

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	<u>NOT</u> REPORTABLE
(2)	<u>NOT</u> OF INTEREST TO OTHER JUDGES

CASE NO: 2015-17439

DATE: 3 FEBRUARY 2026

In the matter between:

TIRTZA MOSEWICKA

Plaintiff

and

COLIN McLELLAN

Defendant

Coram: Adams J

Heard: 30 September and 1 October 2025

Closing Argument on: 8 October 2025

Delivered: 3 February 2026 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 3 February 2026.

Summary: Contract for the sale of immovable property – cancellation of contract – *restitutio in integrum* – 'return to the previous position' – property to be

restored destroyed in a fire – restitution to take the form of compensation equivalent to the fair and reasonable costs of repairing the damaged property – quantification of the restoration costs – restoration required only to place the other party in the position he/she was in at the time occupation of the property taken pursuant to the failed contract – claim for restoration to be quantified as and at the date of cancellation of the contract.

Restoration of identified property – restoration done when property returned or when proceeds of sale of property paid over to other party – no further obligation on the part of the restorer – deteriorated or depreciated property, restitution need to be made only of the deteriorated or depreciated value – no interest payable on such a claim.

ORDER

Judgment is granted against the plaintiff in favour of the defendant for: -

- (a) Payment of the sum of R798 948.63.
- (b) Payment of the sum of R613 548.77, representing interest at 10% per annum on R798 948.63 from 31 May 2018 to date of this order (7 years and 248 days).
- (c) Payment of interest on R798 948.63 at the rate of 10% per annum from 3 February 2026 to date of final payment.
- (d) The plaintiff shall pay the defendant's costs, in relation to the quantification of the amount of the plaintiff's restitution, from 21 November 2023 to date, inclusive of Counsel's charges on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.

JUDGMENT

Adams J:

[1]. This judgment is the next chapter in the dispute between the parties, which dates back to about November 2014, when the plaintiff, as the seller, and the defendant, as the purchaser, concluded a written agreement of sale ('the sale agreement') for the purchase and sale of the plaintiff's immovable property situated along Main Road in Kyalami, Gauteng, and some other listed movable assets, for the agreed purchase price of R3 518 000.

[2]. On 21 November 2023, I handed down a judgment and an order (as subsequently varied in terms of a variation order dated 15 March 2024) in the following terms: -

- '(1) In terms of Uniform Rule of Court 33(4), the adjudication of the quantum of the fair and reasonable cost to remedy the fire damage caused to the restaurant and the

farm stall on the plaintiff's property ('the separated issue'), be and is hereby separated from any and/or all other disputes between the parties.

- (2) The separated issue is postponed *sine die* and it is directed and ordered that the matter proceeds to trial on all of the remaining disputes between the parties.
- (3) It is declared that the written agreement of sale between the parties in respect of Portion 365 (a portion of portion 63 of the Farm Witpoort No 406), Registration Division IR, Province of Gauteng ('the property'), is terminated and the parties are no longer bound thereby.
- (4) The defendant is entitled to restitution of the total amount of R2 154 000 paid by him pursuant to and under the sale agreement, less the fair and reasonable cost to remedy the fire damage to the restaurant and farm stall situated on the property, caused by the fire on or about 27 December 2017.
- (5) It is declared that the defendant is entitled to restitution of the amount of £49 473.66, presently held in trust by the United Kingdom based company, Clipper Marine, which is authorised to release to the defendant the said amount forthwith.
- (6) Each party shall bear her / his own costs in this action to date.
- (7) Interest shall be payable on the aforesaid amounts payable by and between the parties from 31 May 2018 to date of final payment at the legal rate applicable as and at that date, being 10% per annum. This means that interest will be payable only on the net amount due and payable to a party after the amount payable by the defendant to the plaintiff in terms of prayer (4) above has been calculated and after set-off is applied in respect of the amount payable to the defendant in terms of prayer (5) and the amount payable to the plaintiff or the defendant in terms of prayer (4). Interest, calculated as aforesaid, will become payable only after the amount payable to the plaintiff by the defendant, in respect of the damages which resulted from the fire damage, has been quantified either by settlement or by an order of Court.
- (8) As regards costs previously reserved, the plaintiff shall pay the wasted costs occasioned by her application dated 17 July 2023 for a postponement of the trial.'

