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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 13531/2006

In the matter between:

**THE FULL GOSPEL CHURCH OF GOD IN
SOUTHERN AFRICA**

First Applicant

**THE REGIONAL COUNCIL FOR THE CAPE PENINSULA
OF THE FULL GOSPEL CHURCH OF GOD IN
SOUTHERN AFRICA**

Second Applicant

**THE EXECUTIVE COUNCIL OF THE FULL
GOSPEL CHURCH OF GOD IN
SOUTHERN AFRICA**

Third Applicant

and

LIVING WATERS COMMUNITY WORSHIP CENTRE

First Respondent

RAYMOND PAUL OLCKERS

Respondent

Second

CITY OF GRACE LIVING WATERS NON-PROFIT

ORGANISATION

(Registration Number: 2008/029283/08)

Third Respondent

NEW DIRECTION GRACE CHURCH NON-PROFIT

ORGANISATION

(Registration Number: 2015/172406/08)

Fourth Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 1 JULY 2024

MANGCU-LOCKWOOD, J

A. INTRODUCTION & BACKGROUND

[1] The applicants seek the return of property described as Erf 1[...], Bellville (*“the property”*), as well as ejectment of the respondents from the property, plus certain ancillary relief. The application is opposed only by first to third respondents, who are hereafter referred to as *“the respondents”*. Although the fourth respondent was leasing the property when the proceedings were launched, it had vacated it by the time the matter was heard, and did not participate in these proceedings, and a court order of 10 August 2022 confirmed that the matter would not proceed against it.

[2] The property that is at the centre of these proceedings is a church building situated in Belhar, Cape Town. It is common cause that the land on which the church building exists was acquired in 1987 by the Belhar Assembly of the Full Gospel Church, which was then a local chapter of the applicants (*“the Belhar Assembly”*), led by the second respondent as its pastor. In April 2000 members of the Belhar Assembly decided

to leave the Full Gospel Church, and to change the local church name to Living Waters Community Worship Centre, Belhar - the first respondent.

[3] By means of an affidavit deposed by the second respondent dated 30 August 2000, the Registrar of Deeds was requested to endorse the name change in terms of section 93(1) of the Deeds Registries Act 47 of 1937. The affidavit stated that the second respondent was authorized to make that request pursuant to a resolution taken by the Local Church Council of the first respondent. Further, that the name-change from Belhar Assembly to the new name *“will not result in the transfer of any rights”*. The name-change was indeed endorsed on the title deed by the Registrar of Deeds on 30 August 2000.

[4] The applicants viewed the respondents' application to the Registrar of Deeds as fraudulent because, contrary to the second respondents' affirmation under oath, the application in terms of section 93(1) of the Deeds Registries Act necessarily involved a transfer of rights, and especially the ownership of the property to the new entity, the first respondent, and the application was made without consulting the Full Gospel Church. This belief was based on the provisions of their constitution, to which I return at the appropriate time.

[5] As a result, between August 2000 and 2006, negotiations ensued between the parties, effectively regarding the ownership rights of the property. It is common cause that the parties were loath to litigate. It is also common cause that during the same period, there were other local congregations which broke away from the Full Gospel Church, and which also similarly transferred church properties onto their new names, but which subsequently returned the properties pursuant to court orders obtained by the applicants. One such matter was litigated together with this one until it was settled.

[6] On 7 December 2006 the applicants issued summons, seeking return of the property and certain ancillary relief, citing as respondents the present first and second respondents as well as the Registrar of Deeds. The action was defended by the first

and second respondents, who were legally represented by an attorneys' firm as well as junior and senior counsel. The respondents successfully defended the matter, based on a special plea of prescription which was upheld in 2009. However, the court *a quo*'s decision was later overturned by a full bench on appeal in 2011, and was referred back to the trial court. After many delays and numerous interlocutory processes between the parties, the matter was set down for pre-trial conference on 15 October 2013 before the now retired Yekiso J. On the eve of the pre-trial conference, the parties concluded an agreement of settlement (*"the settlement agreement"*), which was made an order of court by Yekiso J on 15 October 2013.

[7] In broad terms, the settlement agreement recorded that the first and second respondents acknowledged that the name change was unlawful; that the applicants were the owners of the property; that the Registrar of Deeds was authorized and ordered to rescind and cancel the name change and to restore the title deed to reflect what it previously reflected prior to the name change. It also provided for sale of the property by the second applicant to the first respondent, the terms of which were set out in the main agreement and an agreement of sale (annexure A thereto) and a draft mortgage bond (annexure B thereto). It also provided for the first and second respondents to pay for the applicants' litigation costs in the appeal in respect of which they had successfully overturned the trial court decision (*"the appeal costs"*). Pursuant to the terms of the settlement order of 15 October 2013, the Registrar of Deeds amended the title deed on 17 August 2015, with an endorsement cancelling the name change which had been effected on 30 August 2000.¹

[8] Much of what transpired after conclusion of the settlement agreement is in dispute, including whether the applicants validly cancelled the agreement on 25 September 2014. It is common cause, however, that after 25 September 2014 the parties continued to negotiate to resolve the issues between them, until 7 February 2019, when the applicants gave notice of intention to launch these proceedings.

¹ It is common cause that the deeds endorsement erroneously referred to a court order of 15 October 2015 instead of 2013, which was the correct year of the settlement agreement and court order.

B. THE APPLICANTS' CASE

[9] According to the applicants, they instructed a conveyancer to attend to the transfer of the property into the name of the first respondent as well as simultaneous registration of the mortgage bond, as envisaged in the settlement agreement. They state that on 8 January 2014 the conveyancer issued an invoice to the first respondent for conveyancing costs in the amount of R51 670-00, and for rates and tax clearance in the amount of R158 523-99, but the amounts had not been paid by 9 April 2014, resulting in two notices of breach of the settlement agreement, dated 9 April 2014 and 25 June 2014. When the notices of breach were not complied with, the settlement agreement was cancelled by letter dated 25 September 2014.

[10] The applicants' case is that the second applicant is the owner of the property, as reflected on the title deed. They also state that, since the respondents breached the terms of the settlement agreement, they [applicants] were entitled to cancel it, which they did. The consequence is that there is no legal reason for the respondents to retain possession, let alone, claim ownership of the property.

[11] Further, any right claimed by respondents for transfer of the property became extinctively prescribed by 15 October 2016, which was three years from the date of signing the settlement agreement; alternatively, by 9 January 2017, which was three years from the first date that the conveyancers demanded payment in terms of the agreement from the respondents. In any event, no new agreement was entered into which would have interrupted prescription.

C. THE RESPONDENTS' CASE

[12] The respondents raised two points *in limine* in the answering affidavit. First, they state that the current third and fourth respondents, who have been joined as parties to this dispute, were not parties to the original dispute that resulted in the settlement

agreement, and accordingly the applicants were required to seek leave to join them to these proceedings. Secondly, they state that, since the settlement agreement was made an order of court, the applicants were required to seek confirmation of cancellation by the court before cancelling the agreement.

[13] The terms of the settlement agreement, including the sale agreement and the draft mortgage bond, are admitted in the answering affidavit. The respondents explain that, pursuant to the settlement agreement they agreed to pay a monthly amount of R10, 000-00 towards the purchase price of the property, which they did until a total amount of R500 000-00 was paid. That was until 2017 when the second respondent discovered that other congregations in a similar position to the first respondent were no longer bound to make payments to the applicants. In any event, the respondents' financial position had deteriorated, and they could not afford to make any more payments, and they stopped making the payments.

[14] The respondents deny receiving any demand for payment of the conveyancing costs dated 8 January 2014, nor any of the breach notices dated 9 April 2014 and 25 June 2014, nor the cancellation of the settlement agreement dated 25 September 2014. They deny that they breached any terms of the settlement agreement. Further, the mandate of the respondents' attorney, Mr Julian Apollos, who represented them from the inception of the action proceedings, was terminated not long after the conclusion of the settlement agreement.

[15] Furthermore, the respondents state that, until the papers in this matter were issued, they were in regular contact with the leadership of the applicants and at no point was there ever demand made for vacation of the property, or demand for any outstanding payments until February 2019. It was only during 2018 that they discovered, for the first time, that numerous letters had been sent to them demanding compliance with the settlement agreement.

[16] As a result, the second respondent authored a letter dated 9 October 2018 proposing a payment arrangement consisting of monthly payments of R10 000-00 for a period of 70 months, with the monthly amount to be reviewed after 12 months, and after 70 months the outstanding balance would be paid in a lump sum. In respect of this proposal, the respondents seek a declaratory order confirming: (a) that the parties concluded a new agreement, with which they are bound to comply; (b) the respondent (it is not clear which one) is to obtain a bond in the sum of R1 million, which is the purchase price in terms of the new agreement; (c) the purchaser is to pay the costs of transfer of the immovable property which forms the subject of this litigation; (d) the parties must sign all the necessary documents to enable transfer thereof, failing which the sheriff is authorized to do so.

[17] The respondents also argue in their papers that, if applicants persist with cancellation of the settlement agreement, they are in turn entitled to restitution of the monthly amounts paid, which amounted to approximately R500 000.

D. DISPUTES OF FACT

[18] As a result of the disputes of facts between the parties, my brother Henney J, who previously dealt with this matter, granted an order dated 10 August 2022 (*“the referral order”*) in which the following issues were referred for oral evidence:

“1.1 The quantum, date of each payment, and to whom it was paid, of the payments totaling the amount of R500 000.00, allegedly made by the First Respondent to the Applicants.

1.2 The designation for allocation, if any, by the First Respondent in respect of each payment totaling the amount of R500 000.00, allegedly made by the First Respondents to the Applicants.

1.3 The actual allocation by the Applicants, of each payment totaling R500 000.00, allegedly made by the First Respondent to the Applicants.

1.4 The payments due and the indebtedness of the First Respondent in terms of the Agreement of Sale and draft mortgage bond annexed thereto, from date of signature thereof on 14 October 2013, to date of cancellation thereof on 25 September 2014.

1.5 Should it be found that the Agreement of Sale and draft mortgage bond annexed thereto has not validly been cancelled, the payments due and the indebtedness of the First Respondent in terms of the Agreement of Sale and draft mortgage bond annexed thereto, from date of signature thereof on 14 October 2013, to date of the hearing of the Application.

1.6 The payments due and the indebtedness of the First and Second Respondents in terms of the Settlement Agreement, relating to the contribution towards the legal costs of the Applicants in the amount of R250 000-00, from date of signature thereof on 14 October 2013, to date of the hearing of the Application.

1.7 Whether the First Respondent was in breach of the Agreement of Sale and draft mortgage bond annexed thereto, on the date of the first breach notice on 9 April 2014.

1.8 Whether the First Respondent was in breach of the Agreement of Sale and draft mortgage bond annexed thereto, on the date of the second breach notice on 25 June 2014.

1.9 Whether the First Respondent was in breach of the Agreement of Sale and draft mortgage bond annexed thereto, on the date of the cancellation thereof on 25 September 2014.

1.10 Whether the First Respondent and Second Respondent were in breach of the Settlement Agreement relating to the contribution towards the legal costs of the Applicants in the amount of R250 000-00, at any time.

1.11 Whether the payments in the amount of R500 000-00 allegedly made by the First and Second Respondents, were made in respect of and towards:

1.11.1 the R250 000-00 contribution to costs in terms of the Settlement Agreement; and

1.11.2 the monthly instalments and interest;
in terms of the Agreement of Sale and draft mortgage bond annexed thereto.

1.12 Whether any payment made by the First Respondent was made in respect of and towards:

1.12.1 the City of Cape Town account; and

1.12.2 the Conveyancer's costs;
as demanded in the breach notices of 9 April 2014 and 25 June 2014.

1.13 Whether the Applicants had a duty to have allocated any payments made by the First Respondent in respect of and towards:

1.13.1 the City of Cape Town account; and

1.13.2 the Conveyancer's costs;

as demanded in the breach notices of 9 April 2014 and 25 June 2014.

1.14 Whether the Applicants had in fact allocated any payments made by the First Respondent in respect of and towards:

1.14.1 the City of Cape Town account; and

1.14.2 the Conveyancer's costs;

as demanded in the breach notices of 9 April 2014 and 25 June 2014.

1.15 Whether the First and Second Respondents had designated any payments made by the First Respondent in respect of and towards:

1.15.1 the City of Cape Town account; and

1.15.2 The Conveyancer's costs;

as demanded in the breach notices of 9 April 2014 and 25 June 2014.

1.16 Whether the Applicants were entitled to cancel the Agreement of Sale on 25 September 2014.

1.17 Whether the Agreement of Sale was validly cancelled by the Applicants on 25 September 2014.

1.18 Whether or not the First Respondent was still in lawful occupation of the property after the cancellation of the Agreement of Sale on 25 September 2014.

1.19 Whether or not the First, Third and Fourth Respondents were still in lawful occupation of the property at the time this Application was launched on 2 April 2019.

1.20 Whether or not the First and Third Respondents are still in lawful occupation of the property at the time of the hearing of the Application.

1.21 In the event that it is found that the Agreement of Sale was not validly cancelled, whether the First Respondent is entitled to still claim occupation of the property in terms of the Agreement of Sale.

1.22 In the event that it is found that the Agreement of Sale was not validly cancelled, whether any claim by the First Respondent to occupy the property in terms of the Agreement of Sale, has become prescribed.

1.23 In the event that it is found that the Agreement of Sale was not validly cancelled, whether any claim by the First Respondent to claim transfer of the property in terms of the Agreement of Sale, has become prescribed.”

[19] Two witnesses were called to give evidence on these issues, namely Mr Johannes Jacobus Badenhorst, the attorney who has represented applicants since before the action proceedings of 2006 were instituted, and the second respondent on behalf of the respondents.

Evidence of Johannes Jacobus Badenhorst

[20] Mr. Badenhorst testified that the applicants were loath to litigate, and especially against the respondents, and wanted to afford the second respondent opportunity to continue with his ministry. This is why it took so long to launch the 2006 action proceedings and to launch these proceedings.

[21] According to Badenhorst, it was the erstwhile legal representative of the respondents, Apollos, who had approached him and pleaded for settlement of the action proceedings following the appeal decision. Badenhorst was in fact the author of the

settlement agreement, with input from Apollos. The settlement agreement was signed at the chambers of the applicants' present counsel, Mr Du Plessis, after protracted negotiations, where the second respondent was present together with Apollos and the respondents' senior and junior counsel on the one hand, and Badenhorst and Mr Du Plessis, on the other. Badenhorst signed the agreement on behalf of the applicants, while the second respondent signed on behalf of the first and second respondents. He testified that the date on which the settlement agreement was signed, 14 October 2013, was the day of, or day before the set down date for pre-trial of the matter, and there were a number of interlocutory applications between the parties, and the effect of the settlement agreement was to settle all the legal proceedings between them. After the signing thereof, he and his counsel had attended to court to make it an order of court.

