the duty of the court and not the witnesses, there is in this case the benefit of the evidence of not any witness, but the author or drafter of the contract in regard to the preparation and background to the agreement, as instructed by *Natal Joint Municipal Pension Fund v Endumeni Municipality*, which should be taken into account.

- [35] It was the evidence of Mr Flynn that there was a departure from the agreement as there was no deposit paid and no guarantee provided prior to the manufacture of the unit in both the four and the five-axle trailers, conceding non-compliance.<sup>9</sup> The court applies this evidence as part of the unitary exercise of interpretation.
- [36] Furthermore, the Respondent as drafters of the contract through these conditions, built protective mechanisms into the contract to operate as protection for themselves.
- [37] It is settled law that the principle of *contra preferentem rule* must fall on the Respondents, by construing the terms of the contract against the Respondents. In the case of Klintown Clothing Industries Pty Ltd<sup>10</sup> it was stated:
- “if the meaning of a word or clause in an insurance contract is not clear, or the word or clause is ambiguous, the *verba fortius accipiuntur contra proferentem* rule is applicable. This rule requires a written document to be construed against the person who drafted it.”
- [38] Having applied the firmly established contextual approach to interpreting the contract and determining the rights and obligations of the parties, I am compelled to reject the Respondent’s submission that the provision in regard to the guarantee is separate and not subject to a time frame, as the *court a quo* also found.
- [39] The court *a quo* having found that the five-axle agreement is subject to a suspensive condition, found that there was a waiver.
- [40] In *Branscombe v Branscombe & Others*<sup>11</sup>, this division dealing with the issue of a waiver quoted with approval the case of *Meintjies V Coetzer & Others*<sup>12</sup> wherein the Supreme Court of Appeal stated the following:

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<sup>9</sup> CaseLines 01-446 to 01-447

<sup>10</sup> 1961 (1) SA 103 (AD)

<sup>11</sup> [19016]/2014] dated 11 June 2014 GLD

<sup>12</sup> (089/09)[2010] ZASCA 32 (29 March 2010)



“The first and second defendants bore the onus to establish that a waiver had occurred. For a waiver to be effectual they had to show that the deceased, with the full knowledge of her right to portions 2 and 3, decided to abandon it, ‘whether expressly or by conduct plainly inconsistent with an intention to enforce it.’ (Laws v Rutherford 1924 AD at 263). What happened in this case is plainly inconsistent with that intention. When the deceased made her last will she bequeathed her entire estate to the plaintiff and not the ‘remainder’ thereof. If her intention had been to abandon portions 2 and 3 one would have expected her to state unequivocally that she was giving the plaintiff only portion 1 or at the very least the remainder of her estate.

The first and second defendants bore the onus throughout to prove waiver or abandonment. The mere fact that the property is registered in the name of a person does not translate into ownership. Ownership may be acquired by prescription or by abandonment even if the property is not registered in one's name. For abandonment of property there must be an intention by the owner to abandon the property.”

[41] The court continued in Branscombe and quoted from *Union Free State Mining and Finance Corporation Ltd v Union Free State Gold and Diamond Corporation Ltd*<sup>13</sup> at 549C-E where it was stated:

“I do not think that a creditor can by the mere exercise of his will terminate the obligation without the concurrence of the debtor because as both Wessels and Pothier point out a release, waiver or abandonment is tantamount to making a donation to the debtor of the obligation from which he is to be released and until that donation has been accepted it has not been perfected. There may conceivably be circumstances in which a debtor does not wish to be released from his obligation. It may for a variety of reasons not suit him to be released. To allow the release, waiver or abandonment and the consequent making of a donation dependent solely on the will or action of the creditor would be tantamount to creating a contract at the will of one party which is a concept foreign to our jurisprudence.”