[3]. Subsequent to the issue of my aforesaid order, the parties have not been able to reach agreement on the quantum of the plaintiff's damages which resulted from the fire damage to the restaurant and the farm stall. Put more accurately, agreement could not be reached between the parties on the quantification of the fair and reasonable costs to remedy the fire damage caused to the restaurant

and the farm stall. That is therefore the issue to be decided upon by me. Additionally, further related disputes between the parties have arisen from my said judgment and order, which are also required to be adjudicated by me. By the time I heard closing arguments in the matter, those issues had crystallised into the following: - (a) what the condition of the premises was before the fire; (b) what the relevant date is to determine what the fair and reasonable cost is to remedy the fire damage to the premises; (c) the resolution of the individual items of differences between the quantity surveyors of the parties on the so-called 'table of differences'; (d) what, if any, discount should be made to the total costs as calculated by the quantity surveyors to take into account the difference between the premises present prior to the defendant's occupation and a newly built building; and (e) Finally, which party has achieved substantial success given their respective with prejudice offers of settlement.

[4]. These issues are to be decided having regard to the legal principles set out in the paragraphs which follow.

[5]. Importantly, the plaintiff is entitled to be placed, by way of restitution, in the same position that she was in before the conclusion of the now-terminated sale agreement. Restitution is a flexible and an equitable remedy designed to restore parties, as far as may be possible, to the positions they occupied before entering into a contract. In that regard, see *Feinstein v Niggli and Another*¹, in which the Appellate Division held that the object of the *restitutio in integrum* rule is 'that the parties ought to be restored to the respective positions they were in at the time they contracted'. This principle, so it was found by the AD, is founded on equitable considerations.

[6]. The quantification of the fair and reasonable costs to remedy the fire damage must accordingly begin with a factual assessment of the condition of the premises when the defendant took occupation. This, in turn, means that the experts needed to cost the replacement of what was factually built on the site,

¹ *Feinstein v Niggli and Another* 1981 (2) SA 684 (A).

and not what could now be built new.

[7]. Moreover, the date on which restitution was required to be made is the date on which the costs of remedying the premises has to be calculated. That means that the obligation to make restitution arises upon the date on which the underlying agreement is cancelled. This date fixes both what restitution is required, and the interest that is to run on that obligation of restitution (if it is monetary in nature).

[8]. *In casu*, the parties have agreed that the sale agreement terminated on 31 May 2018, and that interest 'on any amounts found to be owing in favour of either party shall be payable at the prescribed rate from 31 May 2018'. An order to that effect was also made by this Court 15 March 2024.

[9]. With those principles in mind, I now turn to the facts in this matter as gleaned from the evidence led during the trial. In that regard, the plaintiff herself gave lay evidence in support of her case and she also led the expert testimony of a Consulting Civil and Structural Engineer, Mr Andre Ballack, and that of a Quantity Surveyor ('QS'), Mr Regardt Muller. In support of his cause, the defendant himself and a Quantity Surveyor, Mr Dumisani Golele, gave evidence. The testimony of Mr Golele was of an expert nature.

[10]. Importantly, at a factual level, the evidence before the Court clearly indicated that the condition of the premises as at the date of the sale was far from perfect. In fact, as was explained by the defendant, with reference to electronic pictures taken by him at the relevant time, the improvements to the property were constructed in a haphazard unprofessional manner. The windows and the windowpanes were broken at the time when the defendant took occupation of the premises. As testified to by the defendant, and as evidenced by photographs produced by him, a large window was cracked, some other windows were cracked and several smaller windows were nailed shut, with wooden pieces jammed in to hold them in place. The premises generally were in a dilapidated state at the time that the defendant took occupation during August 2014. The roof

structure had some translucent sheeting, gum pole rafters, straw and stick components, and a makeshift mezzanine level constructed from irregular timber. The foregoing was corroborated by photographs taken by the defendant at the relevant time, that being during August 2014, when he took occupation of the premises.