[22] Badenhorst testified that the second respondent was visibly pleased and relieved when the settlement agreement was concluded, and all those present hailed it as a significantly favourable agreement towards the respondents. In his view, it was a 'bargain of a lifetime' for the respondents because it was obtained after attachment of the respondents' movable property pursuant to the costs in the appeal which had been taxed by that stage; and according to him, the respondents knew they could not win the action after having lost the appeal; and the second respondent would not be losing his church or congregation; and the respondents were to purchase the property at a quarter of its price, which was at that stage valued at R4 636 3 380 by the City of Cape Town, funded by the applicants.

[23] He explained the terms of the settlement agreement in detail. In effect, it provided for payment of two debts, namely the taxation costs of the appeal and the purchase price of the property. The respondents agreed to pay an amount of R250,000.00 towards the appeal costs in equal monthly instalments of R10,000.00. Annexure A contains an acceleration clause in terms of which failure to pay within the required time would result in the full balance being payable together with interest at 15.5%, retrospectively calculated from 1 October 2013.

[24] As regards the sale of the property, the second applicant in effect, stepped into the shoes of a financial institution and agreed to fund the purchase through a mortgage bond which was payable over a period of 10 years. To this end, a draft mortgage bond was attached as annexure B, and was to be registered once the transfer costs were paid by the respondents. The purchase price of the property was R2.5 million, payable in monthly installments of R20,000.00 with effect from 1 December 2013, and the instalments were to increase to R30,000.00 per month after two years, and thereafter the full amount was payable. The sale agreement also contains an acceleration clause, but which required notice first.

[25] In the event of default, the agreement provided the applicants with two options, namely to declare cancellation or to claim payment of the full balance due. By bringing this application, the applicants opted to declare a cancellation. The settlement agreement also provided that any amendment thereof could only be in writing.

[26] Following the settlement agreement, Badenhorst instructed a conveyancer to proceed with registering the transfer of the property to the respondents. In terms of the agreement, and specifically Annexure B, the respondents were liable for the transfer costs, including disbursements thereon. The conveyancer issued an invoice for payment of R51,670.00 for his fees. In addition, the City of Cape Town produced an invoice of R158,523.00 before it could issue a rates clearance certificate. On the basis of these invoices, Badenhorst sent a letter to Apollos dated 9 April 2014, bringing the outstanding payments to the attention of Apollos and his client, the second respondent. The registered letter dated 9 April 2014 was not collected at the post office and was returned to Badenhorst and he had accordingly sent it by e-mail to Apollos on 13 May 2014.

[27] On 14 May 2014, Apollos responded by e-mail contained in the bundle and reported that he had consulted with the second respondent on that morning and had impressed on him the urgency of remedying the breach. The e-mail concluded by stating: *"I am sure client will remedy the situation"*. However, the breach was not

remedied. On 25 June 2014 Badenhorst addressed another letter to Apollos for the respondents to remedy the breach, and when that did not result in the breach being cured, he sent the letter of cancellation on 25 September 2014. He does not recall receiving a written response from Apollos during that period, but he testified that he had telephonic conversations with him on almost a daily basis – at least once a day. It would be left to Badenhorst to record the contents of their telephonic discussions in letters immediately following the discussions. He referred in this regard to the letter of 25 September 2014, in which he had recorded that Apollos had confirmed receipt of both letters dated 9 April 2014 and 25 June 2014. According to Badenhorst, Apollos was the attorney of record representing the respondents, and gave no indication otherwise. The last interaction he had with Apollos in this matter was in July 2015.

[28] By reference to his letters contained in the record, Badenhorst gave evidence regarding his interactions with Apollos. In this respect, he testified that, upon receiving the letter of 25 September 2014, Apollos telephonically begged him for more time to submit further proposals to the applicants. However, nothing was received from him by 8 October 2014, which elicited a letter on that day from Badenhorst demanding a response. On 30 November 2014 Badenhorst had a discussion with Apollos who confirmed that he had spoken to the second respondent, and who, in turn was in direct communication with the leadership of the applicants, in line with the ongoing background negotiations between the clients. On 1 December 2014 the respondents were again afforded until 5 December 2014 to forward proposals and the opportunity was repeated in January 2015. However, nothing was forthcoming from the respondents.

[29] Badenhorst vehemently disputed the allegation that Apollos was no longer representing the respondents after the settlement agreement. He referred to the e-mails from Apollos in which he stated that he had consulted with the second respondent “*this morning*” dated May 2014 and July 2014. He stated that, even by middle of 2018 Apollos was still the attorney of record on behalf of the respondents and was on daily telephonic contact with him, sometimes twice a day, pleading for settlement of the

matter and assuring Badenhorst that his clients were “*busy getting the money together*”. He also referred to his letter of 25 September 2014 in which he recorded a telephonic discussion between the two of them, where Apollos made mention of a consultation he had held with the second respondent. Another letter he referred to in this regard is dated 1 December 2014, and it again confirmed discussions between he and Apollos.

[30] It was put to him that the only written response in the record from Apollos was the e-mail dated 14 May 2014. Badenhorst could not confirm this, but explained that often Apollos would respond telephonically and it would be left to him (Badenhorst) to confirm their discussions in writing. He never asked Apollos why he did not put things in writing. He explained that the two of them had come a long way in this matter and the respondents had repeatedly failed to comply with timeframes, and so he had become accustomed to being the one who would always confirm discussions in writing. In any event, Badenhorst stated that the address of Apollos was the *domicilium* address in terms of the settlement agreement. And to date, there has never been a notice of withdrawal by Apollos.

[31] In cross examination, he was challenged to explain why he addressed a letter directly to the second respondent on 15 November 2018 despite his evidence that he believed the respondents were still represented by Apollos. He initially admitted that, if the letter was not also copied to Apollos, this would have been an oversight on his part. However, it later transpired during his evidence that Apollos was copied in the letter of 15 November 2018, and that the letter was a response to a letter received directly from the second respondent on 9 October 2018. He explained that in effect, the letter of 15 November 2014 showed that Apollos was directed to the correspondence of 9 October 2018, and that Badenhorst believed that Apollos was still the attorney representing the respondents. He also referred to his other correspondence immediately before then, dated 19 July 2018, August 2018, in which Apollos was copied.

[32] Badenhorst also vehemently disputed the second respondent’s claim that he never received a copy of the settlement agreement. He explained that, after signature

by the parties, photocopies were made and every person in the room obtained a copy, including the second respondent. Badenhorst had personally handed a copy of the settlement agreement to each person in the room, including the second respondent. He pointed out that subsequently, the monthly payment installments were made into his trust account almost immediately after the settlement agreement, from 11 November 2013, without anyone requesting his banking details. This shows that the second respondent was aware of terms of the settlement agreement because his trust banking details were contained therein.

[33] Badenhorst prepared a schedule, for purposes of his evidence, setting out the payments made by the respondents and how they were allocated by the applicants. He testified that he had structured the schedule in such a way as to be the most beneficial towards the respondents. In other words that, according to him the respondents were liable for more than was reflected in the schedule. He explained that he never received any instruction from Apollos or the second respondent explaining what the respondents were payments were for specifically, or how to allocate them. However, from the regular monthly amounts received of R10,000.00, it was clear to him, upon applying the terms of the settlement agreement, that the payments were towards the appeal costs. He explained that the respondents never paid any installment of R20,000.00, which would have qualified as payment towards the purchase price. He confirmed during cross examination that the only exceptions to the monthly payments of R10,000.00 were a payment of R80,000.00 on 8 December 2014, and a payment of R50,000.00 on 2 February 2015.

[34] His belief that the monthly payments of R10,000.00 were towards the appeal costs was also confirmed by the commencement date of the payments, which was 11 November 2013. In terms of the agreement, the first payment towards the appeal costs was due from 1 October 2013, whilst the purchase price payments were due from 1 December 2013. He also referred in this regard to an e-mail of 6 January 2016 in which the second respondent requested waiver of *“our court fees in terms of our agreement*

made in October of 2012 (sic) please". According to Badenhorst, this shows that even in the mind of the second respondent, the payments were towards the appeal costs.

[35] According to the schedule of payments prepared by Badenhorst, the full amount payable towards the appeal costs was only covered on 8 June 2015, amounting to R248 879.00. He had accounted to the head office of the applicants at the time regarding the payments, and there is no longer money is lying in his trust account in regard in this matter. As at 8 June 2015, an amount of R11,879,84 was in credit and it was the first payment allocated towards the purchase price of the property, and that was on 2 July 2015. The payments received were allocated towards interest before allocation to the capital amount. The respondents continued paying monthly installments mostly in the amount of R10,000.00, although they were sporadic, until 5 June 2017, which is when the last payment was received from the respondents.

[36] By the date of cancellation of the agreement in September 2014, no payment had been made towards the purchase price of the property. However, in line with the applicants' stance of affording grace to the respondents, the agreement was not cancelled on that additional basis. At the time, the priority for the applicants was the registration of the transfer, hoping that the purchase price payments could be regularized at a later stage. However, the failure to pay for the conveyancing costs meant that no transfer of the property could be effected. In fact, by September 2014, the appeal costs were due and owing in terms of the acceleration clause, and only an amount of R110,000.00 had been paid, and although the applicants were entitled to also execute and attach the respondents' property in that regard, they instead chose to allocate the monies paid towards that debts owed in terms of the settlement agreement.

[37] He confirmed during cross examination that no transfer documents were sent to the respondents because they had not paid the conveyancer's invoices. The conveyancing costs were due before transfer could be attended to by the conveyancer, in line with the usual conveyancing practices. There was furthermore no lodgment date obtained as yet because that would require the transfer documents to be signed, which

could not be done because the conveyancing costs had not been paid. He explained that there is a very short window between lodgment and transfer. It was put to him during cross examination that, Annexure A of the settlement agreement implied that conveyancing costs could not be demanded until a lodgment date was obtained. Badenhorst disputed this, referring to the provisions of the settlement agreement which, according to him did not require that the lodgment date be secured, but merely that it be anticipated by the conveyancer.

[38] It was put to him that the conveyancer could not have received the City's rates and clearance account when he issued his own invoice dated 8 January 2014, because the municipal account is dated 12 March 2014. Badenhorst stated that the municipal account expressly states that it was valid for one month between 12 March 2014 and 16 April 2014. This meant there was a very small window to lodge and register the transfer document. This is why the first breach notice was sent on 9 April 2014. He confirmed that no lodgment date had been obtained when the conveyancer issued his invoice, however he stated that it was anticipated because of the short window.

[39] He also explained that by April 2014 the respondents had paid an amount of R50,000.00, which did not cover the two invoices from the conveyancer. By September 2014 the respondents had paid an amount of R110,000.00 which was still not enough for the conveyancing costs which included the municipal bill. In any event, according to the settlement agreement, the monthly payments were not for payment of the conveyancing costs. He testified that there was simply no way in which the monthly payments by respondents could be construed as payments towards the breach notice, and Apollos never told him that the payments were towards the breach notices. To date, no payment has ever been made towards the conveyancer's costs and rates clearance.

[40] According to his calculations, as at 31 January 2024, the respondents owed an amount of R5,312,100.00 in respect of interest calculated in terms of the settlement agreement. The respondents also owe value of occupation of the property which is in

effect damages that the applicants are entitled to claim. However, the applicants have not laid any legal claim for any of those amounts.

[41] The property remains vacant since the fourth respondent left, and the second respondent has a new congregation with a new building near the property. The applicants are concerned about the safety and security of the building because there are no security guards appointed to it. The rates bill has since been reduced substantially, although he did not have details of when those payments were made since they were made directly to the City.

[42] He testified that, until the answering affidavit was delivered, the respondents never demanded repayment of the amount of approximately R500,000.00 that they have paid and which has been allocated as illustrated above. According to him, there would be no basis for such a demand in any event, because interest had already accumulated in respect of both the payments towards the purchase price and the taxation costs. In any event, such a claim would have prescribed because the last payment received from the respondents was over six and a half years ago. Further, the respondents have never laid a claim for transfer of the property into their names since the Registrar of Deeds rectified the title deed in compliance with the court order. He opined that they would have to tender payment of the purchase price and interest in order to have such transfer take place.

[43] Save for what I have specifically mentioned above, the evidence of Mr. Badenhorst was not challenged.

Evidence of Mr Raymond Paul Olckers (second respondent)

[44] The second respondent testified that he was present when the settlement agreement was concluded. His erstwhile attorney, Apollos, had called him on that same morning of its signature and informed him that the applicants were ready to settle the litigation relating to the ownership of the property. The negotiation discussions started

with mention of an amount of R4.7 million which he thought was ridiculous given the location of the property in Belhar. Later that afternoon they settled on an amount of R2.5 million, which he agreed to pay at R10,000-00 per month.

[45] He testified that the current terms of the settlement agreement, reflected in the record, are not what he agreed to. He would never agree that the property does not belong to the respondents, and everyone who knows him knows that he would never agree to something like that. He also never agreed to the provision in which the respondents acknowledged that the name change was irregular, and in which the Registrar of Deeds was requested to rescind it. Furthermore, no mention was made of transfer documentation in the discussions. It was during the oral evidence of Badenhorst that he heard, for the first time, that the applicants had offered the respondents a mortgage bond.

[46] Although he admits that he signed and affixed his initials to the settlement agreement, including Annexures “A” and “B”, he states that he *“never signed for all that other rubbish that’s on there”*. In this regard, he referred to a digital application he had heard of, called ‘robo-signing’, in terms of which a person can sign a document and alterations can be made by someone else at a later stage, suggesting that this is what happened in this case. He had later discovered all these new provision in early 2019 when he attended at the Deeds Office with a Ms Fischer, a lawyer congregant who was assisting him at the time and who is now deceased, and obtained a copy of the settlement agreement. He stated that he was not furnished with a copy of the agreement on the day that he had signed it.

[47] He could not say specifically who had told him that he was required to make the payment of R2.5 million, which he said was to be made up of monthly payments of R10,000-00, but stated that it arose from the discussions although he also stated that it was because the agreement told him so. According to his understanding, the payments were to be made over some time, and no specific period was agreed upon. As regards the payments towards transfer of the property, his evidence in chief was that he cannot

remember whether he was told that he would be required to pay for transfer, or when those payments were due. He denied that he agreed for the respondents to pay for appeal legal costs in the amount of R250,000-00.

