

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

**REPORTABLE
CASE NO: A64/2023**

In the matter between:

BRADLEY JONES N.O.

Appellant

(In his capacity as the executor of the Estate Late
Clive Andrew Cook, Master Ref no: 015011/2020)

and

ABSA BANK LIMITED

Respondent

Bench: P.A.L. Gamble, D.S. Kusevitsky and D.M. Thulare, JJ

Heard: 24 January 2024

Delivered: 1 November 2024

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be Friday, 1 November 2024 at 12h30.

JUDGMENT

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GAMBLE, J:

INTRODUCTION

1. In 2008 Mr. Clive Andrew Cook (the deceased) secured a contract to perform certain earthworks for a property developer. To do so, he needed a front-end loader (the loader) and so he set about procuring a secondhand machine. Through the involvement of a certain Mr. Ismail Solomon, a 2003 model Kawasaki Renoster loader was located in KwaZulu Natal (KZN). The supplier was an auctioneering company called Peter Maskell Auctioneers (Maskell) which had evidently obtained the loader from a firm known as DJ Plant & Equipment, (DJ) also in KZN.

2. The deceased obtained finance for the loader from the respondent (ABSA) and to this end he concluded an instalment agreement (the agreement) as defined under the National Credit Act, 34 of 2005 (the NCA). The agreement recorded that the cash price of the loader was R444 600.00 (VAT inclusive) payable through a deposit of R44 000.00, 3 monthly instalments of R9867.17, 1 instalment of R64 467.17 and a further 50 monthly instalments of R9887.17. The deposit was paid to Maskell and the total recoverable by ABSA under the agreement (inclusive of finance charges) was R587 427.18.

3. The deceased signed ABSA's pro forma "*Release Note*" in respect of the loader on 3 March 2008 and pursuant thereto the loader was delivered at his business premises at Philippi in Cape Town during the latter part of March 2008.

4. When the loader arrived for delivery aboard a large flat-bed trailer, it was immediately apparent to Cook that it had certain obvious patent defects. The deceased immediately complained to the driver of the flat-bed that this was not the loader he had bought and he was not inclined to take delivery thereof. The driver would have nothing of it and insisted that the loader be taken off the trailer. This task fell to the deceased's son, Jacques Cook (Jacques), who realised that the loader had various latent mechanical defects as well. For example, the vehicle did not start properly, it belched black smoke when it eventually did start and its hydraulic system did not function properly when Jacques attempted to lift the bucket before reversing

it off the flat bed. In short, the deceased realized there and then that he had bought the proverbial “lemon”.

5. In an endeavour to meet his pressing contractual obligations to the property developer, the deceased set about effecting certain essential repairs to the loader. By July 2008 the cost of further repairs was estimated at R242 664.96 and it was considered to be uneconomical to do so. There was then a meeting in Cape Town on 23 July 2008 at which certain of the parties attempted to resolve the issues arising from the defects in the loader, and to which I shall refer later.

6. In the meanwhile, the deceased fell into arrears under the agreement and on 4 June 2009, after complying with the requisite prescripts of the NCA, ABSA issued summons out of the Wynberg Magistrates’ Court against the deceased for payment of the amount then allegedly due under the agreement – R575 228.03. Given that the deceased alleged a counterclaim against ABSA which exceeded the jurisdiction of that court, the matter was transferred to this Division where the deceased commenced proceedings by issuing summons against ABSA for cancellation of the agreement, payment of damages in the sum of R3 220 376.82 and costs on the punitive scale. The damages were allegedly for a loss of profits on the earthmoving contract with the developer.

7. ABSA’s response to the deceased’s claim was multifaceted. Firstly, it raised a special plea that the claim against it had been settled at the aforementioned meeting of 23 July 2008. Then, it set up various defences to the deceased’s claims on the merits, and, lastly, it filed a claim in reconvention for the amount allegedly due to it under the agreement.

8. The deceased died on 29 March 2020, after *litis contestatio*, but before the commencement of the trial. In the result, the appellant (the executor of the deceased’s estate) was substituted as the plaintiff in the matter. The demise of the deceased deprived the executor of the evidence of the critical witness in order to adequately advance his case. Notwithstanding the absence of a crucial witness to advance the case, the executor resolved to persist with the claim. He thus had to do

the best he could with the other witnesses available to him and, further, was required to rely on circumstantial evidence and inferential reasoning.

9. The case went to trial in November 2020 before Mantame J (the Trial Court). The issues for determination were the merits of the claim in convention, the special plea and the claim in reconvention. All issues relating to quantum were held in abeyance. In a judgment delivered on 19 March 2021, the Trial Court dismissed the claims lodged on behalf of the deceased and upheld ABSA's claim in reconvention. In the result, the executor was ordered to pay ABSA the sum of R575 228.03, together with costs on the party and party scale.

10. On 12 September 2022 the Trial Court dismissed the executor's application for leave to appeal. He is now before this Court with the leave of the Supreme Court of Appeal, pursuant to an order granted on 13 December 2022. At the hearing of the appeal the parties were represented as they were before the Trial Court - the executor by Advs. M.A. Albertus SC and J.B. Engelbrecht and ABSA by Adv. M. Greig. The court is indebted to counsel for their comprehensive heads of argument and the bundle of authorities prepared for the hearing of the appeal.

THE DECEASED'S CASE AS PLEADED

11. In his heads of argument before this court, Mr. Albertus was constrained to concede that the untimely demise of the deceased had constrained the executor to persist with only three of the claims originally advanced in the pleadings. These consisted of the main claim and two of the three alternative claims pleaded. Counsel accepted that the second alternative claim, based on the allegations made in para's 8 to 12 of the particulars of claim relating to various alleged misrepresentations, could no longer be advanced in light of the unavailability of the deceased to testify.

12. For the purposes of background detail only, it is sufficient to record that the second alternative claim relied on allegations that the loader which was delivered to the deceased was not the same vehicle as the loader which he had been led to believe he was purchasing. In this regard it was said that the deceased had never physically inspected the loader but had relied on a series of photographs sent to him

by Solomon and/or Mr. Sean Fortune acting in concert with each other. The deceased specifically pleaded that Solomon and Fortune were both ABSA's agents.

13. Finally by way of background, and as noted above, because the matter went to trial on the merits only with the quantum standing over for later determination, the allegations made in regard to the quantum in para's 14 to 19 of the particulars of claim and the response thereto in the plea will accordingly not be traversed in this judgment.

The Main Claim

14. The main claim pleaded in the particulars of claim was set out in para's 4 and 5 thereof. The agreement was annexed to the particulars of claim as Annexure A and I shall refer to it as such.

"4. It was an express and material term of the agreement [annexure A] by virtue of clause 12¹ thereof that the loader was in a good and roadworthy order and condition and operable at the time of its purchase.

5. However, contrary to and in breach of the express term as aforesaid, the loader delivered by Defendant to Plaintiff was not in a good and roadworthy order and condition but in a mechanical state of disrepair and in operable."

15. The first alternative claim was based on the allegations made in paras 6 and 7 of the particulars of claim.

"6. Alternatively to paragraphs 4 and 5 above, and only in the event of this Court finding that it was not an express and material term of the agreement that the loader

¹ It should be noted that, while reference is made in the particulars of claim to "clause 12", it is really only clause 12.1 of Annexure A which has any relevance to the allegations made in paras 4 and 5. It reads as follows.

"12 THE GOODS

The Purchaser will –

12.1 keep the goods in his possession and control and maintain them in good and roadworthy order and condition, not allow them to be used by another person or body nor allow any unqualified or unlicensed driver or operator to use the goods and not remove the goods from the Republic of South Africa without the prior written consent of the Bank."

was in a good and roadworthy order and condition and operable, then and in that event, Plaintiff pleads that by virtue of clause 12 thereof, it was an implied and material term of the agreement that the loader was in a good and roadworthy order and condition and operable at the time of its purchase.

7. However, contrary to and in breach of the said implied term as aforesaid, the loader delivered by Defendant to Plaintiff was not in a good and roadworthy order and condition but rather in a mechanical state of disrepair and inoperable.”

The first alternative claim was thus based on the *actio redhibitoria*

16. The third alternative claim was based on the allegations made in paras 13 and 13.1 – 13.5 of the particulars of claim.

“13. Alternatively to paragraphs 4 to 12 above, and only in the event of this Court finding that the loader delivered by Defendant to Plaintiff was the one sold to him in terms of the agreement (which is denied), that it was not an express, alternatively, an implied term of the agreement that the loader was in a good and roadworthy order and condition and operable and further, that no misrepresentations as aforesaid had been made or if made, were not intentional or negligent (all of which is denied), then and in that event, plaintiff pleads that:

13.1 plaintiff purchased the loader from Defendant for the purposes of loading and offloading gravel, sand, dirt and such like at building and other sites;

13.2 at the time of the agreement and unbeknown to Plaintiff the loader was latently defective in that it was in a state of mechanical disrepair and not operable;

13.3 by reason of such defect the loader was substantially unfit for the purpose of loading and offloading, gravel, sand, dirt and such like at building and other sites and in fact inoperable;

13.4 Solomon and Fortune² were at all material times aware of the purpose for which Plaintiff had purchased the loader;

13.5 had plaintiff known of the defects, he would not have purchased the loader.”