[11]. On the whole, the improvements were constructed as a 'DIY (Do It Yourself)' job. As per the defendant's testimony, the floor and ground surfaces were defective and severely damaged over large portions even when he initially took occupation. Again, his evidence in that regard could not seriously be challenged as it was supported by real evidence in the form of photographs.

[12]. In sum, at the time that the defendant took occupation of the property, it was run down. The premises were dilapidated and badly built, requiring extensive repainting, re-electrification, new toilets and remedial works. Thin paint coats through which plaster was visible match the photographic record. The premises were built by the plaintiff's partner, a Mr Gush, as an amateur and he made use of recycled materials.

[13]. I accordingly accept, as I was urged to do by Mr Watson, Counsel for the defendant, that the premises were built in a relatively amateur style, using recycled materials, and were deteriorated or dilapidated by the date that the defendant moved into the premises. All of the foregoing translate, in my view, into the calculation as set out in the paragraphs which follow.

[14]. The value of the premises is to be assessed as they were and not as a newly built structure. There should be some sort of a discount on the quantum fixed by the quantity surveyors to take into account the amateur and deteriorated state of the premises. The relevant date for the quantification of the restitutionary obligations is 31 May 2018. There is ample authority for this conclusion – the obligation to make restitution accrues upon the date of the cancellation of the contract, or in the case of void or voidable contracts, the date the innocent party

elects to avoid the contract².

[15]. That brings me to the calculation of the fair and reasonable costs of restoring the property to the condition it was in during August 2014, when the defendant received occupation of the premises from the plaintiff pursuant to the sale agreement between the parties.

[16]. A convenient starting point in that regard is the calculation relating to those items requiring rebuilding or repair or replacement and in respect of which there is no dispute between the parties. De-escalated to May 2018 monetary values, the plaintiff's calculation for the costs of those items amount to R1 834 518 (inclusive of Value Added Tax), less R829 084.30 (including VAT), representing the disputed items and their costs = **R1 005 433.70**. The defendant's equivalent calculations are as follows: R1 157 258.58, less R151 825.83 = **R1 005 432.75**. This latter total is, in my view, not in dispute and the plaintiff is entitled to a refund of at least that sum.

[17]. The question remains – what is to be done with the items which are in dispute? As was done by Mr Watson, I intend dealing with those items individually and indicate whether any particular costed item is accepted, rejected or accepted in part.

[18]. The dispute relating to the amount quoted in respect of 'Preliminaries and General' is a dispute between the Quantity Surveyors. Plaintiff's QS agreed to 10% of the gross project costs, whereas the defendant's QS is of the view that 5% would be fair and reasonable. I am inclined to accept the approach adopted by the defendant's QS for the simple reason that some of these charges relate to fixed costs such as site establishment and disestablishment (fence building, removal, etc). These are normally about 15% of the P&Gs. Time related costs, such as supervision, salaries of people involved (engineers, QS'es, etc), which

² *Brüwer NO and Others v Trustees, Phillip Fourie Family Trust* 2022 (6) SA 214 (WCC) and the cases referred to therein – such as *Baker v Probert* 1985 (3) SA 429 (A); *Cook v Morrison and Another* 2019 (5) SA 51 (SCA).

have to be calculated over the anticipated period of the project, are normally about 75% of the P&Gs. And the value of the property is normally about 10% of the P&Gs.

[19]. In this matter, there would be minimal site establishment. By any standard, this project is not a major one and the construction site will be small. The bulk services (water and electricity) have already been connected to the site. There are toilets available on site. I would therefore award an amount equivalent to 5% of the total construction costs, which, according to my calculations amount to R56 109.75.