[42] In *Branscombe* the dealing with the communication between the parties quoted with approval *Traub v Barclays National Bank Ltd*; *Kalk v Barclays National Bank Ltd*<sup>14</sup>, in which the following was stated:

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<sup>13</sup> 1960 (4) SA 547 (W)

<sup>14</sup> 1983 (3) SA 619 (A)



“a creditor’s intention not to enforce a right has no legal effect unless and until there is some expression or manifestation of it which is communicated to the person in whose favour the right is waived or in some way brought to his knowledge, and that any mental resolve not communicated to the other party and only discovered later has no effect.”

- [43] It follows from the contractual nature of waiver of a right conferred by the terms of a contract that the intention to waive must be communicated to the other party.
- [44] It was held in *Trans-Natal Steenkoolkoöperasie Bpk v Lombaard*<sup>15</sup> that notice of a waiver must be given before the expiry of time limit set for fulfillment of the condition. If no time limit is set, presumably before the expiry of a reasonable time.<sup>16</sup>
- [45] There was no plea of a waiver nor was there any notice of a waiver. By demanding the payment of a deposit or providing a guarantee in January 2018, the Respondent showed behaviour contrary to the conclusion of the trial court that there was indeed a waiver. The Respondent’s behaviour displayed no evidence of waiver, and no notice of waiver was given before expiry of any time limit set for fulfilment of the condition and before expiry of a reasonable time, having regard to Mr Flynn’s evidence.
- [46] In conclusion, this court finds that both the four and five-axle trailer agreements are each subject to suspensive conditions. These suspensive conditions are constituted in the provisioning of a guarantee from a financial institution in respect of the four and five-axle trailer agreements and the payment of the 30% or 50% of the purchase price as deposit of the unit, each condition to be fulfilled prior to the manufacture of the individual units. This court also finds that no waiver took place. In the circumstances, the agreements never came into effect.

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<sup>15</sup> 1988 (3) SA 625 (A)

<sup>16</sup> *Design & Planning Service v Kruger* 1974 (1) SA 689 (T)

[47] I therefore conclude that the Appellant must succeed in this appeal.

[48] I also see no reason why costs should not follow the result.

[49] In the result, I propose the following order:

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following:  
"The Plaintiff's claims are dismissed with costs on scale B."
3. The Respondent is liable to pay the costs of the appeal including the costs of the application for leave to appeal and the petition to the Supreme Court of Appeal.



**M T Jordaan**

**Acting Judge of the High Court Johannesburg**

I concur



**M Twala**

**Judge of the High Court Johannesburg**

## VALLY J

### Introduction

[50] I have read the judgment of my colleague Jordaan AJ, which Twala J concurs with. It is with regret that I have to record my disagreement with it. I hold that the appeal should be dismissed with costs on a C scale. These are my reasons for coming to a different conclusion from that of my colleagues.

### The facts

[51] There was no factual dispute in this matter. The appellant placed two written orders with the respondent. Each of the orders constituted an agreement. One order was for the purchase of two four-axle trailers and the other was for the purchase of a five-axle trailer. The agreements catered for the manufacturing of the trailers. There is a clause in both agreements dealing with the financing of the payment for the trailers by the appellant. This is controversial and is dealt with in detail below. The controversy is not a factual one. It turns on an interpretation of the relevant clause in the two agreements. The clause is identical in both agreements.

[52] The manufacture of the two four-axle trailers was completed, but prior to delivery to the appellant the appellant repudiated the agreement by failing to pay for it or to furnish a guarantee from a financial institution for the payment. In the meantime, the manufacture of the five-axle trailer was in process. However, because of the repudiation of the four-axle purchase agreement, the respondent called for a deposit for the five-axle trailer and when this was not forthcoming, treated it as a repudiation, halted the manufacturing of the five-axle trailer, and cancelled this agreement too.



The respondent sued for the damages it suffered as a result of the appellant's repudiation of the two agreements.

A preliminary issue concerning the manner in which the trial proceeded

[53] Before delving into the merits of the appeal it is necessary to attend to an issue which was presented upfront by the appellant as one of its grounds of appeal. This ground was so robustly pursued that it formed a major ground for seeking leave to appeal from the Supreme Court of Appeal (SCA).