The third alternative claim is thus based on the *actio empti*.

ABSA’S CASE AS PLEADED

Special plea

17. In the first instance ABSA put up a special plea of compromise. For the sake of completeness, the pleading is recited in full.

“1. On or about 23 July 2008 and in Cape Town the Plaintiff (represented by Roderique Marz), the Defendant (represented by Jasmina Gasnolar and/or Sean Fortune), Ismail Solomon (personally) and Peter Maskell Auctions CC (represented by AJS Grant of Venn, Nemeth and Hart Attorneys) entered into a partly written and partly oral, alternatively purely oral settlement agreement in relation to the dispute arising from the alleged defects in the loader referred to in the Plaintiff’s particulars of claim (“the settlement agreement”).

2. The material express, alternatively, tacit terms of the settlement agreement were as follows:

2.1 All disputes arising from the alleged defects in the loader referred to in the Plaintiff’s particulars of claim were resolved and/or settled;

2.2 The plaintiff’s agent, Ismail Solomon, undertook to pay the plaintiff the sum of R 25,000.00 by no later than 29 July 2008 in respect of the alleged defects in the loader; and

² This is a reference to the aforesaid Ismail Solomon and Sean Fortune, the alleged agents of ABSA.

2.3 Both the Defendant and Peter Maskell Auctions CC had “fallen out of the picture”, and neither the Plaintiff nor Ismail Solomon would have any further claims against the Defendant or Peter Maskell Auctions CC.

2.4 The Plaintiff would continue to pay the installments due upon, and otherwise comply with, his obligations in terms of the agreement with the Defendant of 3 March 2008 (annexure “A” to the particulars of claim).

3. A copy of the written portion of the settlement agreement/confirmation of the settlement agreement is attached as annexure “X”.

4. To the extent that the above settlement agreement is held to be invalid or unenforceable by virtue of clause 13.1 of annexure “A” to the particulars of claim, the Defendant pleads that the operation of this non-variation clause in the prevailing circumstances and on the facts of the case, at the time the court is or will be asked to enforce the clause, is unreasonable and/or offends public policy, and is accordingly void and or voidable. The relevant facts and circumstances in this regard are the following:

4.1 The settlement agreement was concluded where all the parties including the Plaintiff were present in person;

4.2 The settlement agreement was concluded in circumstances where the plaintiff was represented by an attorney, or by a party purporting to be an attorney, namely, Roderique Marz;

4.3 The settlement agreement was confirmed in writing in terms of annexure “X”, and no parties, including the Plaintiff or Roderique Marz, read any objection to this confirmation or its terms;

4.4 The settlement agreement was the outcome of extensive negotiations between the parties which identified Peter Maskell Auctions and/or Ismail Solomon, the Plaintiff’s agent, as the party responsible for problems the Plaintiff allegedly experienced with the loader;

4.5 The Plaintiff's particulars of claim themselves rely on allegations of express written clauses in annexure "A" to the particulars of claim which do not exist; and

4.6 The attempt by the Plaintiff to enforce clause 13.1 in the above circumstances is accordingly not bona fide.

5. The effect of the settlement agreement is to bar proceedings on the cause of action pleaded in the Plaintiff's particulars of claim."

ABSA's Plea on the Merits

18. In its plea on the merits in respect of the main claim, ABSA admitted the conclusion of Annexure A but went on to allege that that the aforesaid *pro forma* document entitled "*Release note and acknowledgement of delivery*" dated 3 March 2008 and signed by the deceased (which was annexed to the plea as "P1"), formed part of the agreement.

19. Then ABSA pleaded that clause 12 did not embrace the meaning attributed to it by the deceased. It went on to refer to various clauses contained in annexure A which it stressed were express material terms of the agreement. I shall not repeat those clauses herein other than the non-variation clause to which ABSA expressly referred in its plea.

"13.1. No addition to, variation, novation or agreed cancellation of any provision of this agreement shall be binding upon the parties unless reduced to writing and signed (or initialed in the case of modifications on this document) by or on behalf of the Bank by an authorized official and the Purchaser."

20. ABSA further adverted to the following clauses in the release note.

"I have receive (sic) in good order and condition, to my entire satisfaction and according to my specification/requirements, the article described above.

I have compared the chassis, engine and serial numbers indicated above with the chassis, engine and serial numbers as indicated on the article.”

21. In regard to the first alternative claim (the *actio redhibitoria*) set forth in para’s 6 and 7 of the particulars of claim, ABSA pleaded an estoppel in the following terms:

“8. Save to state that the loader was delivered by Peter Maskell’s Auctions CC to the Plaintiff who accepted delivery as the Defendant’s agent, the allegations in these paragraphs are denied as if specifically traversed.

9. The Defendant further specifically pleads that annexure “P1” signed by the Plaintiff on 3 March 2008 contains the following material term:

“I herewith warrant that;

I have receive (sic) in good order and condition, to my entire satisfaction and according to my specification/requirements, the article described above [being a ‘Renoster Kawasaki Front End Loader 20031.1 (sic) have compared the chassis, engine and serial numbers as indicated on the article.”

10. The Plaintiff further paid a deposit of R 44,000.00 to Peter Maskell’s Auctions CC in respect of the loader.

11. The Defendant accordingly pleads that the Plaintiff-

11.1 Warranted that the loader was in good order and condition and to his entire satisfaction according to his specifications or requirements, and that it was the loader he had purchased; alternatively

11.2 He waived any right he may have had to allege or claim it was not; further alternatively

11.3 He is estopped from alleging it was not that:

11.3.1 He represented to the Defendant that the loader was in fact in good order and condition when he took delivery thereof and paid the deposit;

11.3.2 The Defendant acted on the strength of his representation by entering into the agreement with the Plaintiff and releasing the balance of the purchase price to Peter Maskell's Auctioneers; and

11.3.3 In so doing the Defendant acted to its detriment in concluding or finalizing the agreement and releasing the balance of the purchase price."

22. ABSA pleaded a further estoppel in response to the allegations made in para 13 and 13.1 – 13.5 of the particulars of claim (the *action empti*). After denying the contents of the paragraph and after repeating the allegation that the release note constituted a warranty by the deceased, it alleged as follows.

"17. The Defendant accordingly pleads that the Plaintiff –

17.1 Warranted that the loader was in good order and condition and to his entire satisfaction according to his specification or requirements, and that it was the loader he had purchased; alternatively

17.2 Waived any right he may have had to claim or allege that it was not; further alternatively

17.3 Is estopped from alleging it was not, on the basis that:

17.3.1 He represented to the Defendant that the loader was in fact in good order and condition when he took delivery thereof;

17.3.2 The Defendant acted on the strength of this representation by entering into and/or concluding the agreement with the Plaintiff and releasing the balance of the purchase price to Peter Maskell's Auctions CC; and

17.3.3 In so doing the Defendant acted to its detriment in concluding or finalizing the agreement and releasing the balance of the purchase price.”

The deceased's replication to ABSA's special plea

23. In his replication to the special plea the deceased admitted conclusion of the alleged agreement of settlement on the following basis.

“Ad paragraphs 1, 2 and 3

1. Save to deny that:

1.1. the plaintiff was represented by Roderique Marz;

1.2. the settlement agreement or any part thereof was in writing; and

1.3 Ismail Solomon was the plaintiff's agent,

the plaintiff admits the allegations herein contained.”

24. It is, in my respectful view, of critical importance, when considering the import of the deceased's replication to the special plea, to have regard to the extent of the admissions made in para 1 thereof. Save for the limited issue raised under para's 1.1, 1.2 and 1.3 of the replication, the remainder of the allegations contained in para's 1 to 3 of the special plea were admitted by the deceased. This means that the deceased admitted the content of para 2.1 of the special plea, which is to the following effect-

“2.1 All disputes arising from the alleged defects in the loader referred to in the Plaintiff's particulars of claim were resolved and/or settled;”

25. The import of para 2.1 in the special plea is that the deceased orally agreed to waive his right to seek redress against ABSA arising out of the defects (which were by then common cause) in the loader. The admission by the deceased of the waiver of this right was not limited or couched in terms suggesting that he was not informed of the extent of the rights he was waiving, as My Colleague Thulare suggests in the second judgment. Rather, the allegation by ABSA of the waiver is admitted by the deceased.

26. This admission thus removed waiver from the *lis* between the parties, ABSA having properly pleaded the waiver in accordance with the established principles.³ For that reason one sees no suggestion in the cross-examination of Grant that the deceased was not aware of his rights when he concluded the settlement agreement and waived reliance on the aedilitian remedies as against ABSA.

27. Importantly, in the replication the deceased attacked the legality and enforceability of the settlement agreement on 4 discrete grounds. viz public policy, undue influence, formal non-compliance and, ultimately, a resolute condition. I shall deal with each of these separately.