[48] He testified that he terminated the mandate of Apollos shortly after signing the settlement agreement, and never communicated with him after the settlement agreement was entered into. He could not give an exact date of when this occurred. However, during cross examination he stated that he never terminated it verbally or in written form, but simply stopped responding to Apollos' messages. It was on hearing the triumph in the voice of the applicants' counsel when the latter telephonically informed his clients of the settlement agreement, that the second respondent felt that he had been 'thrown to the wolves' by Apollos, and also felt that he had been lured into the settlement discussions by him on that day. However, he had not pursued the issue any further by investigating the matter further, or laying a complaint against Apollos.

[49] After the settlement agreement, he made payments with effect from 11 November 2013. In cross examination he was asked to explain how and where he obtained the bank details into which he was supposed to pay, which were the bank details of Badenhorst's trust account, and he stated that he obtained those details from Mr Apollos although he could not give details of when this would have been. It was put to him that if he obtained the bank details from Mr Apollos, this could have only been after entering into the settlement agreement, which meant that he was still in contact after the signing thereof. At this point he stated that he could have obtained the bank details from Pastor Le Fleur, although he gave no detail in this regard.

[50] He confirmed that on 8 December 2014 he made a payment of R80,000-00, which was a contribution from the sale of his own house. Again, in February 2015 he made a payment of R50,000-00. He testified that he made all these payments towards the property. No one ever told him that the payments were to be allocated towards appeal legal costs. The monthly payments of R10,000-00 were stopped because of the effects of COVID-19 upon his congregation. However, during cross examination he was

confronted with the fact that the last payment made towards the settlement agreement was on 5 June 2017, long before COVID-19, and he could not provide an answer. He confirmed that the property has been vacant since 2019.

[51] After termination of the mandate of Apollos, he confirmed receiving a letter from Badenhorst although he could not remember which one it was. He could not remember receiving the letters of cancellation regarding non-compliance with the settlement agreement, and by then he was no longer in contact with Apollos and did not receive any such notification from him.

[52] He referred at many times to the situation of Pastor Raymond Le Fleur, whose congregation similarly left the applicants only to return after a settlement. Although he admitted that the history of Le Fleur was different, the applicants had written off his congregation's debt, and when he discovered this, he penned an email dated 6 January 2016 to the leadership of the applicants, asking for the same grace. He admitted during cross examination that the other congregations which seceded from the applicants did not take the property of the church with them and that the respondents in this case are the only ones who did so.

[53] As regards his email of 6 January 2016, he could not explain in cross examination why he referred to the settlement agreement as *"an amicable settlement [entered into] in good faith"* in that email, whilst he disputed the terms of the settlement in his oral evidence. In the same e-mail, he requested the applicants to consider *"waiving our court fees in terms of our agreement made in October of [2013]"*. It was put to him that the reference to court fees means he understood that the agreement includes settlement of legal costs for the failed appeal. He disputed this, stating that he was referring to the R2.5 million portion of the settlement.

[54] He received a response from the then Secretary General of the applicants, Dr Petersen, dated 20 July 2017, stating that they would not accept any offer less than R1 million. It was this letter, dated 20 July 2017, that the second respondent referred to as

a new contract with the applicants. He also conceded, however, that no agreement was ever reached with the applicants in that regard.

[55] The letter of 20 July 2017 referred to a financial statement received from the applicants' attorneys which stated that R250,000-00 had been deducted for court fees in the failed appeal, after which an amount of R277,000-00 was transferred to the applicants towards the payment of the amount of R2.5 million. The second respondent testified that he was not happy about the fact that the respondents' payments had first been allocated towards what he described as attorneys' fees because, in his understanding the payments were towards the R2.5 million. However, he did not take any action or challenge that allocation after receiving the letter of 20 July 2017. He testified that he has never had any discussion, whether written or telephonic, regarding how the payments made by the respondents were to be allocated.

[56] In response to the letter of 20 July 2017, the second respondent addressed a letter dated 09 October 2018 in which he made a proposal for a payment arrangement consisting of monthly payments of R10,000-00 for 70 months after which one lump payment was to be made. The applicants responded by letter dated 15 November 2018, rejecting the offer and informing the respondents that litigation was to ensue.

E. RELEVANT LAW

[57] A settlement agreement or compromise, whether embodied in a judgment of the court or *extra-judicial* has the effect of being *res judicata* in that it embodies the final settlement of disputed or uncertain rights or obligations by agreement and puts an end to litigation between the parties.² As a result, litigation designed to enforce it will generally relate to non-compliance with the settlement order, and not the merits of the original underlying dispute.³

² *Road Accident Fund v Taylor and other matters* (1136/2021; 1137/2021; 1138/2021; 1139/2021; 1140/2021) [2023] ZASCA 64; 2023 (5) SA 147 (SCA) (8 May 2023) paras 36 – 39.

³ *Eke v Parsons* (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015) para 32.

[58] When requested to do so, a court has the power to make an agreement or part thereof, an order of court, which means the settlement agreement becomes an enforceable court order. Such an order will be interpreted like all court orders, in line with the well-established test on the interpretation of court orders, which is the following:

“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.”⁴

[59] In *Engelbrecht*⁵ the Supreme Court of Appeal (SCA) articulated the test for interpreting court orders as follows:

“The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the ‘genesis of the transaction’ or its ‘factual matrix’. Its aim is to put the Court ‘in the armchair of the author(s)’ of the document. Evidence of ‘surrounding circumstances’ is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide ‘sufficient certainty’.”

⁴ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (*Finishing Touch 163*) at para 13. See also *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A). *Eke v Parsons*, para 29.

⁵ *Engelbrecht and Another v Senwes Ltd* [2006] ZASCA 138; 2007 (3) SA 29 (SCA) at paras 6-7.

[60] Whilst ordinarily the purpose served by a settlement order is that, in the event of non-compliance, the party in whose favour it operates should be in a position to enforce it through execution or contempt proceedings, the efficacy of settlement orders is not limited to that.⁶ The type of enforcement of a settlement order, which has been made into a court order may take any form permitted by the nature of the order.⁷

[61] Since these are motion proceedings in which relief of a final nature is sought, the legal principles set out in *Plascon-Evans*⁸ apply insofar as any disputes of fact may arise in the papers. That is, that a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify such order.⁹ It may be different if the respondents' version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.¹⁰ The Court has to accept those facts averred by applicant that were not disputed by respondents, and respondents' version insofar as it was plausible, tenable and credible.¹¹ It is otherwise undesirable to decide an application upon affidavit where the material facts are in dispute¹², and a final interdict may be granted on application if no *bona fide* dispute of fact exists.¹³

[62] Where there are factual disputes in oral evidence, the technique generally employed by courts was summarised in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*¹⁴ as follows:

⁶ *Eke v Parsons supra*, para 24.

⁷ *Ibid*, para 31.

⁸ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁹ Harmse *Civil Procedure in the Supreme Court*, B6.45.

¹⁰ *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA); *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243; 2009 (2) SA 279 (SCA).

¹¹ *Airports Company South Africa Soc Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books* [2016] 4 All SA 665 (SCA).

¹² Harmse *Civil Procedure in the Supreme Court*, B6.45

¹³ *Plascon-Evans supra*.

¹⁴ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* 2003(1) SA 11 (SCA).

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”¹⁵

[63] A similar approach was articulated as follows in *National Employers General Insurance Co. Ltd v Jagers*¹⁶:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support

¹⁵ At para [5].

¹⁶ *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (ECD) 440 to 441.

the evidence of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as in a criminal case, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably be bound up with a consideration of the probabilities of the case and if the balance of probabilities favour the Plaintiff, then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false."

[64] When dealing with circumstantial evidence the first rule applicable is that the inference sought to be drawn must be consistent with all the proved facts.¹⁷ If it is not, then no inference can be drawn. Secondly, in civil cases the proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail.¹⁸ There is a distinction to be drawn between inference and conjecture or speculation.¹⁹

[65] Where a party fails to call as his witness one who is available and able to elucidate the facts, whether the inference that the party failed to call such a person as a witness because he feared that such evidence would expose facts unfavourable to him

¹⁷ *R v Blom* 1939 AD 188 at 202-203.

¹⁸ *Macleod v Rens* 1997 (3) SA 1039[E], and Zeffert, *the South African Law of Guidance* at p105.

¹⁹ See *Probest Projects (Pty) Ltd v The Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* (20761/2014) [2015] ZASCA 192 (30 November 2015) para [18] and the authorities cited there.

should be drawn could depend upon the facts peculiar to the case where the question arises.²⁰

[66] In *Tshishonga v Minister of Justice and Constitutional Development and Another*²¹, it was held that a failure to call a witness is reasonable in certain circumstances, such as when the opposition fails to make out a *prima facie* case, but an adverse inference must be drawn if a party fails to place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.

[67] As regards the relief of a *rei vindicatio*, an owner need do no more than allege and prove that (s)he is the owner.²² Since one of the incidents of ownership is a right to possession of the thing, a party who establishes ownership is not required to prove that the other party's possession is unlawful. That *onus* falls on the other party, who must establish their right to retain possession.

F. DISCUSSION

The points *in limine*

[68] The first point *in limine* was effectively dealt with in the postponement order of 10 August 2022, which included the following:

“3. The matter will proceed against the First and Third Respondent[s].

²⁰ *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979(1) SA 621 AD.

²¹ *Tshishonga v Minister of Justice and Constitutional Development and Another* [2007] 4 BLLR 327 (LC); 2007 (4) SA 135 (LC) (26 December 2006).

²² *Chetty v Naidoo* 1974 (3) SA 12 (A) 20A- C. *Dreyer and Another v AXZS Industries (Pty) Ltd* (250 of 2004) [2005] ZASCA 88 / 2006 (3) All SA 219 (SCA).

4. The applicant does not seek any relief against the Fourth Respondent who has vacated the property.”

[69] No challenge was brought against that order, which effectively clarified who the participating parties henceforth would be. It is clear from the papers that the reason that this order had to be made was because of the first point *in limine* raised by the respondents. The court was accordingly satisfied that the third respondent was a necessary party to these proceedings, and was properly cited as a party, even in the absence of a separate, formal application for such joinder. That is in accordance with the wide powers accorded to the High Court in terms of section 173 of the Constitution²³ to regulate its processes.

[70] In any event, it is evident from the papers that the third and fourth respondents were necessary parties which had a direct and substantial interest in the matter when the application was launched. The relief sought, which includes ejectment from, and vacation of, the property, necessarily involved the fourth respondent which was in occupation of the property when the matter was launched although it has since vacated the property. It is also common cause in the papers, though not entirely clear how, that the third respondent “*has superseded or replaced the first respondent [and that the first respondent] may currently be dormant*”. Apart from admitting this statement, the respondents did not provide any clarity regarding the current status of the first respondent, save to state that the second respondent is a member of the third respondent as well as an active preacher in the service of the first respondent, which implies that the first respondent is still in existence. There was accordingly nothing irregular about citing the third and fourth respondents to this application.

[71] The basis for the second point *in limine* is less clear, and the respondents did not persist with this point in argument. In essence, the respondents state that the applicants’ failure to seek confirmation of cancellation of the agreement from the court renders this application defective and premature. This is because firstly, the settlement agreement

²³ Constitution of the Republic of South Africa 108 of 1996 (“*the Constitution*”).

requires that any cancellation should be confirmed by the courts, and secondly because “one party” - which I assume is a reference to the respondents - has complied with the agreement.

[72] The respondents have provided no reference contained in the settlement agreement for the alleged requirement for a party to first approach a court before cancelling the agreement. I have found none. Instead, clause 8 of the annexure A to the settlement agreement provides as follows:

“8. DEFAULT

Should the PURCHASER default with the due performance of any of its obligations in terms of this agreement and persist in such default for a period of 30 [thirty] days after it will have received a notice calling upon it to remedy such default, then notwithstanding any prior waiver, and without prejudice to any other claim which the SELLER may have, either in terms of this agreement or at law, it shall be entitled to either—

8.1 declare this agreement cancelled and to resume possession and occupation of the property and to recover from the purchaser all damages it may have suffered or sustained by reason of such default; or

8.2 claim and recover from the purchaser the full balance of the purchase price then outstanding which shall be deemed to be due and owing.” (my emphasis)

[73] Thus, in terms of the settlement agreement the applicants may declare the agreement cancelled and resume possession and occupation of the property, and that is the route that they have opted to pursue by launching these proceedings. That is what the court order sanctioned as a remedy for non-compliance, based upon the agreement of the parties. It is correct that, since the settlement agreement was an

enforceable court order, the applicants had the option to enforce it by bringing contempt proceedings or even execution, in which event they would have to approach the court. However, the nature and terms of the court order are paramount in determining what form its enforcement might take.²⁴ I was otherwise referred to no authority which required the applicants to first approach the court for permission to cancel the settlement agreement in the event of breach thereof. The available authority indicates the opposite.²⁵

[74] To require a party to first approach the court after agreeing in a settlement regarding how to terminate the agreement would be contrary to the underlying purpose and benefit of entering into a settlement agreement, which was articulated as follows in *Le Grange*²⁶:

“[T]he policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on the judicial system. By disposing of cases without the need for a trial, the case load is reduced. This gives the Court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently.”

[75] I also observe that the terms of the settlement agreement are not conditional upon it being made into a court order for their operation. Clause 3 of the settlement agreement provides as follows:

“ORDER OF COURT

²⁴ *Eke v Parsons* (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015) paras 29-31.

²⁵ *Sonia (Pty) Ltd v Wheeler* 1958 (1) SA 555 (A) 560-1.

²⁶ *Ex Parte Le Grange and Another In re: Le Grange v Le Grange* [2013] ECGHC 75 (*Le Grange*) at paras 36 and 38. In the South African Law Reports, this is reported as *PL v YL* 2013 (6) SA 28 (ECG).

3.1 The parties to this agreement agree and request that this agreement be made an order of the above Honourable Court.

3.2 Any of the parties may, at their own cost and expense, apply to the above Honourable Court to have this agreement so made an Order of the above Honourable Court.”

[76] The intention evinced by these provisions is that the parties were willing, and in fact agreed, to make the settlement agreement an order of court. However, either party was permitted in terms of clause 3.2 to approach the court for such an order. There was no requirement for both parties to approach the court at any particular time for such endeavour. There was no timeframe put into place for such an endeavour. There was no obligation to do so either. And as contemplated in these provisions, the court order itself indicates that it was the applicants’ representatives²⁷ who approached the court for such an order.