[54] The case was designated a commercial one in October 2019. The commercial court practice directive became applicable as a result thereof. The matter was allocated to Modiba J. She was required to case manage the matter and to preside over the trial. She duly did so. She applied the relevant provisions of the commercial court directive. She hosted meetings with the parties for purposes of ensuring that the matter was trial ready before a trial date was set. The directive allows for parties to indicate up front if there are any legal points they wish to raise, and to bring any interlocutory applications before the trial commences. The appellant failed to raise any legal points or bring any interlocutory applications. The respondent delivered its witness statements as per the directive. The appellant failed to deliver its witness statements, despite promising on more than one occasion to do so. Three calendar days before the trial commenced, the appellant gave notice to the respondent that it would be raising an exception on the first day of the trial, and that it would be objecting to the presentation of the respondent's evidence.

[55] At the commencement of the trial Mr Hollander for the appellant informed the Court that the appellant wished to raise two points before the matter commenced on the merits. These were: (i) it excepted to the respondent's claim for storage costs and asked that these be separated from the rest of

the claims – in other words, the adjudication of the damages suffered should be split as the claim for storage costs, according to it, lacked a legal basis; and, (ii) the Court should determine upfront whether the respondent's witnesses should be allowed to traverse evidence that fell outside the scope of its Particulars of Claim.

[56] Modiba J dismissed the application, holding that both issues could be adequately dealt with during the course of the trial, and that she would attend to both issues in her judgment on the entire matter. She was entitled to do so<sup>17</sup>, especially in the light of the fact that she had case managed the issue for many months before the hearing, and was never given any indication that the appellant had any preliminary issues it wished to raise. The appellant also had the evidence of the respondent for months before the matter was set down for hearing and raised no objection thereto. It had brought no interlocutory applications and had agreed that the matter was trial ready. Modiba J explains her reasons for dismissing the application in her judgment in the following terms:

‘[2] ... [the appellant] pleaded that [the respondent] was not entitled to commence the manufacturing of the trucks because it (the appellant) had not paid a deposit or furnished a guarantee as required in terms of the agreement. For this reason, it contended that [the respondent] is not entitled to recover the purchase price. [The appellant's] defence not only mutated on the eve of trial, at the commencement of the trial, its counsel raised an exception point, which he sought [to] argue upfront. ...

[3] The court frowned upon the incremental development of [the appellant's] defence as it risked derailing the trial under the circumstances where [the appellant] failed to make optimum use of the opportunities that the commercial court provides to fully investigate [the respondent's] claim, prepare its defence and through the judicial case manager dispose of interlocutory issues prior to the trial. This would have resulted in triable issues being defined and narrowed down with reasonable

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<sup>17</sup> Section 173 of the Constitution of the Republic of South Africa Act 108 of 1996 provides for the Court *a quo* to regulate its own process and this was a procedural issue.



certainty, resulting in a prompt disposition of the matter. [The appellant's] conduct was undoubtedly prejudicial to [the respondent] because it had to respond to the additional defences referred to above without any investigation and preparation of its response. There is hardly a need to articulate the inconvenience [the appellant's] conduct caused the court.

[4] ... After [the respondent] commenced these proceedings, [the appellant] filed a plea but subsequently failed to file witnesses' statements and numerous undertakings that it would do so. Ultimately, it came to trial without a version, resorting to various technical skirmishes in an attempt to debilitate [the respondent's] case.<sup>18</sup>

[57] I see no misdirection on the part of Modiba J. When the issue was raised with Mr Hollander in this appeal, he indicated that the appellant was no longer pursuing the issue as Modiba J's decision to continue with the trial to finality made the application for a separation of the two issues from the rest of the case 'moot'. This position was only revealed to this Court at the hearing. In its heads of argument, on the other hand, the appellant robustly contended that the failure to separate the points it wished to raise from the rest of the issues was a fatal misdirection on the part of the Court *a quo*.