Contra bonos mores

28. The first contention was that the settlement agreement was contrary to public policy.

“2. The plaintiff more especially pleads that the settlement agreement was void and of no legal force and effect, alternatively, voidable, on account of the fact that it was contrary to public policy, by virtue of the fact that its terms were and/or its implementation was unfair and/or oppressive and/or draconian and/or unconscionable and/or exploitative and/or immoral, for one or more of the following reasons:

2.1 the parties were in unequal bargaining positions in that:

2.1.1. The plaintiff was the credit receiver, whilst the defendant, the credit grantor, under the installment sale agreement;

2.1.2. The defendant was a large and powerful commercial bank whilst the plaintiff was a naïve and unsophisticated businessman with his highest educational qualification being Standard 8; and

³ See for example, Laws v Rutherford 1924 AD 261 at 263 and Feinstein v Niggli and another 1981 (2) SA 684 (A) at 698 F-G

2.1.3. The defendant (sic) was in arrears with his instalments on the instalment sale agreement and in no position to dictate terms to the defendant on the way forward;

2.2. the defendant was aware that:

2.2.1 the plaintiff had purchased the front end loader to carry out a contract and/or contracts with the view to generating an income;

2.2.2 the front end loader from the time of its delivery to the plaintiff was in a serious state of mechanical disrepair and as such, was not fit for the purpose for which it was purchased; and

2.2.3. for as long as the front end loader remained unrepaired, the plaintiff would not be able to carry out his contractual obligations and hence not be able to earn an income;

2.3 despite the facts set forth in the foregoing paragraphs, the defendant persuaded and/or influenced and/or cajoled alternatively, was complicit along with Ismail Solomon and attorney AJS Grant, representing Peter Maskell Auctions CC in persuading and/or influencing and/or cajoling the plaintiff to forgo his rights to judicial redress against defendant in respect of the defects to the loader and to accept the sum of R 25, 000.00 from the said Ismail Solomon in full and final settlement of his claims against the defendant, full well knowing that the said sum was grossly inadequate to cover the costs of repairing the defects to the loader.”

Undue influence

29. The second attack on the settlement agreement is that it was induced through undue influence.

“3. ALTERNATIVELY, to paragraph 2 above, the plaintiff further pleads that the settlement agreement is void and of no legal force and effect, alternatively, voidable, inasmuch as it was procured by the defendant by way of undue influence on account of the following facts:

3.1. the defendant occupied a position of influence over the plaintiff by virtue of the fact that:

3.1.1. the parties were in unequal bargaining positions in that the plaintiff was the credit receiver, whilst the defendant, the credit grantor, under the instalment sale agreement; and

3.1.2. the defendant was a large and powerful commercial bank whilst the plaintiff was a naïve and unsophisticated businessman with his highest educational qualification being Standard 8;

3.1.3 The defendant (sic) was in arrears with his instalments on the instalment sale agreement and in no position to dictate terms to the defendant on the way forward;

3.2. the defendant's influence weakened the plaintiff's resistance and made his will pliable;

3.3. the defendant used this influence in an unscrupulous manner and/or unconscionably to prevail upon the plaintiff to enter into the settlement agreement, more sepecially in that:

3.3.1. to the knowledge of the defendant:

3.3.1.1 the plaintiff was as a result of the loader being inoperable, unable to earn an income from the use of the loader (as intended) and as such lacked the necessary financial means to pay the instalments claimed by the defendant under the instalment sale agreement;

3.3.1.2. the plaintiff lacked the financial means to effect the repairs required to make the loader operational;

3.3.1.3. the plaintiff faced financial ruin if the loader remained inoperable;

3.3.1.4. the plaintiff lacked the financial means to instruct an attorney to advise him regarding the remedies available to him arising from the delivery of the defective loader;

3.3.1.5. the plaintiff was in the circumstances, vulnerable and desperate enough to take any financial assistance which would enable him to getting (sic) the loader operational so that he could start earning an income;

3.3.2. at the meeting on 23 July 2008, at which the settlement agreement was concluded, the defendant, represented by Jasmina Gasnolar, alternatively, Sean Fortune, represented to the plaintiff and made him believe that irrespective of the condition of the loader delivered to him, he was bound by the instalment sale agreement and was still legally obliged to repay the balance of the purchase price advised by the defendant to the plaintiff;

3.3.3. all the parties at the meeting, other than Roderique Marz, acted in concert against the plaintiff; and

3.3.4. The defendant and the other parties at the meeting (excluding Roderique Marz), represented to the plaintiff and made him believe that he had no other remedies available to him, proposing in the process, that the matter be settled on the basis of Ismail Solomon paying him R 25, 000.00 in full and final settlement of his claims against the Defendant (sic);

3.4. the settlement agreement was prejudicial to the plaintiff's rights and to his detriment;

3.5. exercising a normal free will, the plaintiff would not have entered into the settlement agreement;

3.6. The plaintiff tenders to repay Mr. Solomon the amount of R8 0000.00 (sic) being the amount paid by Mr. Solomon to the plaintiff pursuant to the settlement agreement.

Non-Compliance with Formalities

30. The third ground of attack related to an alleged failure to comply with the formalities prescribed in the contract itself.

“4. ALTERNATIVELY, to paragraph 2 and 3 above, the plaintiff pleads that the settlement agreement is invalid and unenforceable for non-compliance with the formalities contained in clause 13 of the agreement.”

Suspensive / Resolutive Condition

31. The last basis for the attack on the settlement agreement initially sought to rely on the non-compliance with an alleged tacit suspensive or resolutive condition.

“5. ALTERNATIVELY, to paragraphs 2 to 4 above, the plaintiff further pleads:

5.1. The settlement agreement was subject to a tacit suspensive, alternatively, tacit resolutive condition, that should Ismail Solomon not pay the plaintiff the sum of R25,000.00 on or before 29 July 2008, the settlement agreement would be void and of no force and effect and the plaintiff would be entitled to all the remedies and/rights enjoyed by him prior to 23 July 2008 in respect of the defects in the loader;

5.2. By 29 July 2008, and indeed to date, Ismail Solomon has failed to pay the plaintiff the sum of R 25, 000.00, having only paid R8, 000.00;

5.3 As a result, the settlement agreement has been rendered void and is regarded as if it had never existed.”

32. As already observed, in argument counsel abandoned any reliance on a suspensive condition and addressed only the purported resolute condition.

33. In addition to the special plea, ABSA also filed a plea on the merits, the terms whereof need not be detailed at this stage. There was no rebuttal filed by ABSA to the deceased's replication and so all of the relevant allegations contained in the replication are taken to be denied by ABSA.

MATERIAL FACTS

34. A complete and accurate narration of the relevant facts is not possible, given the absence of testimony from the deceased and the dearth of other evidence from the limited witnesses who testified. Nevertheless, it appears from the record that the events leading up to the purchase of the loader and the consequences after delivery were the following.

35. The deceased needed the loader to execute his contract with the property developer. The deceased made contact with Mr. Solomon, a person who procured second-hand earth moving equipment and machinery for interested buyers. Mr. Solomon apparently had an on-going working relationship with Maskell for whom he disposed of earthmoving equipment and was indebted to them by virtue of an unrelated transaction. Solomon and Maskell agreed that he would work off part of that debt by procuring a loader for the deceased: evidently there would be a commission payable on the transaction by Maskell which Solomon could apply to his credit.

36. Solomon procured a loader from DJ and supplied it to Maskell. Maskell then on-sold the loader to ABSA which paid Maskell and financed the deal for the benefit of the deceased. The deceased never physically inspected the loader but was shown photographs thereof, probably courtesy of Solomon.

37. I pause to observe that just whose agent Solomon was not conclusively resolved on the evidence. In the special plea, ABSA alleges he was the deceased's agent while in the replication, the deceased says that he was ABSA's agent and, as demonstrated above, accuses him of collusion with ABSA's employees (Fortune and Gasnolar) and Grant, all acting in concert to his (the deceased's) detriment.

38. After the loader had been sourced, a certain Mr. Bennett, a sworn appraiser, was asked by Solomon to provide a so-called "desk top" assessment of the value of the loader. Bennett never personally inspected the vehicle but relied on the registration documents of the loader sourced by Solomon to provide the deceased with a fair valuation thereof based on information sourced on the internet. In evidence before the Trial Court Bennett said that he had been approached by Solomon and DJ to provide the valuation. Evidently, he had no direct contact with the deceased.

39. It is not in dispute that the loader which was delivered to the deceased in Philippi in late March 2008 was not the same the loader that was depicted in the photographs that had been shown to Bennett and emailed to the deceased (care of his wife) on 27 February 2008. That much was apparent from the external defects depicted on the loader delivered to the deceased – these were not visible on the photographs disseminated earlier by Solomon. The full extent of the defects (both latent and patent) are fully set out in the second judgment.

40. The financing of the vehicle was facilitated through ABSA's branch in Claremont, Cape Town which is where, on 3 March 2008, the deceased signed Annexure A and the other documentation necessary to secure delivery of the loader to his premises in Philippi. ABSA's agent at that meeting was Fortune.

41. The evidence establishes that, whatever external manifestations or patent defects⁴ there may have been to the loader upon delivery, it was only when the engine was started up by Jacques in order to drive it off the low-bed at the deceased's premises that its defective mechanical functioning became apparent.

⁴ It was said that there was, for example, damage to the door and the mirrors, that the tyres were in poor condition and that the loading bucket was rusted.

Jacques testified that, Inter alia, the hydraulics were not fully functional to the extent that the loading bucket could not lift properly, its gearbox was faulty and it belched smoke.