[20]. There is also a dispute relating to the costs of the 'Ground floor construction'. The plaintiff's Consulting Engineer, Mr Ballack, is of the view that new surface beds need to be installed or a new overlay surface bed must be constructed. His evidence was that it has to be accepted that the fire would have caused extensive damage to the surface beds, which can only be rectified by filling in the existing unevenness on the cracked surface bed. Mr Ballack's view was that if this was not done, it could result later in cracking to the cement surface. The defendant's Quantity Surveyor, Mr Golele, is of the view that there is no need to first fill the existing surface bed because cracking can be avoided by properly laying the concrete. I am inclined to accept the version of the plaintiff on this item, but to the extent that the overlay surface bed needs to be constructed. This translates into R70 594.84 to be allocated for this item.

[21]. There are three items (G2, G4 and G5 in the 'table of differences'), which relate to the construction of a veranda roof – corrugated roof sheeting to veranda with colour finishing one side, including all flashing, insulation, etc and erection of roof trusses and sheeting. The plaintiff asks for an amount of R118 050.34 in respect of these items. The defendant submits that an amount of R41 923.46 would be fair and reasonable under this heading.

[22]. This dispute turns on what constitutes the appropriate replacement for the veranda structure. The defendant painted a picture of an original veranda which

was constructed in a substandard manner with the use of second-hand material. All things considered, I am of the view that, as submitted on behalf of the plaintiff, the figures used by the defendant's QS, were too low and do not accord with the reality of the matter and the probabilities. I would however apply a 10% discount on plaintiff's figures to make provision for the general state of the veranda when occupation was taken of the premises by the defendant. This translates into a total sum of R118 050.34 X 90% = R106 245.41.

[23]. As for the 300mm Rubble stone wall to veranda, which is a factual dispute, I am inclined to accept the evidence of the defendant, supported by the photographic evidence, that the rock walling was still present after the fire. I therefore agree with the defendant's contention that this is not a loss that he should be responsible for. I therefore allocate no amount to this item.

[24]. There is also a factual dispute in relation to Coat primer and two finishing coats PVA paint to the external plastered walls or concrete. In respect of this dispute, I am inclined to accept the version of the defendant which equates to half of the actual costs provided for by the plaintiff. The reason for such discount is simply that to hold otherwise would, in effect, amount to over compensation. As testified to by the defendant, the paintwork was of a poor quality, particularly over the cob walls. The defendant could see the plaster of the cob walls using his naked eye and this was also confirmed by pictures, which showed shoddy workmanship. He had to repaint the premises when he moved in, which he did. I therefore allocate R7 654.72 for this item.

[25]. As for the replacement of the Windows, there is vast difference between the R39 878.42 claimed by the plaintiff and the R738.49 offered by the defendant. The defendant submits that the window frames were made by Mr Gush, and that they were filled with 1mm glass not 4mm glass. Some of the windows were broken. The defendant also gave direct evidence of having to replace windows, confirming that 4mm glass was not used.

[26]. To make provision for these considerations, I intend applying a 30%

deduction on the figures of the plaintiff, which translates into R39 878.42 X 70% = R27 914.89.

[27]. The factual dispute in respect of the costs to rebuild the Half-brick walls can and should, in my view, be decided on the basis suggested by the defendant. Many of the walls were constructed from cob materials and cardboard. Cob walls were Mr Gush's recycled walls, built using poles, chicken wire, and filled with old plastic bottles, and plastered shut on both sides. These walls were constructed not using brick and mortar and it therefore cannot be replaced at the costs of brick-and-mortar walls. Plaintiff's QS priced for brick-and-mortar because there is no standard for construction of cob walls. Defendant's QS priced using instead a labour and materials costing. The latter is to be preferred and an amount of R12 252.29 should be allocated to this item.

[28]. The factual dispute relating to the application of 'Clear sealer to the concrete floor' can and should safely be decided in favour of the defendant on the basis that the defendant's uncontested and unchallenged evidence was to the effect that there was no sign of any sealer on the floor. But even if there were some form of sealer, it was obviously very poorly laid. The floor was visibly littered with divots, holes and other gaps. When the floor was swept, parts of the floor would crumble off.