#### The interpretation of the clause relating to the financing of the purchase price

[58] The appellant met the case of the respondent with a contention that in terms of the two agreements the respondent is not entitled to its claims because of the provisions of the clauses dealing with the financing of the purchase of the trailers. As the two clauses are identical in terms, it would be appropriate to refer to only one of them. The clause:

'A deposit of 30% [for the four-axle trailer] and 50% [for the five-axle trailer] of the purchase price is payable prior to the commencement of the manufacture in the event of the unit not being financed by a South African financial institution.

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<sup>18</sup> Judgment of the Court *a quo* at [2], [3] and [4]. All the quotations in this judgment are as per the original.



In the event of the unit being financed by a financial institution: We will require guarantees from the institute in question.’

[59] It is common cause that the deposit of 30% was not paid prior to the commencement of the manufacture and neither was a guarantee from a South African financial institution furnished. Yet the manufacture of both the four and the five-axle trailers had commenced, and the four-axle trailers completed. The appellant’s case was that as the two conditions were not met, the agreements were void. It maintains that both conditions suspended the agreement. The Court *a quo* agreed with the appellant that the agreements were each subject to a suspensive condition. I do not agree with this interpretation of the clause.

[60] Firstly, in neither of the two agreements is there any direct statement that the agreement would not take effect until and unless there has been compliance with the terms of this clause. A clause or a phrase to this effect would displace any doubt that the agreement contains a suspensive condition.

[61] Usually, the words ‘subject to’ are employed to indicate that the agreement is suspended pending the fulfilment of a condition for they ‘are apposite to the creation of a true suspensive condition.’<sup>19</sup> And they can be easily used by parties should they wish to subject their agreement to a suspensive condition. It is a typical way of expressing an intention and as Hefer AR says, one can hardly think of a better or clearer way to express an intention to create a suspensive condition.<sup>20</sup> The parties in this case could easily have said the commencement of the manufacturing process is ‘subject to the payment of the deposit.’ They chose not to do so. They simply chose to say that the deposit is payable ‘prior to the commencement of the manufacture’.

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<sup>19</sup> *Palm Fifteen v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 884F; See also: *Corondimas and Another v Badat* 1946 AD 548 at 551.

<sup>20</sup> *Badenhorst v Van Rensburg* 1986 (3) SA 769 at 777J-778A.

This merely indicates the time when the deposit is payable, but it does not say that commencement of the manufacturing process cannot proceed if the deposit is not paid. The sentence also does not say that a deposit of the purchase price ‘must be paid’ prior to the commencement of the manufacture. Had it said so, it would be more than plausible to conclude that the sentence creates a suspensive condition. But it does not do so. Instead, it simply says, the deposit ‘is payable’. ‘Is payable’ is simply not the same as ‘must be paid’. The latter would create a suspensive condition. The former not.

[62] Secondly, the clause as a whole deals with the financing of the purchase price. There are two methods of financing that are envisaged: self-financing by the appellant and financing by a South African financial institution. The clause is made up of two sentences. The first sentence refers to ‘the event of the unit not being financed by a South African financial institution’ (underlining added), while the second sentence refers to ‘the event of the unit being financed by a financial institution’. In the case of the former, a deposit of 30% for the four-axle trailers and 50% for the five axle trailers ‘is payable prior to the commencement of the manufacture’ of the trailers. In the case of the latter, the appellant is required to furnish a guarantee from the financial institution that would be providing the finance. Unlike in the former case, the latter method of financing does not require that the guarantee be provided ‘prior to the commencement of the manufacture’. That phrase is conspicuously absent in the second sentence, which refers to financing of the purchase price by a financial institution.

[63] In my judgment then, the requirement that the deposit be paid ‘prior to the commencement of the manufacture’ only applies when the appellant elects to self-finance the purchase of the trailers. But even in this case, there is nothing that indicates that unless the deposit was paid the manufacturing of the trailers cannot commence. It is therefore not a straightforward case of



this particular sentence of the clause creating a suspensive condition applicable to the entire agreement. In my judgment the phrase ‘prior to the commencement of the manufacture a deposit of’ 30% (in the case of the four-axle trailers) or 50% (in the case of the five-axle trailer)’ is a right accorded to the respondent and an obligation imposed upon the appellant. It is a right in the hands of the respondent not to commence with the manufacturing of the trailers until the appellant complies with its obligation to pay the requisite deposit. The respondent is free not to exercise its right.