42. Jacques said that the deceased remonstrated with the driver of the low-bed regarding the fact that the loader that was being delivered was not the loader he had bought. The driver remained steadfast that he was only doing what he was instructed to do – to effect delivery of the loader to the deceased. In the result, the deceased did not refuse to take delivery of the loader. Rather he instructed Jacques to reverse it off the low-bed and he would thus have been immediately aware of its latent defects as his son struggled to get the behemoth to move.

43. In the result, the deceased kept the loader and attempted to effect certain running repairs, seemingly in order to render it basically functional. To this end certain mechanics who had worked on the loader over time testified in the Trial Court as to its defects. This evidence was not seriously challenged.

44. The evidence did not reveal that the deceased took immediate steps vis-à-vis ABSA to address the alleged latent defects in the loader. As already stated, during 2008 he took the loader to various mechanical firms for repair work. He paid for some of that work but ultimately he was quoted the amount R242 664, 96 by a company known as Shadan Hydraulics for the anticipated cost of further repairs. The deceased did not authorize these repairs and simply abandoned the vehicle at Shadan's premises in Stikland.

45. Some years later Shadan gave up occupation of the Stikland premises and the loader remained behind forlornly abandoned at the mercy of the elements. During 2015 an agent for the manager of the Stikland premises, Ms. Cox Jones, testified that she made contact with the deceased's erstwhile attorneys enquiring what should be done regarding the abandon loader. She was told to contact the deceased. Ultimately, said Cox-Jones, the machine was cut up and sold for scrap. The recipient of the proceeds was unknown to her.

46. In 2009 the deceased defaulted on his payments to ABSA, whereafter summons was issued out of the Wynberg Magistrates Court for delivery of the loader alternatively payment of the outstanding capital – the sum of R575 228.03 – together with interest and costs on the attorney and client scale. The deceased lodged a counterclaim in that court in excess of R3m, made up in the main of his consequential losses for his inability to use the loader to discharge his contract with the developer. Because the counterclaim exceeded the jurisdiction of that court, the parties agreed to transfer the matter to this Division where the deceased issued summons on the basis set forth in his particulars of claim as set out above.

47. In the midst of the toing and froing in 2008 to have the loader repaired, the parties met in Cape Town in an attempt to resolve their differences, hence the agreement which forms the basis of ABSA's special plea. The details hereof will appear more fully hereunder.

IN SUMMARY

48. At the end of the day, the relevant facts may briefly be summarized as follows. The deceased bought a loader which was financed by ABSA and which was its property: in terms of Annexure A, the deceased was the purchaser of the loader and ABSA was to retain ownership thereof until the deceased had settled his indebtedness in full. In the event that the deceased elected to terminate the agreement at any stage prior to the fulfillment of his contractual obligations, he was obliged to return the loader to ABSA. The agreement contains no voetstoets clause nor are there any express clauses relating to warranties given by the one party to the other.

49. The loader which was delivered to the deceased was not the loader financed under the agreement. In this regard both Annexure A and the Release Note made provision for the recordal of the loader's engine, chassis, registration and serial numbers, yet neither document contained any such detail. Further, on Annexure A the loader was described as a "Renoster Kawasaki Front End Loader" with the year of first registration being recorded as 2003, while on the Release Note it was described as a 2000 model.

50. There is no dispute that the loader contained latent defects which affected its ability to function properly, or put differently, which rendered it unsuitable for its designated purpose. This fact is borne out by the evidence of the mechanics who either worked on the loader or were asked to quote on the anticipated cost of further repairs. Furthermore, the evidence on record of Grant, who was ABSA's only witness before the Trial Court, established that the background to the meeting of 23 July 2008 at ABSA's offices in Cape Town was the following.

"MR GRANT: What happened, was there was a Clive Cook, and there were a number of other people involved as well in the series of transactions. So the issue was, in relation to Cook and the others, is that the equipment which had been purchased and delivered to them had certain defects, and they were unhappy with the equipment that they had taken delivery on. And so the discussions were along the lines of how do we resolve and how do we deal with those issues in relation to the equipment."

Mr. Grant went on to testify later that the deceased had bought the loader "blind" and was not happy with it because of its poor condition.

51. Lastly, it is common cause that the deceased breached the agreement in early 2009 and that he did not return the loader to ABSA. On 6 May 2009 the deceased's attorneys wrote to ABSA's attorneys and informed them that they were instructed by the deceased that the loader could be collected at the premises of Shadan Hydraulics and that the return thereof was tendered without prejudice to the deceased's rights. At no stage did the deceased purport to cancel the agreement in terms: the particulars of claim allege that the letter of 6 May 2009 constituted the cancellation of the agreement, alternatively that the service of the summons herein (sometime after 11 November 2009) served as cancellation thereof.

THE JUDGMENT OF THE TRIAL COURT

52. The judgment of the Trial Court is unfortunately not a model of clarity and the reasoning is sometimes difficult to follow. At the conclusion of the judgment, the Trial Court adopted what might be termed an overarching approach to the various causes of action pleaded by the deceased in non-suiting him.

“F. FINDING

[80] In the circumstances, this Court is not convinced that the plaintiff has presented a proper case for the relief sought. At the same time, in the absence of a dispute to the defendant’s arrear instalment claim in reconvention of an amount of R575 228.03 the claim succeeds.”

That notwithstanding, I consider that the following can be gleaned from the judgment.

53. Firstly, without expressly saying so, the Trial Court appears to have acknowledged the enforceability of the settlement agreement and upheld the special plea.

“[70] It might be argued that the agreement was contrary to public policy, unfair, oppressive and draconian and so on. However, the plaintiff did not tender any evidence supporting the suggestions that the circumstances leading to the conclusion of the settlement agreement were unfair, unconscionable and oppressive. These suggestions were only put to the witnesses to comment who were not party to this contract and/or settlement agreement. Again, this court cannot make its own assumptions on a settlement agreement that was concluded in the presence of Mr. Cook. In this situation, it is not open for the plaintiff to argue legal principles without which (sic) are not based on facts.

[71] Moreover, it was not clear whether Mr. Cook had disavowed the terms of the settlement agreement that he would not have any claim against Absa nor Peter Maskell Auctions CC when he received the part payment of the settlement agreement and subsequently claimed damages against Absa. In addition, there was no suggestion as to what should be done with the benefit (R8000.00) acquired by the plaintiff as a result of that settlement agreement. No authority was produced on whether the plaintiff is entitled to receive a benefit under the settlement agreement and under this claim. In my view, that is impermissible.”

54. Secondly, in relation to the interpretation of clause 12 of the agreement and the allegation by the deceased in para 4 of the particulars of claim that that it was an express term of the agreement that the loader was in good working order and condition and fit for purpose, the Trial Court said the following.

“[64] The plaintiff, in its (sic) interpretation of Clause 12 seems to suggest that it was only ABSA who stated that the loader was in good working order. This interpretation sort of loses sight of the fact that there were two parties to this agreement. This was an express and material term of the contract that the loader was in good order and condition. The plaintiff in agreement with the defendant agreed and or warranted that in deed (sic) the loader was indeed in good working order.”

55. After quoting the well-known passage from Endumeni⁵ relating to the interpretation of written agreements, the Trial Court continued –

“[65].... Judging from the contract of sale and the release note that was signed by the plaintiff subsequent thereto, there is no way that this court can doubt the fact that the plaintiff was satisfied by (sic) the loader that he purchased even before having sight of it. In D & H Piping System (*supra*)⁶, the SCA held that a delivery note constituted a performance of a contract. This therefore means that the contract at that stage was finalized and the deal was sealed. The Courts are cautioned not to be tempted to substitute their own interpretation in the contract, other than the one that was agreed to by the parties. If Mr. Cook did not intend to agree to those terms as specified, he should have simply refused to sign the said documents.”

56. The Trial Court appears to have considered that the clause in the Delivery Note relating to the deceased's satisfaction with the condition of the loader, confirmed a contractual term that the deceased had accepted that the loader was in good condition and working order. The passage in D & H Piping referred to by the Trial Court reads as follows.

⁵ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]

⁶ D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd and another 2006 (3) SA 593 (SCA) at [15]. This para in that judgment was cited by the Trial Court in para [56] of the judgment herein.

“[15] Neither a delivery note nor an invoice is a contractual document i.e. the type of document in which the recipient would expect to find terms and conditions intended to form part of the contract between the sender of the document and the recipient. Both the delivery notes and the invoices received by the appellant’s employees reflected performance, or part performance, of a contract already concluded. Neither constituted an offer to do business. They would therefore not have required the attention of a person authorised by the appellant to negotiate and agree to the terms of any contract with the respondent. The respondent could accordingly not reasonably have expected that they would come to the attention of such a person, as opposed to the person(s) who would acknowledge receipt of goods delivered or process invoices for payment; and this is particularly so both because the respondent must have known that the appellant is a large company, with different employees authorised to perform different functions on its behalf and also because, to the knowledge of the respondent, the terms of its contractual relationship with the appellant had already been negotiated with Lombard. Once it is established that no person authorised to bind the appellant to the respondent’s general terms and conditions ever became aware of them, or could reasonably have been expected to do so, it does not avail the respondent to point to the number of occasions on which such documents were sent to the appellant or the period of time over which this was done.”

57. As I read that *dictum*, it establishes that where the party acknowledging satisfaction with the condition of the *merx* is someone other than the person who concluded the agreement, unless the former is expressly authorized to acknowledge the integrity of the *merx* on delivery, any such acknowledgement is legally irrelevant.