[77] It is settled law that parties who enter into a settlement agreement are not obliged to make it into a court order.²⁸ A settlement, or more technically, a compromise, whether embodied in a judgment of the court or extra-judicial has the effect of *res judicata*, in that it is the final settlement of disputed or uncertain rights or obligations by agreement.²⁹ Clauses 3.1 and 3.2 above lend themselves to that intention. In other words, what the parties envisaged was that the settlement agreement would be effective, regardless of whether it was made into a court order.

[78] However, a court has the power to make a settlement agreement, or part thereof, an order of court when requested to do so. One can think of a few reasons for such an intention in this instance. One was to facilitate the rescission of the name change at the Registrar of Deeds. Experience shows that that office will rarely implement the kind of

²⁷ Referred to in the court order as “*the legal representative for the plaintiffs*”.

²⁸ *Road Accident Fund v Taylor and other matters* (1136/2021; 1137/2021; 1138/2021; 1139/2021; 1140/2021) [2023] ZASCA 64; 2023 (5) SA 147 (SCA) (8 May 2023) para 37-39.

²⁹ *Cachalia v Harberer & Co* 1905 TS 457. See *RAF v Taylor*, para 37.

action it was required to effect in this case without a court order. Another is the fact that, in terms of clause 8.2 already referred to above, the applicants were entitled to institute a claim and recover monies due and owing. It would be easier to obtain such relief on the basis of a court order. The settlement agreement furthermore did not make any reference for the parties to approach a court on the same papers in case of breach of the agreement.

[79] Logically, all of this means the applicants were also entitled to cancel the settlement agreement without court sanction.

The settlement agreement

[80] I now proceed to deal with the merits. Since the effect of the case law referred to earlier is that, following the settlement agreement and court order, the rights of the parties are to be determined in accordance therewith and not in terms of the original litigation between them, it is necessary to first have regard to issues relating to the settlement agreement.

[81] As is evident from the summary of the parties' cases above, there was no dispute in the papers that the parties entered into the settlement agreement, or regarding its terms. That was until the second respondent's oral evidence in which he disputed its core provisions which deal with ownership, change of name, payment for taxed appeal legal costs, transfer costs and the draft mortgage bond (annexure B).

[82] Because the terms of the settlement agreement were not disputed in the papers, the applicants did not have opportunity to deal with his denials in reply. It is trite that, if an issue is not disputed in motion proceedings, it is deemed to be admitted. Where a respondent fails to deny allegations contained in an applicant's founding affidavit, the

court will accept the applicant's allegations as correct.³⁰ This is why the Supreme Court of Appeal sounded a caution in *Wightman*³¹, as follows:

“...when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[83] Another result of the fact that the terms of the settlement order were not placed in dispute in the papers is that the issue was not referred for oral evidence in terms of the order of 10 August 2022. Given the centrality of this issue for the determination of this matter, it is not unreasonable to conclude that, if the agreement was placed in dispute in the papers, it too would have been referred for oral evidence. And although the issue did arise in the oral evidence of the second respondent, it was not put to Badenhorst during his evidence and accordingly he did not have opportunity to deal with it in his oral evidence. That is another reason to not entertain the second respondent's belated denial of the terms of the settlement order. Doing so would result in extreme unfairness to the applicants, not to mention the abuse to the administration of justice.

[84] Thus, although the second respondent's denial of the terms of the settlement order pervaded much of his oral evidence, which I have set out in the summary of his evidence, it is not an issue that I consider to be a genuine dispute of fact between the parties within the contemplation of *Plascon Evans*. It is otherwise clear from all the evidence before the Court that the parties did indeed agree to all the terms contained in

³⁰ See *Erasmus* D1-63 and authorities cited there.

³¹ *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008) para 13.

the settlement agreement, and that, as contemplated in the agreement it was thereafter made a court order, pursuant to an application by the applicants' legal representatives.

[85] The settlement agreement facilitated sale of the immovable property from the applicants to the respondents through clause 2.3, the sale agreement (annexure "A"), and a draft mortgage bond (annexure "B"). Clause 2.3 provides as follows:

"2.3 SALE OF THE IMMOVABLE PROPERTY

2.3.1 The [applicants], jointly and severally, insofar as may be needed or may be required, hereby sell the immovable property to the First [respondent].

2.3.2 The terms and conditions of the sale of the immovable property and the purchase price, payment terms and all other terms and conditions agreed to between the parties will be set out in the Sale Agreement annexed hereto as annex **"A"** and the draft First Mortgage Bond annexed hereto as annex **"B"**."

[86] The sale agreement, annexure "A", is headed "Sale of Property Agreement", and was an agreement between the second applicant as seller and the first respondent as purchaser. The preamble noted that the second applicant is the registered owner of the property and it wished to sell it to the first respondent. Clauses 3 and 4 set out the purchase terms as follows:

"3. PURCHASE AND SALE

3.1 The seller hereby sells to the purchaser who hereby purchases the property subject to the terms and conditions set out herein;

3.2 The purchase price of the property (the PURCHASE CONSIDERATION) is the sum of R2 500 000-00 (TWO MILLION FIVE HUNDRED THOUSAND RAND).

4. PAYMENT

4.1 The payment of the purchase price of the property by the PURCHASER to the SELLER shall be by way of payments as set out in and substantially in accordance with the First Mortgage Bond annexed hereto as annex "[B]", to be registered simultaneously with the registration of TRANSFER.

4.2 The First Mortgage Bond shall be registered by the PURCHASER as Mortgagor in favour of the SELLER as Mortgagee as set out in 4.1 above."

[87] Annexure "B" was headed "Mortgage Bond" and described the first respondent as "*the mortgager*" and the second applicant as "*the mortgagee*". It further set out terms providing for first respondent to be indebted to the second applicant in the sum of R2.5 million, which was said to be the purchase price of the property sold by the mortgagee to the mortgager. It further provided for payment of the capital sum of R2.5 million, plus accrued interest as follows:

"(a) monthly instalments of R20 000-00 (TWENTY THOUSAND RAND) each, the first of which shall be paid on the 10th day of December 2013 and subsequent instalments on or before the 10th day of each and every succeeding month thereafter; and

(b) monthly instalments of R30 000-00 (THIRTY THOUSAND RAND) each, on the 10th day of December 2015 and subsequent instalments on or before the 10th day of each and every succeeding month thereafter; and

(c) one final payment equal to the full amount of capital and accrued interest then still outstanding on 30th of November 2023.

The Mortgagor shall be entitled to pay larger instalments than are provided for herein or to anticipate the due date of any instalment or instalments or to pay the full amount owing at any time. In the event of any one of the aforesaid instalments not being paid on the due date thereof, then and in such event the full balance of capital and interest shall immediately become due and payable 10 (TEN) days after the Sellers shall have called upon the Purchaser in writing to pay the instalment and it shall have failed to do so within the said period of ten days provided that should be Sellers have despatched two such notices to the Purchaser in the same calendar year and the Purchaser should thereafter again fail to make any one payment on due date thereof then the full balance then still outstanding shall become due and payable immediately and without notice. Should the Mortgagor at any stage hereafter sell the property, then the full amount of the purchase price and the accrued interest shall likewise immediately and without notice become due and payable.”³²

[88] Badenhorst testified that Annexure “B” was a draft mortgage bond, which would have been registered once transfer costs were paid by the respondents. Indeed, the document contained no date, stating that the date is “*to be inserted*”. Then, on the last page where the Registrar of Deeds would normally stamp the document, no stamp or signature from the Registrar of Deeds is contained.

[89] Although annexure B was a draft mortgage bond, its contents were incorporated by reference to the settlement agreement, and immediately became binding. That much is clear from firstly, clause 2.3.2 which provides that the “*terms and conditions agreed to between the parties will be set out in the Sale Agreement annexed hereto as annex “A” and the draft First Mortgage Bond annexed hereto as annex “B”.*” Secondly, from clause 6 which provides as follows:

“6. FULL SETTLEMENT

³² Para a) at pages 2 -3 of annexure B.

The parties confirm that this agreement and Annexes "A" and "B" constitute and contain the entire Agreement between them and that this Agreement is further in full and final settlement of the Plaintiffs' claims against the Defendants' arising from the action and as set out in the Plaintiffs' particulars of claim and that the parties will have no further claims against one another except as is set out in this agreement.

7. ENTIRE AGREEMENT

This settlement and the annexes thereto constitute the entire agreements between the parties and any variation of consensual cancellation of this agreement, (including this clause 7 and Annexes "A" and "B"), will only be valid if reduced to writing and signed by all the parties hereto."

The cancellation

[90] The settlement agreement included terms relating to payment for transfer costs by the respondents. The relevant terms in that regard were as follows:

"6. TRANSFER

6.1 Transfer of the property into the name of the purchaser shall be given and taken as soon as is reasonably possible after the –

6.1.1 fulfillment of any suspensive conditions, if applicable, referred to in this agreement; and

6.1.2 payment by the purchaser of the costs referred to in clause 7 hereof;

6.2 Transfer shall be effected by the CONVEYANCERS.

...

6.5 Without derogating from 5.1 hereof [risk, benefit and occupation dates], the SELLER and the PURCHASER, on demand from time to time, will pay to the CONVEYANCERS their proportionate shares of the amounts required by the local authority concerned for the issue of rates clearance certificates in order to procure the transfer of the PROPERTY. Such proportionate shares will be calculated according to the date which the CONVEYANCERS reasonably determine as being the anticipated TRANSFER DATE...

7. COSTS AND TRANSFER

7.1 The PURCHASER shall bear and pay all of the costs payable in accordance with the normal conveyancing practice, together with all and any duties in relation to the transfer, payable on demand;

7.2 The transfer will be effected by J. J. Badenhorst & Associates Attorneys of 10 Bert Close, Helderkruijn, Roodepoort, Tel: (011) 764 4745 at the cost of the PURCHASER which costs will be payable by the purchaser on demand made by the CONVEYANCERS, which demand may not be made until a reasonable time before the date which the CONVEYANCERS reasonably determine as being the anticipated LODGMENT DATE for the transfer taking into consideration disbursements that have to be made.”

[91] The portions highlighted indicate that the respondents, as purchasers, were required to pay for the transfer costs upon demand by the conveyancers. The requirement for a purchaser to pay for transfer costs is not unusual. The second respondent admitted this in his cross examination, and he knew this because he has been involved in many purchases and sales of properties over the years. He also admitted that the norm is for transfer costs to be paid before lodgment and the registration date of a property. Therefore, to the extent that the respondents state that they only expected to pay for transfer costs after full payment of the purchase price of the property, or after registration, this would be against even the usual experience of the

second respondent. It would also be contrary to the provisions of the settlement agreement, as set out above. In any event, he did not completely deny that the respondents were required to pay the transfer costs in terms of the settlement agreement. He put it no higher than to state that he cannot remember whether he was told about it.

[92] The only challenge in this regard concerned whether that transfer costs were in fact due given that no lodgement date had been obtained by the conveyancer, which was a requirement according to the respondents. This requires interpretation of the applicable provisions. First, what is clear from clause 6.1 is that transfer of the property into the name of the respondents could only be effected once they had paid the transfer costs in terms of clause 7. Second, in terms of clause 7.1, read with 6.2, those costs were payable on demand by the conveyancer. Third, the demand by the conveyancer could not be made until *“a reasonable time before the date which the conveyancers reasonably determine as being the anticipated lodgment date for the transfer taking into consideration disbursements that have to be made”*. In other words, the conveyancer had to reasonably determine the anticipated date for lodgement, and within a reasonable period before that, make the demand for payment. Thus, there are two periods contemplated in this clause in respect of which the conveyancer was required to make a reasonable determination. One is the reasonable time for making a demand for payment, and the second is the reasonable time of an anticipated date for lodgement.

[93] What flows from that conclusion is that the conveyancer was afforded discretion to consider the two periods involved, but that such determination had to be reasonable. Also clear from the wording of the clause is that the lodgement date would be ‘anticipated’ when the demand was made. The Cambridge dictionary defines anticipates as follows: *“to imagine or expect that something will happen; to take action in preparation for something that you think will happen”*; whilst the Collins dictionary explains that *“[i]f you anticipate an event, you realize in advance that it may happen and you are prepared for it”*. Taking these definitions into account, I am of the view that there was no requirement for the conveyancer to have obtained a definite date before making

a demand for payment. In any event, as I have already indicated, even the second respondent did not deny Badenhorst's evidence that, according to the usual conveyancing practices a lodgment date can only be obtained after the signing of the transfer documents, which in turn required that the conveyancing costs be paid. The question rather is whether the conveyancer's demands in this case, if they were made, were issued taking into account those two reasonable periods.

[94] As it turns out, this issue may be academic because there is no proof in the record that the two invoices that formed the basis for the demands and cancellation, were sent by the conveyancer to the respondents at the time of their issue. The two invoices were for the conveyancer's costs dated 8 January 2014 and the City's account, indicating a validity period between 12 March 2014 and 16 April 2014. There is no proof that the two were brought to the attention of the respondents at any time prior to 13 May 2014. No confirmatory affidavit was obtained from the conveyancer in this regard. In fact, in the papers, the applicants introduced the invoices as annexures that were sent with the first breach notice which was, in the end, only sent on 13 May 2014. I do note that, in his letter dated 9 April 2014 but only forwarded on 13 May 2014, Badenhorst alleged that the respondents had failed to pay the conveyancing costs. However, even there, no proof was attached to show that the conveyancer's invoice had previously been sent to the respondents or that any demand had been made by the conveyancer as contemplated in the settlement order.

[95] As for the rates clearance invoice from the City, it indicates that it was valid from 12 March 2014 until 16 April 2014, and Badenhorst testified that this means it was issued to the conveyancer on 12 March 2014. Again, there is no evidence that it was sent to the respondents on any of the dates spanning its validity. Furthermore, although Badenhorst's breach notice was dated 9 April 2014, his evidence was also that he did not send it on that day because of instructions he had received from his clients. He confirmed as much to Apollos in his e-mail of 14 May 2014. As a result, I am unable to find that the respondents had been placed in *mora* with regard to the two invoices prior to the date of 13 May 2014.

[96] By the date that the first breach notice was dispatched by Badenhorst of 13 May 2014, the City's invoice was no longer valid, having expired on 16 April 2014. I have not been referred to any further invoice that was issued by the City or which formed the basis for the notices of breach sent to the respondents. As a result, even if the respondents had not settled the expired invoice by 13 May 2014, on the applicants' own version the validity period of the bill had expired. And the common cause evidence was that the rates bill was eventually reduced substantially, by the respondents, although it is not clear when or to what amount. As a result, the applicants have not established the basis on which they continued to demand payment of the amount in that specific invoice.