[64] The appellant though contends that it is a creative use of a suspensive condition. This interpretation effectively:

[64.1] adds the words ‘failing which the agreement is of no force and effect’ after the word ‘manufacture’ and before the words ‘in the event of’. This sentence of the clause would thus – with the added words in bold typeface - read:

‘A deposit of 30% [for the four-axle trailers] and 50% [for the five-axle trailer] of the purchase price is payable prior to the commencement of the manufacture **failing which the agreement would be of no force and effect** in the event of the unit not being financed by a South African financial institution.’

Or,

[64.2] adds the words. ‘The agreement is subject to the payment of’ at the beginning of the sentence and remove the words ‘is payable’. The sentence – with the added and removed words in bold typeface – would then read:

‘**The agreement is subject to the payment of** a deposit of 30% [for the four-axle trailers] and 50% [for the five-axle trailer] of the purchase price [removal of the words **is payable**] prior to the



commencement of the manufacture in the event of the unit not being financed by a South African financial institution.’

- [65] In both cases the addition (as well as removal in the second case) of the words in bold typeface to the sentence would be re-writing, not interpreting, the agreement. Courts have no authority to do so. These are only two examples of how they could have created a suspensive condition to this method of payment. There may be others. The point is that it is for the parties to craft their agreement, and should they wish to create a suspensive condition, nothing stopped them from so doing. They chose not to do so.
- [66] I hold that the clause is not creative of a suspensive condition. But even if one were to adopt the interpretation propounded by the appellant and conclude that this sentence of the clause is creative of a suspensive condition, the suspensive condition is restricted to the self-financing method of payment. The phrase ‘prior to the commencement of the manufacture’ is conspicuous by its absence in the second sentence which deals with the financing of the purchase by a financial institution. The clause consists of two sentences and read together it is plain that a deposit (of 30% and 50% for the four-axle and five-axle trailers respectively) is ‘payable prior to the commencement of the manufacture in the event of the unit not being financed by a South African financial institution’ while the guarantee from the financial institution is not required ‘prior to the commencement of the manufacture’.
- [67] Put differently, the agreements envisaged two methods of financing the purchase price: one by the appellant itself and one by a South African financial institution. In the former case a deposit of (30% and 50% for the four-axle and five-axle trailers respectively) was required prior to the commencement of the manufacture, whereas in the latter case, all that was required was that a guarantee was to be provided by the financial

institution. The guarantee did not have to be furnished 'prior to the commencement of the manufacture'. It is clear that the parties were not willing to delay the manufacturing of the trailers by waiting for the guarantees. They were willing to allow for the furnishing of the guarantee to take as long as it took to manufacture the trailers. This makes perfect business sense.

The evidence on the issue of the deposit and the guarantee

[68] The evidence of the respondent was that as soon as the agreements were concluded the appellant informed it that it intended to adopt the second method of financing: financing by a financial institution rather than self-financing. The evidence was not rebutted. The evidence went further to say that the appellant on more than one occasion informed the respondent that the guarantee would be forthcoming. In fact, promises to this effect took place right until the manufacture of the four-axle trailers was complete and ready for delivery. This is the evidence the appellant did not want the Court to entertain. It was one of the points that the appellant raised at the commencement of the trial. In fact, as the evidence was being led, Mr Hollander constantly objected to its presentation. He raised an objection to almost every single averment made by the witness, despite being reminded by the Court *a quo* that its admissibility would be determined at the conclusion of the trial and would be dealt with in the judgment. The evidence was certainly relevant and material to the issues before Court. In my view, the Court *a quo* was correct in refusing to decide at the outset as to whether the evidence should be led.

