

**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO

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29 September 2025

Case No: 34726/2022

In the matter between:

**INTERGAME PROPERTIES (PTY) LTD  
INTERNATIONAL GAME TRADING CC  
GLEN AFRIC SPRINGWATER CC**

First Applicant  
Second Applicant  
Third Applicant

and

**GO2 H2O (PTY) LTD**

Respondent

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**JUDGMENT**

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GOUWS, AJ

## **INTRODUCTION**

[1] This application concerns the status of two written lease agreements, respectively concluded between the first applicant and the respondent, and the first through third applicants and the respondent, during July 2020.

[2] It is common cause that both leases contained a series of suspensive conditions which had to be fulfilled within a “reasonable period”, failing which the agreements would automatically lapse.

[3] The applicants’ case is that none of these conditions were fulfilled, and that the agreements have accordingly lapsed. Declaratory orders relating to both agreements are sought to this effect.

[4] In respect of the first lease agreement, which concerned the lease of water rights and a portion of a six-hectare portion of land, the suspensive conditions included:

[4.1] the obtaining of all necessary licences and permits required by South African law, the Department of Health and the Department of Water Affairs;

[4.2] the submission of an application for an extension of the existing water-use licence, which must include reports of a geologist and an EIA (environmental impact assessment) report;

- [4.3] the granting of all registrations that may be required by local council;
  - [4.4] application and registration with the South African National Bottled Water Association ("SANBWA");
  - [4.5] installation of a constant waterflow monitoring system;
  - [4.6] the appointment of a land surveyor to survey and record the co-ordinates of the leased portion to be registered with the deeds office;
  - [4.7] the registration of servitudes relating to water use;
  - [4.8] the registration of servitudes for roads and excess roads to the existing factory; and
  - [4.9] the obtaining of special zoning, including business rights for the factory, bottling, distribution, residential and/ or other.
- [5] In respect of the second lease agreement, the suspensive conditions were similar:
- [5.1] the obtaining of requisite licences required under South African law, and permits from the Department of Water Affairs and the Department of Health;
  - [5.2] the application for an amended or extended water-use licence;

- [5.3] obtaining all general registrations with the local council;
- [5.4] application and registration with SANBWA;
- [5.5] the installation of a flow monitoring system to regulate abstraction;
- [5.6] appointment of a land surveyor to record and survey the co-ordinates of the one hectare, as well as six hectare portions of the property to be leased by the applicants.

### **ASPECTS IN DISPUTE**

- [6] The applicants' case is advanced in broad terms: they allege that the respondent failed to comply with any of the suspensive conditions.
- [7] The respondent, by contrast, deals with each condition individually. It claims that the monitoring system was installed in April 2021; that SANBWA membership was already secured in 2019 and awaited operational status; that a provisional health approval was obtained in August 2021; that professionals were appointed to prepare the water-use application and conduct the survey; and that preparatory steps were taken regarding rezoning, building plans and environmental approvals.
- [8] The respondent contends that the applicant prevented the fulfilment of the outstanding conditions by forcefully and unlawfully evicting the respondent from the leased premises during July 2021, which made further progress impossible.

- [8] A further dispute concerns the effect of clause 7 of the lease agreement, which provides that operations were to commence within five months of occupation. The applicants, in the replying affidavit, contends that this period ought to be attributed also to the suspensive conditions, meaning that 5 months constituted a reasonable period within which these conditions were to be fulfilled.

### **ANALYSIS**

- [9] It is immediately apparent that several of the conditions are described only in broad and unspecific terms. The first condition refers to the obtaining of “all necessary licences and permits required by South African law, the Department of Health and the Department of Water Affairs”, but nowhere do the applicants explain what compliance would entail, or how long it would ordinarily take to obtain whatever licenses and permits were required. The second condition relates to the application for extension of an existing water-use licence, but no evidence is given as to the ordinary duration of such applications, or what would constitute a reasonable period within which to prepare and submit such an application. As to registration with SANBWA, the applicants do not explain what that process involves or the expected timeframe. For the installation of a constant water-flow monitoring system, there is no indication of what would constitute a reasonable period to do this. Similarly, the registration of servitudes and the rezoning of land are recorded, without reference to the steps involved or their typical duration.

- [10] In reply, the applicant contends that all of these conditions were to be met within 5 months from date of occupation, to with around November 2020.
- [10] The respondent, for its part, admits that many of the conditions had not yet been fulfilled. It acknowledges that the extension of the water-use licence, the land survey, the rezoning and the servitudes remained outstanding. It maintains, however, that some conditions were in fact satisfied or substantially progressed. These include the installation of the water-flow monitoring system in April 2021, SANBWA membership already secured in 2019, and a provisional approval from the Department of Health obtained in August 2021. The respondent explains that the outstanding conditions could not be completed because it was forcibly removed from the premises in July 2021, after which it had no further access.
- [11] In addition, the respondent contends that those conditions that remain unfulfilled remain so because of its unlawful eviction from the premises in July 2021, which constituted a repudiation of the agreements. The respondent contends that these conditions ought to be regarded as fictionally fulfilled.
- [12] It is apposite to first deal with the issue of fictitious fulfilment, particularly against the backdrop of the relief sought by the applicants. The applicants seek final relief. In such cases the well-established principle in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–635C applies: Where disputes of fact arise on the affidavits, a final order may be granted only if the facts averred by the applicant, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. Unless

the respondent's version is so palpably implausible, far-fetched or clearly untenable that it can safely be rejected on the papers, the Court must accept it for purposes of adjudicating final relief.