58. But that was not the position here. It was common cause that Annexure A and the Delivery Note were both signed at ABSA’s offices in Claremont on 3 March 2008 by the deceased personally, yet it was also common cause that the loader was only delivered to the deceased at his premises in Philippi during the second half of March 2008. The question that then arises is what is to be made of the acknowledgement by the deceased in the Delivery Note regarding a non-existent state of affairs? In the absence of testimony by the deceased under oath, an answer to that question could be said to amount to judicial speculation, but, that having been said, it is difficult to

avoid a conclusion that the deceased and ABSA were in agreement that the loader described in Annexure A and to be delivered thereafter to the deceased was to be in good working order and condition and fit for purpose.

59. In drawing that conclusion, I have regard to the mandated approach to contractual interpretation that Annexure A must be interpreted contextually and purposively so as to give it commercial efficacy. In Capitec⁷, the SCA restated the approach as follows.

“[25] Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings’ consent was indeed required. The much-cited passages from Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)⁸ offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, ‘[t]he inevitable point of departure is the language of the provision itself’.”

60. As counsel for the deceased argued, and in the absence of a *voetstoots* clause in the agreement, one cannot reasonably undertake to keep a *merx* in good working order and condition unless it has been delivered to one in that state. Had there been a *voetstoots* clause the situation may have been otherwise and it might have been open to ABSA to argue that, whatever the condition of the loader on delivery, it was the deceased’s obligation to maintain it in good condition and working order.

⁷ Capitec Bank Holdings Ltd and others v Coral Lagoon Investments 194 (Pty) Ltd and others 2022 (1) SA 100 (SCA)

⁸ 2012 (4) SA 593 (SCA) at [18]

61. The judgment of the Trial Court deals with the test for the incorporation of tacit and implied clauses into the agreement and aspects of the *actio empti* and *actio redhibitoria* (the aedilician remedies) but there are no conclusive findings as to the applicability or not of these remedies. I accept that the aedilician remedies were available to the deceased in the event that the loader was latently defective and I agree with the exposition of the law relating to the aedilician remedies as set forth in the second judgment.

THE SPECIAL PLEA

62. Although a number of witnesses were called to testify in support of the deceased's case, no one dealt with the meeting held on 23 July 2008 and the agreement, which it is common cause, was concluded there. The sole witness for ABSA was Grant who testified in November 2020 about his recollection of events more than 12 years earlier. His memory was understandably vague and in the witness-box he referred to his contemporary notes taken during the meeting to refresh his memory and a letter dated 26 July 2008 to ABSA. His notes were limited as the file in the matter had been destroyed by the firm with which he had practiced at the time.

63. Grant told the court that he was an attorney with more than 15 years' experience and represented Maskell, a long-standing client who ran an auctioneering business in KZN. Present at the meeting were the deceased who was accompanied by a certain Rodney Mars (also sometimes referred to as "Marz"), who Grant understood to be a para-legal of some sort assisting the deceased. ABSA was represented by Fortune and an employee later identified as Ms. Jasmina Gasnolar. Solomon was there and was later described by Grant as "*the agent involved in the transaction that was under scrutiny*".

64. Grant told the Trial Court of the purpose of the meeting.

"MR GRANT... So the issue was, in relation to Cook and the others, is that equipment which had been purchased and delivered to them had certain defects, and they were unhappy with the equipment that they had taken delivery of. And so

the discussions were along the lines of how do we resolve and how do we deal with those issues in relation to the equipment.”

He went on to describe ABSA’s role in the meeting as “*fairly passive.*”

65. Grant explained that at the meeting Solomon produced the photographs of the loader which had been shared earlier with the deceased and which was the subject of the sale. He testified regarding the deceased’s dissatisfaction expressed at the meeting with the quality of the loader which was delivered to him, according to Grant, on 28 March 2008. He further testified that the deceased had described how the loader had functioned for a week or so and how, thereafter, various problems arose. These were all described with reference to mechanical defects – not related to the external appearance of the loader – which effectively rendered the machine inoperable. He noted that on 21 July 2008 the deceased had obtained a quote for R242 000 to repair the loader.

66. Grant further testified that Solomon, who stayed in the Western Cape, was known to his client, Maskell, and that they had done business in the past. Solomon evidently owed Maskell money from previous dealings and in order to settle that debt, the following arrangement was put in place.

“MR GRANT: So the idea would be that Solomon would introduce to Maskell equipment and the buyer; Maskell would purchase that equipment, and then he would sell it on at a mark-up. So, for example, if he bought an item of equipment, say for R100 000 that had been referred to him by Solomon, he would then sell the same item of equipment, say for R120 000.... And then the profit, the R20 000 would be set off... [against]...the debt owed by Solomon to... Maskell.

The transaction with the deceased was said to be such a deal.

67. Grant testified that an agreement was concluded at the meeting involving the deceased and Solomon. ABSA and Haskell were not parties thereto. The salient terms of this agreement, which was concluded orally and to which I shall refer further

as the settlement agreement, were later recorded in a letter which Grant sent to ABSA on 28 July 2008. It reads as follows:

“Dear Sir

CLIVE COOK – FRONT END LOADER

1. I refer to the meeting held at your offices on 23 July 2008 and confirm that we represent Peter Maskell Auctions CC.
2. We confirm that the ‘dispute’ arising from the sale and financing of the front end loader has been settled.
3. In terms of the settlement, the buyer’s agent, Ismail Solomon, has undertaken to pay to the buyer (Clive Cook) the sum of R 25 000, 00 by no later than 29 July 2008. This payment is in respect of the alleged defects in the front end loader.
4. Both Absa and Peter Maskell Auctions CC have now ‘fallen out of the picture’ and neither Solomon nor Clive Cook shall have any claims against ABSA or Peter Marshall Auctions CC.

Yours faithfully “

68. The letter makes plain that Grant understood that Solomon was the deceased’s agent and that the settlement was concluded on that basis - between the deceased as principal and Solomon as his agent. Pursuant to that agreement, the deceased would look to Solomon to make good for any amounts recoverable from the seller under the aedilician remedies while his obligation to ABSA under the instalment agreement would remain in place.

69. It is significant to note that on the day after the meeting, 24 July 2008, the deceased also wrote to ABSA as follows.

“To: Shaun

From: Clive Cook

According to our meeting with Mr. I. Solomon and myself, the agreement that we reached is that we would fix only the main moving part.

We contacted the mechanic [Russell] which (sic) was introduced by Ismail. He indicated that it would take approximately five weeks, to complete what was discussed.

As for what was arrange (sic) in the meeting, and the mechanics report, we are looking at the end of September/October with instalments.

Yours sincerely”

70. Grant concluded his evidence by explaining that the discussion at the meeting, which he said was fairly cordial, concerned the complaints that the deceased had about the condition of the loader. As he saw it, the problem was that the deceased had “*bought the equipment blind*” and was unhappy with what he had bought on account of its condition.

71. The cross-examination of Grant was protracted but revealed little that was new. Mr. Albertus was understandably hamstrung in his questioning of this witness by the absence of his deceased client whose instructions and evidence were central to the various defences put up in the replication to the special plea. The thrust of the cross-examination was nevertheless two-pronged.

72. Firstly, it was suggested that Grant’s assumption that Solomon was the agent of the deceased was wrong and that he was in fact the agent of Maskell. This is in conflict with the allegation made by the deceased in para 8.1 of his amended particulars of claim, in which he claimed that Solomon was ABSA’s agent or employee. In any event, Grant remained resolute that he had considered that Solomon was the deceased’s agent and in the absence of any evidence to gainsay that stance, I consider that there is no compelling reason to reject this view. At the end of the day, however, the question of agency is not material to the issues before this Court.

73. The second point in cross-examination related to the suggestion that the contract was clearly oppressive and essentially foisted upon the deceased. Mr. Albertus alluded to the fact that there was an allegation attributed to the deceased that there was a quote for repairs to the loader in the sum of R242 000. In light thereof, said counsel, the decision to agree to a settlement of R25 000 was probably attributable to the deceased having been placed under undue pressure to settle. Counsel did not identify the party (or representative) who was alleged to have applied such undue pressure but it can only have been ABSA because that is the party against whom the defence is raised. However, it was not suggested by Mr. Albertus in cross-examination that Fortune had behaved improperly in concluding the agreement on behalf of the bank; this notwithstanding the allegation in para 8.1 of the amended particulars of claim that Fortune acted in concert with Solomon as ABSA's agent or employee.

74. I am not persuaded that there is any merit in the second point. Firstly, there are no obvious conclusions that can readily be drawn from the objective facts which point to undue influence or the bending of the will of the deceased. On this score, it must be borne in mind that the deceased was accompanied to the meeting by Mars who was considered by Grant to have some modicum of legal experience. Moreover, there was no attempt to present the evidence of Mars to sustain the inference that Mr. Albertus sought to draw, nor was there any evidence that Mars was unavailable to testify on behalf of the deceased. Secondly, and importantly, in a defence of this nature, evidence of the state of mind of the contracting party subjected to undue influence will invariably be crucial. Once again the absence of the deceased as a witness is a critical consideration in this regard.