[97] That does not mean, however, that the respondents were no longer responsible for payment of the conveyancing costs. It was always a requirement of the settlement order that the respondents would pay for all for the conveyancing costs in order for lodgment and thereafter, transfer to take place. The invoice for the conveyancer's fees had not expired and remained due for payment by the respondents so that transfer could take place. There was accordingly lawful basis for the applicants to issue a notice on 13 May 2024 for the respondents to comply with the terms of the settlement by paying for conveyancing costs. Even if that notice was the first notification that came to their attention, it constituted a demand for payment in terms of the settlement order, which required remedy within 30 days.

[98] The respondents deny having received any breach notices from the applicants, or any notification thereof. They state that they had terminated the mandate of Apollos not long after the conclusion of the settlement agreement and did not receive any communication from him or from the applicants. They also state that they did not obtain a copy of the settlement agreement, an issue I deal with later below.

Apollos's mandate

[99] I now deal with the alleged termination of Apollos's mandate. I preface this part of the discussion by pointing out that, apart from the oral evidence in court, much of it is based on correspondence exchanged between the two attorneys representing the parties at the time, namely Badenhorst and Apollos, and although the former is still on record and gave evidence, the latter is no longer involved and did not give evidence. I consider the correspondence to be relevant and necessary corroboration of the events at the time in question, and insofar as it constitutes hearsay evidence regarding Apollos, I consider it admissible for determination of this aspect.³³ In this regard, I take into account the fact that Badenhorst gave detailed, undisputed evidence regarding all this correspondence, which was penned by himself on the basis of his interactions with Apollos at the time in question, another issue that was not disputed. Only the two attorneys involved in the discussions could give evidence in this regard. It was also not disputed that it was often left to Badenhorst to confirm the contents of his telephonic discussions with Apollos. It is not unusual for attorneys to commit verbal discussions to writing. He wrote the letters while he was still imbued in the events in question. I have no reason to disregard that evidence.

[100] By contrast, the evidence of the second respondent was very vague regarding the circumstances under which he allegedly terminated the mandate of Apollos or when this occurred. And unlike the applicants, the respondents did not seek to obtain the evidence of Apollos which would have provided assistance on these issues, particularly because the specific issues involving the conclusion and implementation of the settlement agreement and the termination of Apollos' mandate would have been within the combined specific knowledge of the second respondent and Apollos.³⁴ Upon inquiry, the counsel representing the respondents informed me in this regard that the second respondent "*no longer had a relationship with Apollos*". It is difficult to decipher exactly what was meant by this statement from the bar. However, what is clear is that no attempt was made to contact him by, or on behalf of the respondents.

³³ See section 3 of the Law of Evidence Amendment Act 45 of 1988.

³⁴ See *Tshishonga v Minister of Justice and Constitutional Development and Another*.

[101] In terms of clause 4.1 of the agreement, the address of Apollos was the *domicilium citandi et executandi* for purposes of giving notice and serving legal process upon the respondents. Any change thereto was required to be in writing in terms of clause 4.2. Accordingly, apart from Badenhorst, Apollos is the only other person who would be knowledgeable about these issues. I was informed that the applicants' legal representatives unsuccessfully tried to obtain the current contact details of Apollos, in order for him to assist with this matter, and discovered that he is no longer registered as a legal practitioner with the Legal Practice Council.

[102] Turning to the evidence, the record contains an e-mail from Apollos dated 14 May 2014 in response to Badenhorst's notice of 13 May 2014, which stated as follows:

"I refer to your notice dated 9 April 2014 but received on 13 May 2014

...

I am sure that our client will remedy the situation timeously. In fact, I have consulted with [the second respondent] this morning and impressed upon him that this is a matter of extreme urgency and also as to the implications of not meeting their obligations.

I will revert in the next week or so as to our further instructions." (my emphasis)

[103] Badenhorst confirmed in his evidence that he did indeed receive the e-mail from Apollos on 14 May 2014, and that the breach was not remedied as promised, which resulted in him issuing a further breach notice on 25 June 2014. I have already summarized the evidence of Badenhorst regarding his regular interactions with Apollos during the period between 13 May 2024 and 25 September 2014, when the applicants state that they cancelled the agreement, whilst Apollos continued to represent the respondents, seeking indulgences on their behalf. The second respondent's evidence was to simply dismiss this, stating that he was no longer in contact with Apollos by that stage, though he provided no detail in this regard. My impression from his evidence was

that he did not want to talk about this issue, or any of his erstwhile legal representatives for that matter.

[104] Similar allegations were made at paragraphs 60 to 65 of the founding affidavit as those made in the oral evidence of Badenhorst. At paragraph 62, the founding affidavit specifically quoted the contents of Apollos' e-mail of 14 May 2014. In answer to those paragraphs, the answering affidavit states as follows:

"AD paragraph 60 to 65

110.1 The [respondents] has no knowledge of the content of these paragraphs, do not admit same and put the applicants to the proof thereof.

110.2 I can unfortunately not recall any discussions with Apollos as we terminated his mandate not long after settlement.

110.3 In any event we had made about 50 payments totaling about R500,000 towards the purchase of the property and in accordance with the settlement agreement." (my ephasis)

[105] The oral evidence of the second respondent did not provide any more clarity than the highlighted portion above relating specifically to what discussions if any were held with Apollos, and when, and remained veiled in the mystery of the alleged termination of Apollos's mandate, which I consider below. But as regards Apollos' email of 14 May 2014, the second respondent offered no plausible answer or explanation, and instead persisted in his denial of the applicants' right to demand any conveyancing fees despite the clear terms of the settlement agreement, which I have already dealt with. And as indicated in the portion of the answering affidavit quoted above, the respondents' highwater mark in this regard is that the second respondent cannot recall whether Apollos informed him of the first breach notice, thus not denying it. I accordingly find that

the contents of the first breach notice came to the attention of the second respondent on 14 May 2014.

[106] During cross examination, it transpired that the second respondent never issued an oral or written termination of mandate to Apollos. He simply stopped returning his messages though he could not give details as to when this was. Given that he stated in the answering affidavit and in his evidence in chief that he had terminated Apollos' mandate, this contradiction remained unexplained. But it does support the possibility that he was informed of the breach by Apollos on 14 May 2014 and simply chose to ignore the issue. That is a strong probability which is supported by Apollos's email of that date.

[107] The evidence shows that Apollos did continue to communicate and interact with the second respondent after the signing of the settlement agreement. He was not ex-communicated immediately after the signing of the agreement, as alleged in the answering affidavit and in chief by the second respondent. After all, the second respondent's own evidence is that Apollos provided him with amongst other things, Badenhorst's banking details for purposes of making payments in terms of the settlement agreement, which could have only been after the signing thereof.

[108] There are also other indications that Apollos continued to represent the respondents beyond the settlement agreement and was in contact with the second respondent. Apart from Apollos' e-mail of 14 May 2014, was the second breach notice of 25 June 2014 in which Badenhorst stated as follows:

“1. Our telephonic discussion towards the end of May 2014 concerning our letter of 9 April 2014 which was unfortunately only sent out on 13 May 2014, refer.

2. In view of the fact that your offices are the chosen *domicilium citandi et executandi* of the Purchaser and your acknowledgement of receipt of the letter of

demand, you are hereby informed that should the breaches not be rectified by 10 July 2014, which is a date in excess of 30 days calculated from the date of receipt of the letter, my client intends cancelling the agreement of sale and claiming possession of the property...” (my emphasis)

[109] This letter confirms that, apart from the e-mail response of Apollos dated 14 May 2014, there was further communication between the two attorneys, in the form of a telephonic discussion towards the end of May 2014, and this was regarding the first breach notice. The letter of 25 June 2014 also served to confirm that on 14 May 2014 Apollos had acknowledged receipt of the breach notice. All of this shows that the first breach notice was within the knowledge of Apollos. Importantly, the letter also served to confirm that the *domicilium* address for the respondents had not changed. Surely, if the mandate of Apollos was terminated by then, this was the opportunity for him to indicate as much in response to that letter, whether in written form or *via* the phone.

[110] The next letter from Badenhorst was the cancellation letter dated 25 September 2014. It was very detailed and attached a copy of the settlement agreement, the court order and the two breach notices, and was sent by registered mail to the respondents and Apollos. Paragraphs 3 to 6 thereof are instructive:

“3. I confirm that during the numerous telephonic discussions between [Badenhorst] and your Apollos after the breach notices/demands, Apollos had acknowledged that he had received these breach notice demand letters and was still awaiting instructions from the Purchaser.

4. I further refer to the recent telephonic discussion between the writer and Mr. Apollos, some two weeks ago, when he undertook to take urgent instructions from the purchaser and to revert to me urgently.

5. I confirm that on 25 September 2014 the writer was informed by Mr. Apollos that he was still awaiting instructions from the Purchaser, to enable him to respond to the Seller's breach notices/demands referred to above.

“6. [Apollos] informed me that he had in fact gone as far as to request the friend of the [second respondent] Pastor [Le Fleur], on Monday 22 September 2014, to request the second respondent to communicate with Mr. Apollos urgently, but to date has not heard from him yet.”

[111] This letter confirms that as at that date, Apollos still considered himself as the representative of the respondents. At paragraph 3 of the letter there was specific mention made of discussions held between the two attorneys after Apollos' receipt of the breach '*notices demands*'. In other words, after the second breach notice of 25 June 2014, there was yet another discussion between the two attorneys. Badenhorst recalled in his oral evidence that, upon receipt of this cancellation letter, Apollos had telephonically contacted him and begged for more time to submit further proposals on behalf of the respondents.

[112] I do observe that the letter of 25 September 2014 suggests that the second respondent was ignoring the attempts of Apollos to obtain instructions from him. This is indicated by the repeated promises attributed to Apollos, that he was awaiting instructions from his clients, effectively since the last discussion after receipt of the second breach notice. It is also indicated by paragraph 6 of the letter in which it is recorded that Apollos has gone as far as to seek the intervention of a third party in communicating with the second respondent. I am accordingly willing to accept that sometime between 25 June 2014 and 25 September 2014 - it is not clear when exactly - the communication between Apollos and the second respondent broke down. Throughout that time, it appears that Apollos was not informed that his mandate was terminated. Hence his repeated promises to revert with instructions to no avail, and his recorded attempts to seek the intervention of a third party to communicate with the

second respondent on 22 September 2014. This accords with the second respondent's evidence that he simply ignored Apollos' messages.

[113] But that was not the end of Apollos' involvement in the matter. In a letter dated 8 October 2014, Badenhorst recorded events following the cancellation letter of 25 September 2014, as follows:

“1. Our letter of 25 September 2014 cancelling the agreement between our respective clients and subsequent telephonic discussion, after receipt of the letter and after a consultation with your client refers.

2. I confirm that you agreed to let me have a written proposal in this regard.

3. I am still awaiting same.” (My emphasis)

[114] The significance of the highlighted portion is the recordal that Apollos had held a consultation with the second respondent after receiving the cancellation letter of 25 September 2014, and thereafter promised to forward a written proposal, which had not been received by 8 October 2014. This can only mean that, sometime between 25 September 2014 and 8 October 2014, Apollos managed to bring the fact of the cancellation of the agreement to the attention of the second respondent. There would be no other reason for a consultation after receiving the letter of 25 September 2014. Still further, there would be no basis, other than the instructions of his client, to promise to revert with a written proposal. This also accords with the evidence of Badenhorst that after receipt of the letter Apollos had pleaded for more time on behalf of his clients. Then, in a subsequent letter dated 1 December 2014 Badenhorst stated as follows:

“1. Previous correspondence and our discussion yesterday refers.” (my emphasis)

[115] This indicates that Apollos was still in the picture as at 30 November 2014. Furthermore, it was not disputed during the evidence Badenhorst that he was in regular contact with Apollos until approximately the middle of July 2018, with the latter seeking indulgences on behalf of the respondents. Very rarely will a practicing attorney persist in such conduct, without instructions. In fact, it would amount to misconduct for a legal practitioner to enter into, and continue with negotiations on behalf of someone without instructions to do so. But in this case, the reason was recorded in the letters I have specifically discussed, namely that Apollos was in communication with the second respondent, save for the period of a lapse in communication that I have identified.

[116] To summarise this part of the discussion, I have found that the second respondent became aware of the first breach notice on 14 May 2014. As from that date, the respondents had 30 days to remedy the breach, which would have lapsed in or about 13 June 2014. The respondents have not established that they ever complied with that notice since no payment was ever made to the conveyancer or to Badenhorst in respect of at least the conveyancer's invoice. If the second respondent was aware of the first breach as I have found, and never remedied it, as the evidence establishes, then the respondents remained in breach, and were still in breach by 25 September 2014. The evidence further establishes that the respondents were made aware of the cancellation of 25 September 2014, as indicated by the correspondence of 8 October 2014. In terms of clause 8 in Annexure A, if the respondents failed to remedy the breach for a period of 30 days after receiving the breach notice, the applicants were entitled to declare the agreement cancelled and to resume possession and occupation of the property and to recover any damages suffered.

[117] In any event, the settlement agreement provided that Apollos was the *domicilium* address and no one had effected a change to that provision or to the *domicilium*. Service upon him amounted to service upon the respondents. This is why the applicants' legal representative was at pains to confirm in the second breach notice that Apollos remained the *domicilium*. Thus, even if the respondents did not become in fact become aware of the breach notices and the cancellation at the time they were issued,

which I have found was not the case, they are deemed to have received proper notice thereof in terms of the agreement.

[118] In the result, I conclude that the settlement agreement was validly cancelled by means of the letter of 25 September 2014 which came to the notice of the respondents, at the latest by 8 October 2014. The reasons for cancellation were failure to pay for the conveyancing costs in order to facilitate lodgement and later transfer of the property into the names of the respondents. Those were requirements of the sale agreement (annexure A), read with the draft mortgage bond in annexure B. The respondents were accordingly in breach of both annexures.

Payments due until cancellation³⁵

[119] I have already set out the provisions through which the agreement facilitated the sale of the property. In sum, it provided for payment of the purchase amount of R2.5 million at R20,000 per month which was to increase after two years to R30,000 per month, and ten years later the full outstanding balance would be due in a lump sum. The monthly payments of R20,000 were due with effect from 1 December 2013. The sale agreement contained an acceleration clause, which first required two separate written notices within the same calendar year, for remedy of the breach within 10 days. It is common cause that the applicants are not relying on a breach in this regard and that no notice was issued with regard to failure to pay instalments in terms of the sale agreement, read with the draft mortgage bond. However, the payments were due in terms of the sale agreement until cancellation of the agreement on 25 September 2014. That is because of the ‘no indulgence’ and ‘no waiver’ clauses in annexure A, which provided as follows:

“16.5 No indulgence which either party (*“grantor”*) may grant to the other (*“the grantee”*) will constitute a waiver of any of the rights of the grantor, who will not thereby be precluded from exercising such rights against the grantee.