[69] When payment was sought so that delivery could take effect, the appellant defaulted. The respondent placed the appellant in *mora* and when the appellant failed to remedy its default, the respondent cancelled both agreements. The appellant did not at any stage challenge the right of the



respondent to cancel the agreements. It could not do so, because its case has always been that the agreements were of no force and effect because they were subject to a suspensive condition, which condition was not fulfilled. I have found that its case is completely devoid of merit – there was no suspensive condition, and if there was it was restricted to the method of payment involving self-financing. However, as this method was not one chosen by the appellant the suspensive condition (if we were to accept its existence) did not have any bearing on the validity of the agreements.

- [70] The respondent argued that even if the sentence created a condition suspending the entire agreement, the condition was waived by itself which waiver was consented to by the appellant. On my finding, there is no need to deal with this issue. However, as the Court *a quo* found that the condition was for the benefit of the respondent, who could, and did waive it, I will deal with it.

Did the respondent waive the condition to receive a deposit prior to the commencement of the manufacturing process?

- [71] The respondent did not plead that the condition to commence with the manufacturing process ‘prior to’ the payment of the deposit was solely for its benefit, and that it waived the condition. That it was solely for its protection or benefit is not to be doubted. It did not plead that it waived it because it consistently maintained that there was no clause in the agreement that allowed for the suspending of the entire agreement. It is not necessary for a party to put up skittles simply to bowl them over. The appellant, though, pleaded that the agreement was conditional upon the fulfilment of the condition that the deposit be paid prior to the commencement of the manufacturing process. On this pleading, the questions as to whether such a condition existed, and how the parties attended to the condition, became issues for the trial. The parties defined the issues for trial to be:



- a. Whether the agreements are enforceable against the appellant;
- b. Whether the appellant is liable for payment of the amounts claimed or at all; and
- c. Whether the agreements were subject to a suspensive condition and if so, whether such condition was waived by the respondent.

[72] The question of whether a waiver was by agreement between the parties was pertinently placed before the Court *a quo*.

[73] The respondent placed evidence to show that the appellant had expressly and unequivocally indicated to it that it had elected the second method of payment, was in the process of obtaining the finance from a South African financial institution and that it was determined to pursue the purchase to finality. The evidence presented in the witness statement of the witness who testified reads:

‘However, we dealt with the [appellant] previously and had a good working relationship with it. On several previous occasions, despite not paying a deposit when it was due, the [appellant] made payment in full for trailers that were ordered upon their completion. I was satisfied that the [appellant], by entering into the contract, required the trailers and intended to comply with its contractual obligations as it had done before. Furthermore, the [appellant] was fully aware that the manufacture of the trailers had commenced. Mr Ashton Naicker, on behalf of the [appellant], expressed an intention to pay for the trailers on several occasions. At no point did they seek cessation of the manufacture of the trailers: on the contrary, they pleaded with me to complete them.’

[74] The witness went on to say that once the four-axle trailers were completed, the respondent informed the appellant of this and demanded the guarantee from the financial institution. The appellant’s representative, Mr Naicker, said to Mr Flynn the representative of the respondent:

‘Hi maneer, I will never do that to you. If I never want the trailer I would have told you so. I’m out of the country il be back on Monday at work.’

(quote is verbatim)

- [75] This was on 2 January 2018. It is a message that was consistently given by Mr Naicker to Mr Flynn from the outset, and while the manufacturing process continued with Mr Naicker's knowledge and consent.
- [76] In sum, the respondent was entitled to lead the evidence proving that the condition, which was included for its benefit, had been waived by itself. And the evidence was conclusive of the issue.