75. Thirdly, there is the email sent by the deceased to Fortune on 24 June 2008 in which he offers some insight into the reason for his agreement to settle on R25 000 against a quotation for R242 000 to fix the loader. The tenor of the email is that only limited repairs were to be done - *"to fix the main moving part"* – in order to render the loader functional to the extent that it would enable him to use it to perform under the contract with the developer and, most importantly, to resume payment of the monthly instalment under the agreement by September/October 2008. The email might be

interpreted to suggest that the cost of repairs in the sum of R242 00 was considered to have covered more than just essential repairs.

76. In para 4 of the second judgment there is reference to a passage in Sasfin⁹. I adopt that *dictum* which holds that the power to declare contracts to be contrary to public policy is a power to “be exercised sparingly and only in the clearest of cases”. That approach was confirmed as follows by the Supreme Court of Appeal in Pridwin¹⁰.

“[27] The relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution, is now clearly established. It is unnecessary to rehash all the learning from our courts on this topic. It suffices to set out the most important principles to be gleaned from them:

(i) Public policy demands that contracts freely and consciously entered into must be honoured;

(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;

(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;

(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;

⁹ Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 9B-E

¹⁰ AB and another v Pridwin Preparatory School and others 2019 (1) SA 327 (SCA) at [27]

(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.” (Internal references omitted)

77. This *dictum* in Pridwin was endorsed by the Constitutional Court in Beadica¹¹, albeit with limited qualification in respect of the principle of restraint mentioned by the Supreme Court of Appeal in subpar (v) above.

“[88] The second principle requiring elucidation is that of “perceptive restraint”, which has been repeatedly espoused by the Supreme Court of Appeal. According to this principle a court must exercise “perceptive restraint” when approaching the task of invalidating, or refusing to enforce, contractual terms. It is encapsulated in the phrase that a “court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases”.

[89] This principle follows from the notion that contracts, freely and voluntarily entered into, should be honoured. This Court has recognised as sound the approach adopted by the Supreme Court of Appeal that the power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases.

[90] However, courts should not rely upon this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional values. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Courts should not be so recalcitrant in their application of public policy considerations that they fail to give proper weight to the overarching mandate of the Constitution. The degree of restraint to be exercised must be balanced against the backdrop of our constitutional rights and values. Accordingly, the “perceptive restraint” principle should not be blithely invoked as a protective shield for contracts that undermine the very goals that our Constitution is designed to achieve. Moreover, the notion that there must be substantial and incontestable “harm to the

¹¹ Beadica 231 CC and others v Trustees, Oregon Trust and others 2020 95) SA 247 (CC) at [82]

public” before a court may decline to enforce a contract on public policy grounds is alien to our law of contract.” (Internal references omitted)

78. The earlier Constitutional Court authority referred to in Beadica at [89] is Barkhuizen¹² where the Court noted the following.

“[70] While it is necessary to recognise the doctrine of pacta sunt servanda, courts should be able to decline the enforcement of a time limitation clause if it would result in unfairness or would be unreasonable. This approach requires a person in the applicant’s position to demonstrate that in the particular circumstances it would be unfair to insist on compliance with the clause. It ensures that courts, as the Supreme Court of Appeal put it,

“employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of ‘freedom of contract’, while seeking to permit individuals the dignity and autonomy of regulating their own lives.”

And this entails, the Supreme Court of Appeal explained,

“that intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties’ individual arrangements.”

[71] This is a sound approach.” (Internal references omitted)

79. The mandated approach is therefore that the party which seeks to advance the contention that a contract is contrary to public policy bears the onus of establishing the facts upon which it seeks to rely. In this case the deceased adduced no such evidence and the reliance in the second judgment merely on the allegations made in the replication is, with respect, misplaced. Pleadings are the articulation of a party’s envisaged case, not the evidence. In my respectful view, without any

¹² Barkhuizen v Napier 2007 (5) SA 323 (CC) at [70] – [71]

evidential basis having been established on behalf of the deceased, this Court cannot begin to consider whether the settlement agreement is contrary to public policy.

80. Similarly, despite the far-ranging allegations of impropriety and collusion made in the replication, the appellant adduced no evidence to sustain the claims that the deceased was subjected to undue influence in concluding the settlement agreement. In the result, the first and second grounds of defence to the special plea raised in para's 2 and 3 of the replication must fail.

81. The third leg of the replication to the special plea is that the settlement agreement is not enforceable for want of compliance with clause 13 of Annexure A. The argument advanced by Mr. Albertus was that the settlement agreement constituted an “*addition to*”, “*variation*” or “*agreed cancellation*” of a provision of the agreement, as contemplated in clause 13.1 of Annexure A. The argument proceeds as follows.

82. Annexure A is an agreement of sale in which ABSA was the seller and the deceased the purchaser. The agreement contains no *voetstoots* clause and so it is to be imputed that it was an implied term of the agreement that ABSA warranted that the loader was free of latent defects and fit for purpose. In that event, so it was argued, the aedilitian remedies (whether under the *actio empti* or the *actio redhibitoria*) would have been available to the deceased in the event that the loader was found to be suffer from latent defects. By concluding the settlement agreement, and exonerating ABSA from any liability for the latent defects in the loader, it was submitted that the deceased had effectively varied the agreement by consenting to an alteration to the legal consequences of the contract – in effect waiving his entitlement to rely on the aedilitian remedies.

83. Clause 13.1 is a non-variation clause of the sort contemplated in Shiffren¹³. Such clauses have traditionally been strictly enforced by the courts and have

¹³ SA Sentrale Ko-op Graanmaatskappy Bpk v Shiffren 1964 (4) SA 760 (a)

survived constitutional scrutiny¹⁴. However, it has repeatedly been held that the rule in Shiffren does not apply in circumstances where one party waives its accrued rights under a contract.¹⁵ The decision in Academy of Learning¹⁶ relied on by Mr. Albertus is thus distinguishable on the facts. In that matter the non-variation clause included the phrase “*and no interpretation, change, termination or **waiver** of the provisions of this agreement...will be binding upon the parties unless in writing and signed by [both parties]*”. The learned judge, after citing Hillsage Investments and Impala Distributors, was of the view that the clause in that matter was wide enough to cover an oral waiver, which thus was required to be in writing.

84. In the present matter, the non-variation clause does not require a waiver of rights accruing under the agreement to be reduced to writing and signed by both parties. In Impala Distributors¹⁷ the Full Court stressed that a waiver of a right similar to that exercised by the deceased in this matter was a unilateral act by exercised by a party in respect whereof the consent of the other contracting party was not required. It is a unilateral act which can exist alongside the contract and its non-variation clause.

85. In the present matter, I have accepted that the aedilitian remedies were available to the deceased at the time of the meeting of 22 July 2008 given that –

- (i) it was not in dispute that the loader was latently defective;
- (ii) that there was no voetstoets clause in Annexure A; and
- (iii) that the effect of clause 12.1, read in the context of the Delivery Note, constituted a warranty by ABSA that the loader was free of latent defects and fit for purpose.

¹⁴ Brisley v Drotsky 2002 (4) SA 1 (SCA) at [6] – [10]

¹⁵ Hillsage Investments (Pty) Ltd v National Exposition (Pty) Ltd and others 1974 (3) SA 346 (W) at 354F; Impala Distributors v Taunus Chemical Manufacturing Co.(Pty) Ltd 1975 (3) SA 273 (T) at 278A-B; Van As v Du Preez 1981 (3) SA 760 (T) at 763H – 765A; Miller and another NNO v Dannecker 2001 (1) SA 928 (C) at [15]

¹⁶ Academy of Learning (Pty) Ltd v Hancock and others 2001 (1) SA 941 (C) at [36]

¹⁷ At 277C -G

86. Notwithstanding the availability of those remedies, the deceased decided not to avail himself thereof but settled rather for the payment of the sum of R25 000 by Solomon, who was not a party to the agreement. And, importantly, that decision to look to Mr. Solomon for payment in respect of the repairs to the loader was conveyed to ABSA in writing by the deceased on 24 July 2008 and in more detail by Grant on 26 July 2008. Further, the deceased embraced the settlement agreement by accepting the part payment of R8000 made by Solomon towards the agreed sum of R25 000.

87. In the circumstances, I conclude that the deceased is not entitled to rely on the provisions of clause 13.1 to avoid the consequences of the common cause settlement agreement.

88. Lastly, there is the allegation in the replication that the settlement agreement was subject to either a suspensive or a resolute condition linked to the initial payment by Solomon of the sum of R8 000. During the cross-examination of Grant, Mr. Albertus abandoned any reliance on a suspensive condition, noting that the operation of the settlement agreement had not been suspended: rather, counsel accepted that it had been implemented when the deceased accepted the payment of R8 000 from Solomon.

89. The cross-examination turned to the issue of whether the settlement agreement contained a resolute agreement. It was argued that when Solomon failed to pay the balance, the alleged condition was triggered and the settlement agreement was voided and thus of no force and effect. The argument is based on legal sophistry and not evidence. On a plain reading of the written recordal of the oral agreement in Grant's letter of 26 July 2008, there is no basis to conclude that the stipulation that Solomon would pay the full agreed amount by a fixed date was anything other than a term of the settlement agreement relating to payment.