³⁵ Paras 1.4 and 1.6 of the referral order of 10 August 2022.

16.6 No waiver of its rights under this agreement by either party will be effective unless such waiver is express and is in writing.”

[120] There is no evidence that the applicants ever waived their rights to receive any payment in this matter. In this regard, the evidence of Badenhorst is that by 25 September 2014 an amount of R2,737,273.44 was due and owing in respect of the purchase price. This was because, according to his allocation of the payments made by the respondents by that date, only the debt of the appeal costs had been covered, though not complete. Save to dispute that allocation, which is an issue I deal with below, his calculations, which were very detailed, were not disputed, and they took into account the applicable interest rates at different time periods.

[121] Another payment due by the respondents in terms of the agreement is the amount of R250,000.00 towards the taxed appeal costs, in equal monthly instalments of R10,000.00. This was in terms of clause 5, which provides as follows:

“5. COSTS

5.1 The Defendants will, jointly and severally, the one paying the other to be absolved, pay the Plaintiffs’ costs in respect of the Appeal as taxed in the amount of R250 000-00 (TWO HUNDRED AND FIFTY THOUSAND RAND), (including VAT);

5.2 The parties will further be liable for the payment of their own costs in respect of the Plaintiffs’ action and various applications, postponements and the like.

5.3 The total costs payable as set out above will be payable as follows:

5.3.1 to be paid in equal monthly installments of R10 000-00 (TEN THOUSAND RAND) per month, the first installment payable on or before 7th of November 2013 and subsequent payments on or before the 7th day of each and every succeeding month until full payment;

5.3.3 All payments are to be made into Plaintiffs' attorney of records trust banking account as set out below:

...

5.2.5 The capital amount of the costs will bear no interest unless the Defendants are in default.

5.2.6 Should the Defendants however default in the making of any payment due in terms of this agreement to the Plaintiffs, the capital amount in respect of the costs as set out in 5.1 above or any balance thereof, will immediately become due and payable, (default meaning that the payment due is not paid into the trust banking account as set out above, within 7 (seven) days of the due date thereof), or whatever balance may be due at that stage will further bear compound interest at the rate of 15,5% (FIFTEEN COMMA FIVE PER CENT) per annum from 1 October 2013 to date of final payment."

[122] As appears from clause 5.2.6, default in making payment of the taxed appeal costs, which means failure to pay within seven days of the due date, would automatically trigger acceleration of the capital amount plus compound interest calculated at the rate of 15.5% with the effect from 1 October 2013 to date of final payment. No notice was required in terms of that provision.

[123] According to Badenhorst the respondents had paid a total amount of R110,000.00 by 25 September 2014, in monthly instalments of R10 000, all of which he allocated towards the taxed appeal costs. By that date, the total purchase price had

increased to R2,737,273.44, due to interest, and the monthly arrears owed amounted to R200 000. It was only on 8 June 2015 that the full amount payable towards the appeal costs was covered, amounting to R248 879.00. That is when he first allocated payment towards the purchase price, in an amount of R11,879,84. The payments received were allocated towards interest before allocation to the capital amount. The respondents continued paying monthly installments mostly in the amount of R10,000.00, although they were sporadic, until 5 June 2017, which is when the last payment was received from the respondents. From the proof of payments attached to the answering affidavit, it is common cause that the total amount paid by the respondents was R407 000, and not R500 000 as claimed in the answering affidavit and as subsequently mentioned in the referral order.

The allocations

[124] As I have stated, it is Badenhorst's allocation of the payments that is at issue, because, according to the respondents, what they were paying towards was the purchase price, and nothing else. It is otherwise common cause that no directions or instructions were given to Badenhorst for allocation of any of the payments. Naturally, this is an issue that must be determined with reference firstly, to what the agreement contemplated, taking into account the terms of the agreement and relevant context, as set out in the case law earlier.³⁶

[125] In terms of the agreement, the respondents were required to pay a monthly total amount of R30,000, made up of R10,000 in respect of the appeal costs and R20,000 in respect of the purchase price. Instead, they only paid monthly amounts of R10 000, without explanation or instruction regarding allocation thereof. They were thus in default of a monthly amount of R20 000 per month from the very beginning. Secondly, the first instalment payable towards the appeal costs was due on 7 November 2013, and the respondents resumed their payments on 11 November 2013. On the other hand, the

³⁶ *Engelbrecht and Another v Senwes Ltd*, paras 6-7.

first payment towards the purchase price was only due on 1 December 2013, which was some weeks after the first payment was due in that regard.

[126] Thirdly, what the respondents were required to pay towards the purchase price was a minimum of R20,000 per month. Even in the oral evidence of the second respondent, it was never contended that the respondents ever tried to make monthly payments in that amount in compliance with the agreement. To the extent that it is alleged that the agreement was for purchase of the property at R10,000 per month, there is no such provision in the agreement. The only provision in the settlement agreement for payment of R10,000 per month is in respect of the taxed appeal costs.

[127] Fourthly, unlike in the case of the purchase price, any default in regard to the appeal cost payments immediately triggered operation of the automatic acceleration clause. In other words, if Badenhorst had allocated the monthly payments towards the purchase price, the resulting debt would have been even bigger. This is one of the reasons he gave for why he considered it in the respondents' interests to first allocate the payments towards the costs' debt.

[128] In my view, given all the considerations above which are based on the interpretation of the provisions of the agreement, Badenhorst cannot be faulted for allocating the monthly payments of R10 000 towards the appeal costs. I consider his explanation to be reasonable and an approach which was both faithful to the text of the agreement, and which made common sense.

[129] In addition to all of this, the law recognizes that a debtor, such as the respondents in this case, who fails to expressly indicate how payments of a debt are to be appropriated, may instead give such indication tacitly or impliedly.³⁷ In the absence of direction from the debtor, a creditor is entitled to appropriate payments based on his or her dealings with the debtor, which, on application in this case, is the settlement agreement. The creditor may also appropriate the payments based on amounts paid

³⁷ See Bradfield GB, *Christie's Law of Contract in South Africa*, 8th edition, page 518.

which correspond with the debt owed,³⁸ which is what Badenhorst testified he did, based on the regular amounts of R10 000 per month. Much was made of the payments made in the amounts of R80,000.00 on 8 December 2014, and R50,000.00 on 2 February 2015, to refute Badenhorst's allocation towards the appeal costs. However, it is clear that these amounts were exceptions and not the norm, and according to the common cause evidence, the appeal costs debt was due and only fully paid, even with inclusion of those amounts, on 8 June 2015. It is also clear that the debt relating to the appeal costs was more onerous because of its automatic acceleration clause and interest clause.

[130] In this regard, there are applicable common law principles which include the following³⁹: (a) The general principle is that the payment ought to be appropriated to the debt which the debtor had the most interest in discharging, that is to say the debt bearing most heavily on the debtor; (b) An admitted debt must be paid before a disputed debt; a debt that is due must be paid before one not yet due; an enforceable debt must be paid before an unenforceable one; (c) If capital and interest are owing on the same debt, the payment must be credited first to interest and, if not exhausted, to capital, whether or not the running of interest is affected by the *in duplum* rule. It is clear from the evidence of Badenhorst that his allocation of the respondents' payments was governed by these principles.

[131] On the other hand, the respondents' version that they were only paying towards the purchase price and not towards the appeal costs does not accord with the terms of the agreement. As I have already highlighted, there is no requirement in the settlement agreement for monthly payment of R10,000 in respect of the purchase price. The second respondent could not explain what informed his decision in this regard, stating that it arose from the discussions preceding the settlement, while at the same time stating that it arose from the settlement agreement itself. Coupled with this was a denial that the parties reached any agreement for payment of the taxed legal costs resulting

³⁸ *Ibid.*

³⁹ See Christie's Law pp 519 – 521, and the authorities cited therein. *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd* [2008] 3 All SA 395 (SCA) para [46].

from the appeal, one of the issues that have been referred to oral evidence⁴⁰. This denial is contrary to the express provisions contained in clauses 5 to 5.2.6 of the agreement, and has no merit. Badenhorst explained the reason for inclusion of the appeal costs component in the agreement, namely that by then the applicants had taxed their legal costs in the appeal and executed attachment of the respondents' movable property.

[132] Another basis for the respondents' allegation that they were paying towards the purchase price and not the taxed appeal costs is the alleged termination of the mandate of Apollos, which I have already dispensed with, and further that the respondents did not obtain a copy of the settlement agreement and merely paid in accordance with the second respondents' understanding of the agreement. Before dealing with this latter issue, I observe that the subsequent conduct of the second respondent indicates that he was aware that he was paying towards the taxed legal costs as a requirement flowing from the settlement agreement.

[133] This appears from the contents of his correspondence dated 6 January 2016, which he addressed to the applicants' then Secretary General, Dr Stafford Petersen, as follows:

"May I please humbly request your kind and generous consideration of waiving our court fees in terms of our agreement made in October of 2012 please. Since that agreement we have faithfully and punctually paid almost R400,000 at R10,000 per month and in addition we have already spent in excess of approximately R1.3 million on our own attorney's fees for over six years litigation fees. Since we... and yourselves... had an amicable settlement in good faith and we tried to keep up our end of the agreement under difficult and strenuous economic climate..." (my emphasis)

⁴⁰ Referral order, para 1.6.

[134] The specific reference to court fees was significant, and the second respondent could not explain it when confronted in cross examination, save to confirm that he was referring to the requirements of the settlement agreement. When it was put to him that this meant he understood that the agreement includes settlement of legal costs for the failed appeal he disputed this, stating that he was referring to the R2.5 million portion of the settlement. But as I have already illustrated, the provisions of the agreement do not support that allegation.

[135] The issue did not end there. On 20 July 2017 Dr Petersen wrote to the second respondent and stated as follows, amongst other things:

“Having received a financial statement from our Attorneys, we have discovered that after the R250 000,00 thousand was deducted by the Attorneys for the fees that was imposed by the courts for the failed appeal, an amount of R277 000.00 was transferred to us towards the payment of the offer of R2 500 000.00...” (my emphasis)

[136] Badenhorst confirmed that this was a reference to the taxed appeal costs as provided in the agreement. This is clear from the specific mention of the amount of R250 000,00. The second respondent confirmed that he received this letter, but his evidence was that he did not challenge the allocation of the respondents’ payments towards the taxation costs at that stage or ever. He could not explain why no challenge or query was ever made in this regard. The reason can only be that he was aware of the requirement in the settlement agreement for payment of the taxed appeal fees and it was not a surprise to him. It would make no sense for him to let an issue involving such large amounts of money slip by, without raising alarm. His attitude in this regard is corroboration of his earlier correspondence of 6 April 2016 in which he made specific reference to court fees. In fact, the second respondent responded to the e-mail of 20 July 2017 by e-mail dated 26 March 2019, expressly stating that *“we make this offer in line with your last e-mail dated 20 July 2017”* indicating that the contents of that letter were acceptable to him, and were not new.

[137] Turning to the allegation that the respondents did not obtain a copy of the settlement agreement after signing it, one difficulty with the respondents' version is that even if the mandate of Apollos was terminated which I have already found was not, it is common cause that they were also represented by junior and senior counsel who were present at the signing of the settlement agreement. Similar to the details relating to Apollos' mandate, the second respondent was tight-lipped regarding the two counsel's involvement after the signing of the agreement. The difference is that, although he claimed that Apollos had thrown him to the wolves at that settlement discussion, there was no similar allegation regarding counsel who were both present. The unanswered question then is why could he not obtain a copy of the settlement agreement from them. Similar questions arise in respect of the second respondent's now deceased brother who accompanied him to that meeting.

[138] There remain many unanswered questions relating to the second respondent's alleged lack of knowledge of the terms of the settlement agreement. He could not explain how and where he obtained the bank details into which he was supposed to pay, which were the bank details of Badenhorst's trust account, and was very evasive when questioned in this regard. At first, he stated that he obtained those details from Apollos although he could not give details of when this would have occurred. When it was put to him that, if he obtained the bank details from Mr Apollos, this could have only been after signing the settlement agreement, which he disputes, he stated that he could have obtained the bank details from Pastor Le Fleur, but again, he gave no details of when this would have occurred. Eventually, however, he agreed that it was possible that Apollos gave him the bank details on another day after signing the settlement agreement. In the same breath, he stated that it could have been on the same day of signing the settlement agreement.

[139] He was repeatedly asked during cross examination to provide details regarding the circumstances in which Apollos would have furnished him with the banking details, but failed to do so. One observation that may be made is that it would make no sense

for Apollos to only furnish the second respondent with the bank details without giving him a copy of the settlement agreement, because the banking details were contained in the settlement agreement. It would have been efficient for Apollos to rather provide his client with the whole agreement. Besides, the evidence of Badenhorst was not challenged that he personally made the photocopies which he distributed to everyone present in the room on the day of the settlement agreement. It was also not suggested that Badenhorst gave copies to everyone in the room on that day except for the second respondent, which would also make no sense and be highly improbable.

[140] Apart from all of this, the second respondent gave no reason which prevented him from requesting a copy of the agreement from any of the people who were present, including Badenhorst and the applicants. In this regard, the common cause facts were that he remained in discussions with the applicants for some years after 2013, at least until 2019 when these proceedings were launched. There were many discussions held and plenty of correspondence exchanged between the parties during that period relating to the implementation of the settlement agreement, and possible other solutions to the issues between them. It is simply inconceivable that the second respondent did not have a copy of the settlement agreement during that whole period. Furthermore, according to the evidence, at no point did the second respondent ever request a copy of the settlement agreement on the supposed basis that he did not have it.

[141] The probabilities on this issue are decidedly against the respondents' version. According to the second respondent, he 'smelled a rat' when he overheard a telephone conversation between the applicants' counsel and one of his clients immediately following the signing of the settlement agreement. It is highly improbable that he would not have obtained a copy thereof, whether immediately or soon thereafter, to assure himself as to its contents.

[142] Still further, on the second respondent's own version, he was not only acting for himself, but was representing his congregation. One assumes that he would have reported back regarding the settlement talks, and the most obvious and important

accountability measure would have been to present them with a copy of the agreement. After all, according to him, he had just committed the congregation to payment of R2.5 million over a period of 10 years. Why would anyone commit to pay that amount of money without any document presented to them? That includes him as a learned man who has bought, sold and project-managed numerous property purchases, according to the evidence.