[13] The disputes in this matter are real and material. The question of whether the respondent was unlawfully evicted is in dispute. The question of whether this unlawful eviction resulted in the respondent being unable to meet all of the suspensive conditions is in dispute. Whether certain conditions were fulfilled or partially fulfilled is disputed. Whether all of the conditions were to be fulfilled within 5 months from date of occupation of the premises is disputed. And what constitutes a reasonable period within which these conditions were to be fulfilled is disputed.

[14] On the affidavits, I find nothing far-fetched or palpably implausible about the respondent's version that would warrant its rejection on the papers. On that version, the respondent's inability to finalise certain approvals was directly caused by the alleged unlawful eviction.

[15] It is a recognized principle that no party may benefit from its own obstructive conduct. The dictum of Wessels, CJ in **KOENIG V JOHNSON & CO. Ltd 1935 AD 262** is instructive:

*"If it is the fault of the person in whose favour the condition is inserted that the condition cannot be fulfilled, the law considers the condition to have been fulfilled as against him. The nature of the contract is always an important element. In some cases the person benefitted by the non-performance of the condition can sit still and do nothing to assist in its fulfilment; in other cases it is his legal duty to assist in the condition being fulfilled; and in other cases if he deliberately and in bad faith prevents*

*the fulfilment of the condition in order to escape the consequences of the contract, the law will consider the unfulfilled condition to have been fulfilled as against the person guilty of bad faith.”*

- [16] The applicants deal with the proposition of fictional fulfilment by denying the forced eviction, but also by contending that the conditions were required to be complied with within five months of signature – namely by December 2020 – and accordingly, even if the forced eviction did occur later as alleged, it was not the cause of the non-fulfilment. Thus, so the argument goes, nothing would turn on the forced eviction.
- [17] There are substantial difficulties with this proposition. First, a 5-month period that relates to the fulfilment of the suspensive conditions is not borne out by any express term in the agreement. The five-month period is sought to be attributed to the suspensive conditions by the applicants, with reference to clause 7.2 of the respective lease agreements, which provide that the bottling plant had to be operational five months after signature. Ergo, so the argument goes, five months was a reasonable time also for the fulfilment of the conditions.
- [18] There is no evidence before me that would drive a conclusion that the suspensive conditions were all required to be fulfilled when the plant became operational. I cannot simply derive from the affidavits that conditions such as zoning, business rights, registration of servitudes for roads, and the appointment of a land surveyor, serves as preconditions for the plant becoming operational. It might very well be that the plant is required to be operational before some of the conditions can be met. This corresponds to the assertions of the respondent,



where it contends that some of the compliances could only be achieved when the plant became operational. Date of operation does accordingly not automatically correspond to date of fulfilment of one or more of the suspensive conditions.

[19] The respondent also points out that the 5- month period, as sought to be attributed to the suspensive conditions through clause 7.2, is wholly insufficient, when measured against statutory prescribed timelines. Water-use licence amendments ordinarily take more than 12 months. Rezoning applications under SPLUMA often take a year or longer, and environmental approvals under NEMA require extensive procedural compliance extending well beyond five months. Similarly, SANBWA certification presupposes an operational plant, which itself could not be realised within that short period.

[20] In addition, the reliance on the 5-month period in any event carries little or no probative value, as it was advanced for the first time in the replying affidavit. It is trite that a case must be made out in the founding papers, and not in reply.

[21] That leads to the second fundamental difficulty with the applicants' case. The founding affidavit does not enumerate what the conditions are that was agreed to be met. I had previously remarked that some of these conditions are stated in a generalised manner. The term that provides for the obtaining of "all necessary licenses and permits required under South African law" serves as an example. What would those be? This observation is somewhat mitigated by the respondent dealing pertinently in the answering affidavit with what exact licenses or approvals were contemplated by the parties.

[22] More significant, is that the conditions that were enumerated are furthermore fundamentally different. It stands to reason that what would constitute a reasonable time for fulfilment of one condition would not necessarily relate to another. Each would be subject to independent evaluation. I have not been favoured with any evidence that would allow for objective analysis as to what would constitute a reasonable time for fulfilment of the separate conditions. The applicant has resided with a blanket allegation that five months was reasonable for all of the conditions to be met.

[23] I have already dealt with the difficulties that I have with this submission.

[24] The onus lies on the applicants to establish what the conditions were, what would constitute a reasonable time for fulfilment of each condition, and ultimately that the conditions were not fulfilled within a reasonable time. Absent express agreement between the parties as to when the conditions are to be fulfilled, and without evidence showing, for example, how long it should reasonably take to obtain a water-use licence amendment, to complete rezoning, to secure environmental authorisations, or to obtain SANBWA operational compliance, I cannot make such findings. The respondent, by contrast, drew attention to statutory timelines that relate to some of these conditions that typically extend beyond five months.

[25] As I had previously remarked, the application is plagued by a myriad of factual disputes that ought more appropriately to be determined by a trial court. Absent such a referral, and applying *Plascon-Evans*, I am constrained to accept, for

purposes of determination of this application, the respondent's version that the applicants' eviction prevented fulfilment of those suspensive conditions that remain unfulfilled. On this version, the applicants would not be entitled to rely on the non-fulfilment of the conditions, having themselves caused the non-fulfilment through their intentional conduct.

[23] In addition, the applicants have failed to discharge the onus of illustrating, in the founding affidavit, the exact nature and extent of the conditions that were to be fulfilled, what a reasonable time was within which each would have to be fulfilled, and correspondingly that such a reasonable time has lapsed for each condition.

[18] In the result, I cannot find that the agreements have lapsed as prayed for.

Resultantly I make the following order:

1. The application is dismissed.
2. The applicants, jointly and severally, are ordered to pay the respondent's costs of the application on Tariff scale B.



**SG GOUWS**  
**ACTING JUDGE OF THE HIGH COURT, PRETORIA**

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