90. But the argument does not end there. In cross-examination Mr. Albertus, in pressing for a resolute condition, invited Grant to comment on his understanding of the basis for payment. The witness conceded that he had a fair understanding of the law of contract and was adamant, having witnessed the conclusion of the settlement

agreement and made contemporaneous notes thereof, that there was no room for an interpretation that the settlement agreement embraced a resolute condition.

“MR. GRANT: Well, I’m telling you that it – that payment term was not a resolute condition.”

AGENCY

91. In the third judgment, My Colleague Kusevitsky concurs in the second judgment for the reasons contained therein and further raises, by way of an apparent *obiter dictum*, the issue of the agency of Solomon as a potential bar to the conclusion of the settlement agreement. In para 1 of the special plea, ABSA does not seek to rely on the agency of Solomon for the conclusion of the agreement but rather alleges in para 2.2 that Solomon (*qua* agent) undertook to pay his principal (the deceased) the sum of R25 000.00 in respect of the latent defects in the loader.

92. As already pointed out, the allegations in para 2.2 are admitted by the deceased, save that it is denied that Solomon was his agent. The deceased’s case on the pleadings is that Solomon was ABSA’s agent, while later (as pointed out earlier) during cross-examination counsel suggested to Grant that he was Maskell’s agent. But whatever the correct position in law may be, the deceased admitted in the replication that the agreement was that Solomon would pay the deceased and he (the deceased) would no longer enjoy any claim against ABSA arising out of the latent defects. It is for this reason that I contend that the question of agency is legally irrelevant in this matter.

CONCLUSION

93. In the light of the foregoing, I am persuaded that the special plea should be upheld and that the deceased is bound by the settlement agreement as alleged. Consequently, the deceased enjoys no claim against ABSA arising from the latent defects in the loader and the appeal against the dismissal of the claim in convention falls to be dismissed

94. As regards ABSA’s claim in reconvention, the Trial Court held that, “*in the absence of a dispute to the defendant’s arrear instalment claim in reconvention of an*

amount of R575 228.03 the claim succeeds” and judgment was granted in favour of ABSA in that amount.

95. During several pre-trial conferences, and at the commencement of proceedings before the Trial Court, the parties agreed on a separation of issues. These included determination of the special plea and the allegations made in para’s 1 to 13 and 15.1 of the particulars of claim and the defendant’s claim in reconvention. It was expressly agreed that the quantum of the deceased’s claim would stand over for later determination.

96. I do not understand the agreement regarding the holding in abeyance of the quantum of the claim in convention to include the quantum of the claim in reconvention. The notice of appeal does not seek to attack the finding of the quantum ordered on the claim in reconvention – it is only the finding in respect of the determination of the merits of that claim which is attacked. Furthermore, neither party suggested in either the heads of argument or in oral argument before us that the quantum of the claim in reconvention was incorrectly determined. In the result the finding of the Trial Court on the claim in reconvention is correct and must stand.

97. Had this judgment held the majority, I would have ordered that the appeal be dismissed with costs.

GAMBLE, J

THULARE J

98. I have read the judgment of Gamble J. The facts and the applicable law appear from that judgment. In my view, the facts and the application of the law thereto established the availability of the two aedilician remedies, to wit, the action empti and the actio redhibitoria, to the appellant. The loader delivered was not the one identified on the photographs sent but rather another loader of the same vintage, make and colour which was not in a good and roadworthy order and condition but rather in a mechanical state of disrepair and inoperable and was substantially unfit for the purpose for which it was sought. Had Cook known the defects he would not have purchased that loader as he would not be able to discharge his contractual obligations to third parties because of the inoperability of the loader and would as a result suffer damages in the form of loss of profits.

99. I have my doubts that Solomon and Maskell could always be said to have been the agents of Cook. Cook could not source from and deliver the loader to himself. It is amongst others from this point of agency, and its importance in the approach to the alleged compromise, that I am unable to agree with Gamble J. The developments leading up to the 23 July meeting, which founded ABSA's special plea, formed the body of evidence that showed that both Solomon and Maskell acted interchangeably by their own name, on behalf of Cook and on behalf of ABSA. It was for that reason that it was necessary that the meeting was attended by the four, to wit Cook, Solomon, Maskell and ABSA. Against this background, agency, both in respect of the agreement and the settlement, was very central to the dispute. Although Grant used the plural and created the impression that the others were also unhappy, the only person at that meeting who was unhappy with the loader delivered was Cook. At that meeting, it was Cook who expressed dissatisfaction with the loader delivered, which he bought from ABSA.

100. The parties to the sale agreement, in which the agreement founded the delivery of a loader that caused the displeasure of Cook, were Cook and ABSA. In my view, the oppression in the making of that 23 July agreement emerged in that the agreement absolved ABSA where its agents, Maskell and Solomon, delivered an inoperable loader to Cook. The agreement was unconscionable in that two days before that meeting, Cook had obtained a quote for R242 000-00 to repair the loader, and ABSA's agent Solomon, at that meeting, had undertaken to pay him R25 000 in respect of the alleged defects, and the agreement was that ABSA and Maskell fell out of the picture and neither Solomon nor Cook would have any claim against them. The sum was grossly inadequate to cover the costs of repairing the defects to the loader. Without any quote and evidential basis, the amount of R25 000 was proposed to fix only the moving part. This amount is advanced by Solomon, who had previously provided a 'desk-top' assessment of the value of the loader by a sworn appraiser who never inspected the loader but relied on information from the internet and documents supplied by Solomon. Cook had described the manner in which the loader was delivered in a mechanical state of disrepair and inoperable as including that the motor turned but after having been started 3 times, the starter burnt out, the motor started only in the first three occasions, the suspension did not work properly

as the bushes were badly worn, the electrical circuitry did not work properly as there were no wires/cables leading to the lights and the loom which controls the electrical circuitry was in a state of disrepair, the motor delivered power to the axles and power was delivered from the axles to the wheels but there was resistance to free movement, the hydraulic system did not work properly. There was initially no hydraulic oil in the machine. When the machine was filled with 75 litres of hydraulic oil and started, it spewed out oil. Cook was compelled to repair the hydraulic system and after such repairs were effected, the system worked shortly whereafter it packed up on account of there being metal swarf in the hydraulic lifters. The braking system was extremely weak and in addition thereto, there was no functional handbrake. The controls and accoutrements in the cab did not work properly on account of a faulty loom. The gearbox and shifters did not work properly, the gearbox was leaking oil and could not reach top gear. The tyres were smooth with holes and bubbles present on the surface. The door on the driver's side could not open and close and the passenger door had no locking mechanism whatsoever. The cab seat was broken and locked permanently in a fixed position and thus not amenable to any adjustment. The air conditioner did not work. None of the lights on the loader worked. There were no mirrors. There was no window in the passenger door whilst the window in the driver's door was cracked and hanging. The bucket was completely rotten with big holes and in addition was wobbly. The radiator had no cover and was blocked due to oil leaks from the engine and the hydraulic system. The steering was worn and unstable. The cab was rusted and the wheel rims were rusted.

101. In Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at page 9B-E it was said:

“No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12 ([1937] 3 All ER 402 at 407B - C),

'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'

D (see also *Olsen v Standaloft* 1983 (2) SA 668 (ZS) at 673G). Williston on Contracts 3rd ed para 1630 expresses the position thus:

'Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power.'

In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.

'(P)ublic policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject-matters''

The absolution of ABSA, taking advantage of an obviously naïve, ordinary and innocent member of the public, who engaged with ABSA clearly without effective legal representation, resulted in harm to a member of the public, which is substantially incontestable. ABSA delivered an inoperable loader to a member of the public, and ABSA's driver refused to return the loader back to ABSA when the member of the public refused to receive it in its inoperable state. To enforce the agreement under these circumstances is unduly harsh and oppressive. I am unable to find how the letter of Cook the day after the meeting in any way helped ABSA, as regards the attainment of simple justice between man and man, on the interests of the community on economic expedience. Cook bought a loader to conduct business. ABSA delivered a lemon, sought to be absolved and needs to be paid in full as if it delivered a loader fit for purpose. This is a bargain that a court has a duty to invalidate. It would be unreasonable and unfair to enforce the agreement. ABSA cannot gain an advantage from an unacceptable excess of the freedom to contract.

102. In Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa (330/2023) [2024] ZASCA 107 (3 July 2024) it was said at para 15 and 16:

[15] The issue, therefore, in this appeal is whether Phoenix Salt through the Krok Brothers waived its right to claim the remaining loan amount from Lubavitch, if so, whether such a waiver is competent in the face of the non-variation clause. A waiver denotes a voluntary abandonment of a known existing right, benefit or privilege which if it were not for such waiver the party would have enjoyed it. It should be a deliberate abandonment either expressly or by conduct plainly inconsistent with an intention to enforce such right [R H Christie Christie's The Law of Contract in South Africa 8 ed (2022) at 532. See also: Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (T) at 323-324]. The principle that a person may denounce any right or privilege available to him provided such a waiver is not prohibited by law or does not offend public policy, is well established in our law [SA Eagle Insurance Co Ltd v Bavuma 1985 (3) SA 42 (A) 49G-H; Ritch and Bhyat v Union Government (Minister of Justice) 1912 AD 719 at 734-735 where the court held:

'The maxim of the Civil Law (C.2, 3, 29), that every man is able to renounce a right conferred by law for his own benefit was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interests of the public as well. (Grot., 3, 24, 6; n. 16; Schorer, n. 423; Schrassert, 1, c. 1, n. 3, etc.). And the English law on this point is precisely to the same effect.']