[143] I therefore find that the respondents were indeed required to make payments in respect of the taxed appeal costs in the amount of R250 000, in monthly instalments of R10 000, and were aware thereof, and that the applicants were entitled to allocate the respondents' payments towards those costs.

[144] Since there is no objection to the mathematical calculations of the applicants, I find that all the payments made by the respondents, totaling R407 000, were allocated towards what was due and owing in terms of the agreement, namely the taxed costs and the purchase price of the property. The evidence established that as at 25 September 2014 the total purchase price debt amounted to R2,737,273.44 due to interest, and the monthly arrears owed amounted to R200 000; and of the appeal cost debt of R250 000, the respondents had paid a total amount of R110,000.00. Thus, at the point of cancellation, there were monies owed in respect of both of those debts, and accordingly, the fact that some of the respondents' payments were made after cancellation does not alter the fact that the monies were due and owing. This is because firstly, in relation to the appeal costs, clause 5.2.6 provided as follows:

“Should the defendants however default in the making of any payment due in terms of this agreement to the plaintiffs, the capital amount in respect of the [appeal] costs or any balance thereof, will immediately become due and payable, (default meaning that the payment due is not paid into the trust banking account as set out above within seven days of the due date thereof), or whatever balance may be due at that stage will further bear compound interest at the rate of 15.5%... per annum from 1 October 2013 to date of final payment.”

[145] Similarly, the sale agreement contained several clauses which lend themselves to the conclusion that, even without demand, the respondents were liable for payment, namely clauses 8 (default clause), 12 (non-waiver clauses), 16.5 (no indulgence clause) and 16.6 (no waiver clause). Clause 12 is the only one I have not previously set out, and it provides as follows:

“No latitude, extension of time or other indulgence which may be given or allowed by the seller to the purchaser or vice versa in respect of the performance of any obligation in terms of or arising from this agreement shall be a waiver or otherwise affect any of the rights of the seller against the purchaser or vice versa.”

[146] To the extent that it was suggested that the respondents' monthly payments entitled the respondents to transfer of the property, there is no basis for this suggestion in the agreement because there were several suspensive conditions to be met before transfer, including payment of the conveyancing fees. The evidence was also that the respondents have never demanded transfer of the property since conclusion of the settlement agreement. There is also no evidence that the respondents ever offered to pay for the conveyancing costs, even whilst the second respondent was in direct communication with the applicants or their legal representative.

[147] On the other hand, the undisputed evidence of Badenhorst was that after the conclusion of the settlement agreement, the applicants' priority was the registration of the property. Hence the first breach notice of 9 April 2014. And hence the decision to not issue a demand in respect of the failure to pay the monthly instalments of R20,000 which were due in terms of the sale agreement. None of this evidence was disputed. In other words, the evidence shows that if there was a way possible to effect the transfer to the respondents, the applicants would have facilitated it. The only obstacle, according to the applicants was the respondents' failure to comply with the suspensive condition of paying for the conveyancing fees.

[148] The applicants could not have allocated the payments towards the City's rates invoice or the conveyancer's invoice without instructions from the respondents because that would have meant that no installments were made by them in respect of the purchase price and the appeal costs. The payment for transfer costs was a separate payment, involving amounts specified in invoices, which were due in terms of the agreement to the conveyancer. In law, one of the indications regarding how a payment is to be appropriated is where a creditor has demanded payment of a particular debt, and the payment amount corresponds with the demand.⁴¹ There was no such amount which corresponded either with the City's invoice or that of the conveyancer in this case. In any event the respondents have at no stage suggested that the monthly payments were intended as payment of the conveyancing costs.

[149] Since cancellation of the agreement it is common cause that, to date, the respondents have never issued any court process for restitution that they now argue they are entitled to. Instead, they opted to negotiate for a further, reduced, agreement, an issue I turn to below. In any event, as the applicants point out, any such restitutionary claim would long have prescribed by now given that the common cause facts show that the respondents made payments between 2013 and 2017, and that the second respondent claims he came to the knowledge of all available facts in that regard, at the latest in 2019 when these proceedings were launched. In terms of the Prescription Act 68 of 1969 such a claim would constitute a debt which prescribes within 3 years. Furthermore, clause 6 of the agreement stipulates that the parties to the settlement agreement will have no further claims against one another except as provided for in the settlement agreement, which constitutes the entire agreement between the parties.

Alleged new agreement

[150] It will be remembered that one of the points raised in the answering affidavit is that the court should grant a declaratory order to the effect that the parties entered into

⁴¹ *Italtile Products (Pty)Ltd v Touch of Class* 1982 (1) SA 288 (O) 291A-B.

a new agreement after the cancellation of the settlement agreement.⁴² The new agreement was said to be based on a purchase price of R1,000,000. The second respondent testified that the alleged new agreement is based on Dr Petersen's letter of 20 July 2017 in which it was stated that no offer below R1m would be considered by the applicants. During argument the respondents' counsel disavowed any reliance on that issue, stating that no such relief had been sought. It is not clear whether that also means the respondents no longer insist that a new agreement was entered into.

[151] To the extent that it is necessary to decide this issue, the evidence does not support the allegation that a new agreement was entered into between the parties. To start specifically with the letter of 20 July 2017 which the second respondent alleges constituted a new agreement, its contents stated as follows:

“As you can see that your offer is well below the original offer from yourself. The Moderateur is wanting to settle this matter as well, and it is with this in mind that we suggest that you up your final offer of a cash amount of R1,000,000... Should such an offer be forthcoming the Moderateur will certainly motivate strongly that the Executive Council consider accepting the offer. We do not see our way clear of accepting an offer anything less than R1,000,000. We anticipate your favourable response ...”

[152] In cross examination, the second respondent conceded that this letter did not constitute an agreement, and that, in fact no agreement was reached in the end. That is the death knell on the alleged new agreement.

[153] What the evidence shows rather, is that the parties continued to exchange proposals, including two draft agreements from the applicants dated 18 March 2018 and 18 July 2018, but no agreement was reached. It was in fact the respondents who failed to respond to these draft proposals despite prodding on 16 August 2018 and 28 August 2018. Then, on 9 October 2018 the second respondent sent what was effectively a

⁴² Answering affidavit, paras 82, 85 to 85.5 and 121.

counter-proposal, which was rejected by the applicants on 15 November 2018. That is the extent of the attempts to enter into a new agreement, and it shows that no agreement was concluded. As the applicants point out, any such agreement would be required to comply with the Alienation of Land Act 68 of 1981, which requires, amongst other things, that such an agreement be written. No such document has ever been produced by the respondents in this matter. Similarly, the settlement agreement provides, at clauses 7 of the main agreement and 11 of the sale agreement, that any variation or cancellation will only be valid if reduced to writing and signed by the parties.

[154] What remains for consideration is the respondents' right to occupy the property following cancellation of the settlement agreement.

Respondents' right to occupy after cancellation⁴³

[155] In the absence of the settlement agreement or a new agreement in place, the respondents claim a right to possession and ownership of the property by virtue of the payments they have made, and claim that, in any event, the property has been theirs from the start. I have already dealt with the allocation of the payments made by the respondents. Even in the respondents' minds the payments were not made in vacuum, but were made pursuant to the settlement agreement, although as I have found it was cancelled. There was never any agreement, for example, that the monthly payments of R10,000 were somehow to be deemed as payment for rental in terms of a new arrangement. There was simply no new arrangement regarding possession and occupation between the parties after cancellation. That is, except for the position provided by clause 8.1 of the agreement, in terms of which the applicants were entitled to resume possession and occupation. The fact that the respondents made payments to the applicants did not grant them a right to claim possession, let alone ownership of the property. In fact, they have had the beneficial occupation in the interregnum between cancellation of the agreement and these proceedings. More so given the common cause evidence that they stopped making any payments whatsoever since 2017.

⁴³ Referral order, paras 1.18 -1.23.

[156] What remains for consideration is the respondents' right to possession and occupation based on ownership of the building since its erection. The legal position set out in the case law referred to earlier is that the original dispute between the parties must be considered *res judicata* in light of the settlement order, and that the rights of the parties must henceforth be determined in light of the agreement. It is relevant in this regard that the cancellation clause relied upon by the applicants did not resuscitate the original *lis* between the parties, but specifically states that in the event of such cancellation the applicants, described as 'seller' in the agreement, shall be entitled to "*resume possession and occupation of the property*". This provision must be read in the context of the rest of the agreement, chief among which is clause 2, which provides as follows:

"2. AGREEMENT AND ACKNOWLEDGEMENTS

2.1 OWNERSHIP

2.1.1 The Defendants acknowledge the ownership of the Second, alternatively Third, alternatively Fourth, alternatively First Plaintiff in respect of the immovable property.

2.2 NAME CHANGE

2.2.1 The Defendants acknowledge that the name change effected on the Title Deeds of the immovable property by the [Registrar of Deeds] was irregular and not in terms of the provisions of the Deeds Registry Act.

2.2.2 The [Registrar of Deeds] is hereby authorized and requested to rescind and cancel the name change and restore the Title Deeds of the immovable property as it was before the name change."

[157] It will be remembered that the main issue between the parties, which formed the subject of the 2006 action proceedings, and in respect of which negotiations were held

leading to the conclusion of the settlement agreement, was the possession and ownership of the property. That much is apparent from the answering affidavit deposed by the second respondent on 8 July 2019, where he stated that the settlement proposals received from the applicants before agreement “*were mainly focused on us conceding our ownership of the property and acknowledging that [the applicants] are the legitimate owners*”. This is why the Registrar of Deeds was authorized, in terms of the agreement to rectify the title deed by inserting the name of the second applicant as the owner. The deed of transfer indicates that, pursuant to the settlement order, the Registrar of Deeds, did cancel the name change effected by the respondents in 2000, and replaced the first respondent with the second applicant’s name as the owner. Although this only occurred on 17 August 2015 according to the evidence, it was the position that was put into place by the provisions of the settlement agreement and immediately became operational.

[158] What the agreement did was to facilitate the respondents’ possession and occupation pending transfer of ownership to them in terms of the sale agreement. This is why the settlement agreement provided that, upon cancellation, the applicants were to resume possession and occupation. During the period of validity of the settlement agreement, it granted the respondents lawful possession and occupation, which terminated upon cancellation. The result is accordingly that, the cancellation of the agreement means the applicants are entitled to regain possession and ownership of the property.

[159] But in any event, the respondents’ alleged right to ownership of the property has no merit because of the provisions of the governing constitution of the applicants, which was in place at the time of the respondents’ departure from the applicants. To use the second respondent’s language, if that constitution is applicable then the respondents’ case is ‘dead in the water’. That, unfortunately, is the case. The relevant provisions of the constitution include the following:

“Dissolution of the local Church

5.4.6.3.10 In the event of a local church dissolving, the property of such local church movable as well as immovable, shall be transferred to the Regional Council with jurisdiction over such local church, or in the event of there being no Regional Council⁴⁴, to the Executive Council⁴⁵.

Disposal of Funds and Properties

5.8.2.1 All funds and properties, movable and immovable, and all assets and liabilities belonging to a dissolved local church shall at the time of its dissolution revert to and become the property and responsibility of the Regional Council to which such dissolved local church belonged, without compensation, and according to the ruling set forth in Article 5.4.6.3.10.

In justifiable cases, immovable property vested in the Regional Council of the Full Gospel Church of God may be disposed of with the approval of the Executive Council, and the proceeds thereof shall be retained by the Region, for capital expenditure; or otherwise, as approved by the Executive Council.

5.8.2.2 If no Regional Council exists or is functioning in the area where such local church is situated at the time of its dissolution, all funds and properties movable and immovable and all assets and liabilities of such dissolved local church, shall revert to and become the property and responsibility of the Executive Council without compensation, and according to the ruling set for in Article 5.4.6.3.10.

5.8.2.3 In all cases, all such immovable property vested in the Executive Council of The Full Gospel Church of God may be disposed of by the Executive

⁴⁴ It is common cause that, in this case, 'Regional Council' is the second applicant.

⁴⁵ It is common cause that, in this case, 'Executive Council' is the third applicant.

Council and the proceeds thereof shall be retained for capital expenditure and allocated to the work of the Church as it shall deem fit.

5.8.2.4 In the event of a secession of members resulting in the dissolution of a local church, all property movable and immovable and all assets and liabilities, shall revert to the respective council as specified above in Section 5.8.2.1-4 of this Article, without compensation.

Properties of Dissolved or Seceding Local Churches

6.11.1.10 Subject to Article 6.11.1.12 below, the Regional Council shall be obliged to take charge of all property, assets and liabilities of dissolved or seceding Local Churches. The provisions as set forth in Article 5.4.6.3.10 and Article 5 Section 8 of the By-Laws shall apply.”

[160] In the answering affidavit, all the contents of the applicants’ constitution are admitted. The respondents contend that they had a right to retain the property after departing from the applicants because the applicants had failed to make any financial contribution towards the construction of the new building, and as a result, the building belongs to them (*“the financial contribution argument”*). The second basis arose during the second respondent’s oral evidence, and I deal with it in due course.

[161] The respondents state that they undertook numerous fundraising efforts, including a personal bond by the second respondent, for the purpose of erecting a church building which took 12 years to build, and eventually moved into the structure in December 1999. Throughout that time, they state that the applicants only ever contributed a loan amount of R10,000-00 towards the construction of the building, and otherwise made no financial contribution. The applicants could neither confirm nor deny most of these allegations because the relevant leaders of the applicants who were involved at the time of the events, are deceased or unspecified by the respondents, and as a result, the applicants delivered notices in terms of Uniform Rule 35(12) and (14)

before they could deliver a replying affidavit, essentially seeking proof of the allegations, but there has never been response by the respondents. One notable omission from the evidence is any proof whatsoever of the discussions and agreements alleged by the second respondent which led to him joining the applicants' fold, especially any terms obliging the applicants to make financial contributions as alleged. The contents of these discussions are furthermore set out in vague terms, with no indication for example, of who was involved in the discussions with the second respondent, an issue that was raised in the replying affidavit.

[162] Nevertheless, what is relevant when considering the financial contribution argument is that, in the answering affidavit, the second respondent states that during the discussions which led to the respondents joining the applicants, the applicants offered to make supportive structures available to the respondents, and in particular, *“they made it clear that [the respondents’] goal to acquire land [for their congregation] would be made easier if we associated ourselves to [the applicants]”*. The terms were accepted by the respondents, who assumed the name of the applicants, and as agreed, the respondents obtained land during 1987.