### Storage Costs

- [77] As part of its claim for damages, the respondent claimed for storage costs for the four-axle trailers. It was necessary to store the trailers while the appellant either paid for them or furnished the requisite guarantee from a financial institution before delivery. The respondent pleaded that the failure of the appellant to comply with its obligations in terms of the agreement led it to 'incur' storage costs. The trailers were stored at its own premises. Its inability to productively use its premises because of the storage of the trailers is what it says is meant by its characterisation of the damage as one of 'incur[ring]' the storage costs. The appellant takes issue with this. It says that 'incur' is defined in the Oxford English Dictionary as 'bring (something unwelcome) upon oneself.' And, according to the Macmillan Dictionary 'incur' is 'to lose money, owe money or have to pay money as a result of doing something.' As the respondent's evidence does not reveal that it actually 'incurred the expenditure' or that 'it owes the money' or that it is 'having to pay the money' this claim had to be dismissed. This was the very point it wished to have decided as an exception before the evidence was led. The point is not sensible. Whether the word 'incur' or another word conveying the same message such as, for example, lost rental income or lost use of space, is not significant. A word used in a pleading is not to be analysed literally. The meaning of words used by the pleader are to be



considered in the context of the pleading as a whole. Here it is clear that the pleader was referring to the damages suffered by the respondent as a result of having to store the four-axle trailers because of the failure of the appellant to meet its obligations in terms of the agreement. The pleading reveals the damages it suffered and describes it as 'storage costs'. The use of the verb 'incur' does not detract from this. The meaning conveyed to the appellant was clear: the respondent lost usage of space that costs a certain amount, in this case, it was R45 000.00. The appellant was clearly made aware of the case of the respondent. The respondent led evidence showing how the amount was calculated and as this, like all the respondent's evidence, was not rebutted, the Court *a quo* correctly accepted it.

- [78] The challenge to the claim for storage costs is what the appellant wanted considered in the form of an exception. The aim was, in my view, clear. If the Court *a quo* accepted its contention and allowed the challenge to be entertained as an exception before the trial commenced on the merits, then the Court *a quo* would have been obliged to make a decision on the validity of the challenge. If it dismissed the challenge, the appellant may well have sought written reasons and tried to appeal it, in which case the matter could not proceed on the merits. If on the other hand, the challenge was successful, a postponement may have been necessary in order to allow the respondent to amend its pleading. Again, if this was the outcome, the matter would not proceed on the merits. The appellant would in either case have succeeded in having the matter not heard on the merits. After all, (i) it had many occasions on which to bring the application prior to the matter being set down for determination of the merits, but failed to do so, (ii) it confirmed that the matter was trial ready (i.e. for determination of the merits), (iii) before the matter was set down it promised on more than one occasion to file its witness statements and failed to do so, (iv) it came to Court fully cognisant of the fact that it had no rebuttal evidence at hand, and finally, (v) it did not explain why it failed to take advantage of the



practice directive and raise its exception earlier rather than only on the morning of the first day of the trial. The continuation of the trial on the merits was certainly not favourable from its perspective.

- [79] Disturbing as all of this may be, equally disturbing is the fact that when this Court attempted to engage Mr Hollander on the alleged misdirection by the Court *a quo* by refusing the application to hear the exception separately – a point that was vehemently and robustly pursued in the application for leave to appeal and in the heads of argument – he informed us that he is no longer pursuing the point as it was ‘moot’.

### Conclusion

- [80] For the reasons set out above, the appeal, in my view, stands to be dismissed.

### Costs

- [81] The appellant’s case was completely devoid of any merit. It succeeded in convincing the SCA to grant it leave to appeal to this Court by robustly contending that the refusal of the Court *a quo* to accede to its request to hear its exception separately from the merits, and to rule at the outset on its application to have certain evidence disallowed even before it was presented to the court, was a misdirection of fatal proportion. When confronted by this Court on the value of that contention, it baulked and said that the issue is now moot and that it does not intend to pursue the contention anymore. It only adopted this position at the hearing of the appeal, in the meantime this Court was forced to prepare extensively on the point for the hearing. In the circumstances, it would be appropriate to mulct it with costs on the highest scale allowable.

[82] Had I commanded the majority, I would have dismissed the appeal with costs on the C scale.



Vally J

Gauteng High Court, Johannesburg

Date of hearing: 15~~16~~ May 2024

Date of Judgment: 04 September 2024

### APPEARANCES

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