The existence of a waiver can be traced from the conduct of the parties. Whether there was a waiver or not is a matter of evidence.

103. This Court in SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere [SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 4 All SA 520 (A); 1964 (4) SA 760 (A) at 765.] (Shifren) laid down a principle governing the non-variation clauses in agreements. In terms of this principle, once parties to a written agreement agree that an agreement cannot be altered unless certain conditions are met, no amendment will be valid unless the prescribed condition has been met. The

principle was reaffirmed in Brisley v Drotsky, [Brisley v Drotsky 2002 (4) SA 1 (SCA)] where this Court held that the purpose of non-variation clause was to curtail disputes and protect both parties to the contract. The Shifren principle did not create a 'strait jacket', which impact, courts should attempt to soften as a few cases demonstrated. The principle in its simplest interpretation, simply reinforced the rights of individuals to freely contract and be held to contracts they freely concluded. Importantly, for purposes of this appeal, Shifren did not determine whether the non-variation clause precludes a waiver."

I am not persuaded that Cook was informed that the *actio empti* and the *actio redhibitoria* were available to him as remedies in this case, against ABSA, where the loader had latent defects. I am not persuaded that Cook, of his own free will, informed of the available remedies against ABSA, voluntarily abandoned existing rights which he knew about. In my view, Cook cannot be said to have abandoned his rights consciously and intentionally after careful consideration and unhurried engagement. Cook did not deliberately and seriously, after careful thought as an informed and thus capable person having investigated and considered, with the intention that ABSA's obligations towards him as regards the loader would immediately cease, waive his rights. I do not understand Cook's pleadings, as a whole, to be an unequivocal admission of a waiver in the manner that Gamble J interpreted it.

104. For these reasons, I am not persuaded that Cook was bound by the settlement agreement. In any event, the alleged settlement was between Cook and Solomon, and not with ABSA as it should have been. I am persuaded that the deceased had a claim against ABSA arising from the latent defects in the loader and the appeal against the dismissal of the claim in convention should be upheld. It follows that ABSA's claim in reconvention as well as the special plea should fail. I would make an order upholding the appeal with costs, such costs to include the costs of two counsel where so employed. In the result I concur in the order proposed by Kusevitsky J in the third judgment.

THULARE, J

KUSEVITSKY, J

105. I have had the opportunity of perusing the judgments of Gamble J and Thulare J and am in agreement with the conclusion reached by Thulare J. I do, however, wish to add two observations thereto.

106. Absa put up a special plea of compromise. It averred *inter alia* that the material express and/or tacit term of the settlement agreement relied upon was that Plaintiff's agent, Ismael Solomon, undertook to pay the Plaintiff the sum of R 25 000.00 by no later than 29 July 2008 in respect of the alleged defects in the loader.

107. In my view, in order for Absa to be successful in its special plea, it has to show that the settlement agreement of compromise is valid and binding between the parties in the main action. Only once this is established can the enquiry commence as to whether or not the agreement so concluded offends public policy. That is not to say however that the former is an absolute pre-requisite in establishing whether a contract offends public policy. It is a trite principle that contracts should not be *contra bonos mores*.

108. It is trite that agreements of compromise are generally made between the very same parties to the dispute which is sought to be compromised. The effect of a compromise is the same as *res iudicata* on a judgment given by consent.¹⁸ It is an absolute bar to an action on the cause of action compromised, but not on any claim not included in the compromise. The practical effect of a settlement agreement of compromise is that there is no longer any dispute or *lis* between the parties.¹⁹ Furthermore, the general principles relating to compromise are applicable thereto. In *The Road Accident Fund v Taylor*²⁰ and other matters, the court stated the following in this regard:

“The essence of a compromise (*transactio*) is the final settlement of disputed or uncertain rights or obligations by agreement. Save to the extent that the compromise

¹⁸ *Van Zyl v Niemann* 1964 (4) SA 661 (A).

¹⁹ *Legal Aid v Magidiwana* 2015 (2) SA 568 at para 20.

²⁰ 1136-114/2021) [2023] ZASCA 64 (8 May 2023) at para 36.

provides otherwise, it extinguishes the disputed rights or obligations. The purpose of a compromise is to prevent or put an end to litigation. Our courts have for more than a century held that, irrespective of whether it is made an order of court, a compromise has the effect of *res iudicata* (a compromise is not itself *res iudicata* (literally 'a matter judged') but has that effect)."

109. In casu, the *lis* was between Mr Cook, who bought the loader and Absa, who provided the finance thereto. Generally, a settlement agreement would be *inter partes* the dispute, in this case between Absa and Mr Cook. In *Legal Aid v Magidiwana* 2015 (2) SA 568 (SCA), the court held that once the parties have disposed of all disputed issues by agreement *inter se*, it must logically follow that nothing remains for a court to adjudicate upon and determine.²¹

110. If a settlement agreement is concluded by a person not a party to the *lis*, then the onus is on the party relying on the settlement agreement to prove the authority of the third party to enter into the settlement agreement in its stead or otherwise. In his judgment, Gamble J opines that the question of agency does not arise. I respectfully disagree. It is common cause that Cook needed the loader to fulfil his contractual obligations and contacted Solomon who was a broker in earthmoving equipment. To the extent that Solomon procured the defective loader, in my view, his mandate as 'agent' ended as soon as the goods were procured and delivered to the supplier.

111. When the settlement agreement was entered into, present was Cook and Marz, representatives of Absa, Solomon and Grant, representing Maskell Auctioneers. According to the special plea, the averment is made that Solomon was Cook's agent and in that capacity, undertook to pay Cook the sum of R 25 000.00, a sum ostensibly to cover only the repairs of the 'main moving part'. In my view, this was a dispute between Cook and Solomon who ostensibly hoodwinked Cook by providing via Maskell and Absa, a lemon of a product, which was financed by Absa. Absa failed to do its due diligence.

²¹ at 579E.

112. Thus, the substance of the compromise as between Cook and Solomon was for payment of monies by the latter to the former. The effect of this agreement was to settle a dispute between Cook and a third party and the settlement, once concluded, formed the basis of any rights and duties of the parties, and any earlier obligation or liability *inter se* fell away. If there was a breach of the compromise, the aggrieved party had recourse based on the agreement of compromise. In other words, as between Cook and Solomon. The compromise between Cook and Solomon could never have substituted Absa for Solomon as the seller of the *merx*. In casu, the main action is between Cook and Absa and there can be no privity of contract *qua* Solomon. The contract is binding as between Cook, the debtor purchaser and Absa, the creditor. There also does not seem to be a cession of rights between Absa and Solomon. Thus, any agreement to waive rights must specifically be between the contracting parties in the main action.

113. Furthermore, Cook's right to restitution flows from the contract to which Solomon was not a party. The object of obtaining restitution is, as far as possible, to restore the position which existed prior to the conclusion of the contract.²² Generally a court will be slow to countenance a contract seemingly concluded in bad faith by a third party to the main action, the effect of which would be the relinquishing of rights by the debtor in favour of the creditor. There is therefore in my view, no basis in law upon which Solomon, not a party to the main *lis*, could have been a party to the settlement agreement of compromise, as a third party, without agency or novation, thereby absolving Absa from any remedies that Cook would have had against it.

114. Finally, with regard to the Plaintiff's claim regarding the merits, the court *a quo* held that the 'release note indicates that the plaintiff was required to confirm that he was satisfied with the condition of the loader and that it was in accordance with his entire satisfaction and according to his specification/requirements' and that 'in the absence of evidence from the plaintiff to that effect, the plaintiff's allegations are simply untenable'. This finding too cannot stand. It is common cause that Absa required the delivery note to be signed by Cook prior to them releasing the funds to Maskell and weeks before the actual goods were delivered to Cook. It does not

²² See *Van Zyl v Credit Corporation of SA Ltd* 1960 (4) SA 582 (A).

behove Absa to rely on the delivery note to absolve it of its liability. As a consequence, I am in agreement that the Aedilitian remedies are available to the Appellant.

115. For the reasons advanced I too would uphold the appeal and make the following order:

1. The appeal is upheld with costs of the proceedings to date, such costs to include the costs of two counsel where employed.
2. The Respondent's claim in reconvention is dismissed with costs, such costs to include the cost of two counsel where employed.
3. The Appellant is entitled to such damages, including consequential damages as he is able to prove at a later hearing.

KUSEVITSKY, J

GAMBLE, J:

ORDER OF COURT:

In the circumstances the following order is made:

1. The appeal is upheld with costs of the proceedings to date, such costs to include the costs of two counsel where employed.
2. The Respondent's claim in reconvention is dismissed with costs, such costs to include the cost of two counsel where employed.
3. The Appellant is entitled to such damages, including consequential damages as he is able to prove at a later hearing.

GAMBLE, J

APPEARANCES

For the appellant Advs. M.A.Albertus SC et J.B.Engelbrecht
Instructed by Jones Attorneys Inc.
Cape Town.

For the respondent Adv. M. Greig
Instructed by Webber Wentzel
Cape Town.