[163] The title deed indicates that on 11 February 1987 the second applicant transferred the property to the Belhar Assembly Local Church, which registered the property in the name of its church council. This was in terms of the applicants' constitution, which required that any property purchased by local churches, Regional Councils and the Executive Council be held in the name of the council concerned, as follows:

“Section 1 – Registration of Property

5.1 Clause 5 section 1 – All properties purchased by local churches, Regional Councils and the Executive Council shall be held in the name of the council concerned and shall read as follows:

Local Churches

5.1.1 All properties acquired by local churches shall be held in the name of the Governing Body of that specific assembly of the Full Gospel Church of God in Southern Africa, for and on behalf of the specific local church.”

[164] Thus, on the respondents’ own version, one of the main reasons they decided to join the applicants was to obtain land so that a church building could be erected on it, and the applicants did comply in that regard. But in return, again according to the respondents, they were required to resort under the aegis of the applicants. In this regard, the second respondent admitted that he was aware of the provisions of the applicants’ constitution at the time, and the fact that he and the respondents became subject to them. That is a significant admission. Apart from the provisions already set out above, the applicants’ constitution provides as follows:

“Section 1 – Church as a Body Corporate

The [first applicant] is “an association not for gain, of Christian believers assembled in local churches, and shall be a body corporate, shall have perpetual succession, and shall own and hold all its property of whatsoever nature, kind or description in its own name and distinct from that of its members.

Section 2 – The Local Church as a Body Corporate

A local Church in the Full Gospel Church of God in Southern Africa shall be a body corporate, shall have perpetual succession, and shall own and hold all its property of whatsoever nature, kind or description in its own name and distinct from that of its members, and shall act through its duly constituted Governing Body.

Section 3 – Regional Councils

Each Regional Council shall be a body corporate with perpetual succession and shall act through its duly constituted management committee which shall be its organ.

Section 4 – Executive Council

The Executive Council shall be a body corporate with perpetual succession and shall act through its duly constituted Moderateur, which shall be its organ.

[165] There is no ambiguity in these provisions, and none has been raised by the respondents. They confirm the perpetual succession of the applicants, and also confirm that the applicants were entitled to hold *“all its property of whatsoever nature, kind or description in its own name and distinct from that of its members”*.

[166] One of the allegations made in the answering affidavit is that *“a condition of our [joining the applicants was] that we would operate independently, acquiring property and funding such acquisition of property and assets on our own”*. I have not been shown any provision in the applicants’ constitution, or any other document which augmented the above provisions by adding that there was possibility of co-ownership of property with the respondents, or providing for a special arrangement in terms of which the respondents could own this particular property to the exclusion of the applicants. Such a condition would have amounted to significant amendment of the applicants’ constitutional provisions, and I would have expected it to be in writing as recordal of the amendment, and in compliance with the provisions of the Alienation of Land Act. Similarly, I was not referred to any requirement in the applicants’ constitution, or any other document in terms of which the application of the constitutional provisions was made subject to any financial contribution being made by the applicants, and one would expect that to be recorded if it was so agreed.

[167] The second respondent understood the significance of these constitutional provisions because he admitted during cross examination that, in his understanding, the application for a name change that was made to the Registrar of Deeds in terms of section 93(1) of the Deeds Registries Act was going to amount to a transfer of rights, meaning that the property was now to be owned by the new entity, namely the first respondent. Apart from the fact that this was in direct contradiction to the statement he made under oath and submitted to the Registrar of Deeds at the time, it shows that he knew that, by seeking the name change, the respondents were effecting a transfer of property rights to themselves. That could only be the position if they knew that those property rights legally resorted elsewhere in the first place.

[168] In his oral evidence, the second respondent stated that the respondents had received advice when they left the applicants, to the effect that they were not bound by the provisions of the applicants' constitution because it is subordinate to the Constitution of the Republic and they were only bound by the latter. I understood this to mean that the provisions of the applicants' constitution were said to be contrary to the Constitution. It is common cause that no proceedings have ever been launched by the respondents to set aside the provisions of the applicants' constitution or to challenge their constitutionality, whether before, or after they departed from the applicants. Furthermore, given that the respondents received the legal opinion as far back as 2000 giving such advice, I would have expected this issue to be raised in the answering papers, and at least for the basis of that legal opinion to appear therein. But in any event, as I have already mentioned, none of this appears in the answering affidavit and it was raised for the first time during the oral evidence of the second respondent, without being put to Badenhorst for comment. The unfairness is patent.

[169] I accordingly cannot find that the respondents had any right to lawful possession and occupation of the property, since cancellation of the settlement agreement. Instead, as from 25 September 2014, the correspondence contained in the bundle shows that the applicants demanded keys and possession of the property, forthwith. In the letter of 1 December 2014, the applicants threatened to issue a warrant of ejectment unless a

satisfactory settlement arrangement could be reached. On 16 January 2015 the applicants threatened to launch proceedings for a *rei vindicatio*, a name for the current proceedings. It was thereafter that the second respondent communicated directly with the General Secretary of the applicants, until 15 November 2018 when those negotiations broke down, and the applicants demanded once again that occupation be restored within 14 days failing which these proceedings would be launched. I have not been referred to any document indicating that during these negotiations a new arrangement was reached allowing the respondents to remain in possession and occupation of the property. Although all of this took a long time, it is not disputed that the applicants were loath to litigate, and accordingly, the delay cannot be construed as permission for the respondents to remain at the property. In fact, all of the correspondence I have referred to indicates that the applicants were eager to finalise the negotiations without further delays, and made mention of 'further extensions', 'indulgences', 'opportunity upon opportunity' and not being 'satisfied with the progress'. There is no way in which any of that correspondence can be construed as a legal right for the respondents to possess or occupy the property. For all the reasons discussed in this judgment, the applicants have made out a case for the relief they seek.

G. COSTS

[170] There is no reason why costs should not follow the result. This is especially so in circumstances where the parties concluded a settlement agreement, the object of which was to obviate the need to litigate, or at least to curtail litigation. Contrary to that usual intention of entering into settlement agreement, the process has been unusually long, taking four years to reach hearing stage. The respondents had to be compelled to file an answering affidavit by means of a chamberbook application, after numerous, written requests for it.

[171] The litigation style of the respondents has left much to be desired, evincing a lackadaisical approach and discourtesy, not only to the applicants but also to the court. One example is that the referral order of 10 August 2022 gave detailed directions

regarding the leading of oral evidence. No witnesses were to be called unless written statements summarizing their evidence were delivered 60 days ahead. Discovery was to be made 90 days of the making of the referral order. The respondents did not comply with any of these orders, despite various correspondence from the applicants' legal representatives, effectively reminding them of the impending proceedings and the need to comply with the provisions of the order. It was only after hearing the evidence of Badenhorst that an application was made for the second respondent to lead evidence, and whilst the opportunity was granted, the condonation application gave very little, if any explain for the discourtesy towards the court and the opposing parties. However, for the sake of progress given the delays in the matter, and to provide both parties the opportunity to finally ventilate the matter, the opportunity was granted.

[172] There have also been numerous postponements in the matter. One postponement that stands out was on 24 May 2022, in respect of which the court issued an order that the current attorney representing the respondents, Mr. Donovan Sam, *“must, within 1 (one) week from the date of this order, that is by 2 June 2022, make submissions on affidavit to Henney J..., with a copy to all other parties, as to why he should not be ordered to pay the wasted costs occasioned by the postponement of the application on 24 May 2022, de bonis propriis”*.

[173] The order was issued because, on the morning of the hearing of the matter of 24 May 2022, the second respondent arrived in court and informed the court that he had only been advised on the previous evening that the matter was set down for 24 May 2022, and he did not have legal representation, and sought postponement of the matter. Sam had delivered a notice of withdrawal on 23 May 2022. Moreover, Sam was in attendance on the day, but not in a representative capacity. In terms of the order of 24 May 2022, the applicants' attorney was granted opportunity to respond to Sam's affidavit within 11 days thereof. Both attorneys did indeed file affidavits as ordered, and there are many issues in respect of which they disagree, dating as far back as 2019, but I focus on the relevant aspects.

[174] According to Sam, on 6 May 2022 Badenhorst had called him to advise that the matter had been set down for hearing on 24 May 2022, and he had informed Badenhorst that he had not received notification of set down. He advised that he would not have sufficient time to consult and prepare for the hearing, and was in any event not available because he had a possible hearing in Pretoria as well as a trial in Bellville, both on the same day. According to Sam, he and Badenhorst agreed that the latter would remove the matter from the roll, and Badenhorst had requested him to provide alternative dates of his availability in August 2022. Badenhorst had confirmed this conversation in a subsequent letter dated 9 May 2022, in which he attached further documents which indicated, amongst other things, that Badenhorst had previously sent the notice of set down of 24 May 2022 to Sam's old e-mail address on 23 March 2022. On 16 May 2022 Sam says he telephonically informed Badenhorst that the respondents' counsel was busy with trial proceedings and was to provide the requested alternative availability dates in due course. He was still waiting for his counsel's availability dates when he received notification from the registrar of Henney J, on 19 May 2022 that the matter was to proceed on 24 May 2022.

[175] In response to the email of 19 May 2022, Sam requested that the matter be removed from the roll because he was unavailable, and stated that he had reached agreement with Badenhorst for removal of the matter from the roll, which elicited back and forth communication between he and Badenhorst, with the registrar in copy. Eventually, Henney J declined the request to remove the matter from the roll by e-mail from his registrar dated 23 May 2022, recording, amongst other things that the Judge had read the record and was prepared to proceed with the matter on 24 May 2022.

[176] The letter of 9 May 2022, which Sam admits confirmed the telephonic discussion of 6 May 2022 does not support his version that the two attorneys agreed to remove the matter from the roll. A generous interpretation in his favour is that Badenhorst promised to endeavour to do so, as follows:

“15. We will instruct our correspondent to endeavour to have the matter removed from the roll, which may be difficult as a result of the fact that the Application was postponed to 24 May 2022, by the Honourable Judge.

16. If they agree to remove it, we confirm that the wasted costs occasioned by the removal will be reserved.

17. If we cannot succeed in removing it, we urge you to immediately prepare and serve and file the Respondents heads of argument. I look forward to receiving your urgent response.”

[177] There was a further letter from Badenhorst dated 17 May 2022, which confirms Sam’s version that Badenhorst had requested dates of availability for hearing of the matter in August 2022. However, that letter also stated as follows: *“Should you not assist us in this matter [by providing the dates of availability] the matter will be proceeding on 24 May 2022. We look forward to hearing from you urgently”*. This part of the letter confirms that the telephonic discussion of 6 May 2022 had not settled the issue of the hearing date of 24 May 2022 and that a hearing on that date was still a possibility; and in light thereof Sam was urged to act with haste. In short, it shows that by 17 May 2022, Sam was aware that the matter might still proceed on 24 May 2022 and had not been uplifted from the roll. Sam responded to the letter of 17 May 2022 by e-mail of 18 May 2022 stating that he *“will forward to our counsel and revert back with available dates in August 2022”*. It is common cause that he never responded with those dates.

[178] According to Sam’s version, he must not be held responsible for any conduct during that two-and-a-half week period from the time he heard about the set down date on 6 May 2022 because firstly, Badenhorst was supposed to remove the matter from the roll, and secondly, he was waiting for his counsel to provide the availability dates in August 2022. As regards the first, he puts the blame on Badenhorst because he never came back to him after the conversation of 6 May 2022 to tell him that he was not

successful in removing the matter from the roll of 24 May 2022. But the correspondence set out above shows otherwise. As regards the second, his version is that he had promised to revert with those availability dates two weeks prior, in the telephonic discussion of 6 May 2022, but had not reverted with those dates by 19 May 2022 when he received the communication from the Judge's registrar confirming that the matter was to proceed on 24 May 2022. The reason he has given for that delay is his counsel's involvement in another trial.

[179] What Sam never addresses is what he did between 6 May 2022 and 23 May 2022 once he became aware of the set down date. According to his clients, he did not even inform them of the set down date until 23 May 2022. Furthermore, there is no indication that he even attempted to obtain any availability dates for August 2022 during that period.

[180] The set down date of 24 May 2022 was in terms of a court order of the previous Judge President, and was not an agreed date. That, on its own, was reason for Sam to have attended to the matter with the requisite haste and seriousness it deserved. It cannot serve an officer of the court to blame another for not complying in that instance. Such a supine attitude is inimical to his duties as an officer of the court and as a legal practitioner. It was highly reckless of him to assume, without more, that the date could just be erased by a purported telephonic agreement. Even more so when he was informed that the removal was not a *fait accompli*. A duly diligent attorney would have made endeavours during that two and a half-week period, to make himself available or make someone else available in his stead. He would not wait until the last hour before filing a notice of withdrawal. The matter, it must be remembered, concerned motion proceedings in respect of which the affidavits had been delivered. What was required as at 6 May 2022, was the filing of the heads of argument. It has not been explained why that could not be done, even by other counsel, on the basis of the papers already filed.

[181] Needless to say, the decision to withdraw at the very last hour, on 23 May 2022, was prejudicial to the parties, not least of which were his clients, and to the

administration of justice. It is no wonder that the court requested an affidavit from him under oath, which is an unusual development. The public deserves and relies upon on the proper administration of justice, and that in turn relies upon legal practitioners conducting themselves with the appropriate diligence and respect that the profession demands.

[182] I am accordingly of the view that Sam's conduct displayed great discourtesy to the court and to his clients and to the applicants. Even his own clients should not be required to pay for such grossly reckless and negligent conduct. It also amounted to gross dereliction of professional duty.

H. ORDER

[183] In the circumstances, the following order is made:

(1) The respondents and all those occupying the property known as erf 1[...] Bellville (held by Deed of Transfer 7010/93), situate at 4 B[...] Circle, corner F[...] & B[...] Crescent, Belhar, Cape Town (*"the property"*) shall vacate and give possession thereof to the applicants, by end of Friday 26 July 2024.

(2) The respondents shall hand over all keys and mechanisms of access to the gates and buildings on the property to a person nominated by the applicants or the applicants' attorneys of record, by end of Friday 26 July 2024.

(3) Should the respondents fail to comply with paragraphs (1) and (2) above by end of Monday 29 July 2024, the sheriff is authorized to evict the respondents and any person or entity occupying the property, and to restore possession to the applicants.

(4) The first, second and third respondents are to pay the costs of this application on a party-party scale, in terms of scale C of Uniform Rule 67A, jointly and severally, the one paying the other to be absolved.

(5) Mr. Donovan Sam, the respondents' attorney, shall pay for the wasted costs occasioned by the postponement of 24 May 2022 *de bonis propriis*.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicants : Adv J A Du Plessis

Instructed by : Mr H Badenhorst
J J Badenhorst & Associates Attorneys & Inc.

For the respondents : Adv M Filton

Instructed by : Mr D Sam
Sam Attorneys