[29]. This is therefore not an item that the defendant should be required to pay for and I therefore intend allocating R0.00 to this item.

[30]. As for the application of a Coat primer and two finishing PVA paint to internal plastered walls or concrete, this costed item I intend treating exactly the same as I did the painting of the external walls for the reasons alluded to supra. This translates into R21 349.91. The point is that, by all accounts, the paintwork was of a very poor quality and to provide for a pristine paint job would amount to overcompensation.

[31]. Also, as regards the 300mm Rubble stone wall to serving counters, this

item should be treated the same as the other stone walls referred to above. An amount of R0.00 should be allowed for this item. The defendant explained in his evidence that this wall was still present and undamaged after the fire, as can be seen from the pictures produced during his evidence. This was not a load bearing wall, but a counter.

[32]. The item under the heading 'Water supply and waste reticulation to wash hand basins, water closets, etc' appears to be a duplication of another item quoted for by the plaintiff's QS and not disputed by the defendant. The other item is for 'sanitary fittings, including taps, hot and cold-water supply and waste reticulation'. This dispute is over the water and waste reticulation, not the fittings. I would therefore accept the defendant's proposal for the costs under this heading at R1 893.56 to provide for the water reticulation and the piping requirements in that regard.

[33]. The factual dispute relating to the replacement of the Pizza oven should be decided in favour of the defendant, whose unchallenged and uncontested evidence was to the effect that, after the fire, there was a pizza oven capable of being reused. With reference to a photograph, the defendant testified that the pizza oven was reusable when he observed it on site. He also explained that he has other pizza businesses and would have been quite content to reuse the pizza oven.

[34]. The same evidence was led in relation to the Steel fire place including flue. Both these items therefore should be allocated R0.00.

[35]. The sum total of the foregoing amounts to R304 015.37 + 15% VAT (R45 602.31) = R349 617.67. To this amount should be added the R1 005 433.70 referred to above and which relates to the amount agreed upon between the parties and their witnesses as being the costed items in respect of which there are no dispute. This gives one a grand total of **R1 355 051.37**, which in my judgment represents the fair and reasonable costs of restoring the plaintiff's premises to the condition it was in during August 2014, when the defendant took

occupation of the premises thereon pursuant to the sale agreement.

[36]. It was submitted by Mr Watson that a further deduction should be made from this grand total to provide for the fact that on the defendant taking occupation of the property during August 2014, it was in a dilapidated, run-down state, with the building having been erected in a shoddy manner. The whole building and the other improvements, so the contention goes, showed that the workmanship was of a poor quality.

[37]. I disagree with this submission. In my foregoing calculations, I have – when discussing the individual items – had regard to the condition of the improvements at the time that the defendant took occupation of same. I have been singularly conservative and strict in quantifying the cost of the replacement or repair of the individual costed items. To now again apply a further deduction would amount to a double deduction to the undue prejudice of the plaintiff. I am therefore of the view that a further general deduction is not warranted.

[38]. The defendant did his calculations on the basis of figures which exclude value added tax. That approach is misdirected. The plaintiff is entitled to claim VAT in view of the fact that she would be liable to pay such VAT to the suppliers, which means that VAT would in fact be a necessary expense to be incurred by the plaintiff in order for her to be restored to the position she was at prior to the conclusion of the contract. I have accordingly calculated the fair and reasonable restoration costs on the basis that the repair / replacement costs are to include VAT.

[39]. The aforesaid amount of R1 355 051.37 is therefore the sum to be deducted / set off from the amount of R2 154 000 to be refunded to the defendant in terms of prayer (4) of the Order of this Court dated 21 November 2023. That leaves a nett amount payable by the plaintiff to the defendant of R798 948,63

[40]. I interpose here to deal briefly with the restitution made by the plaintiff to the defendant in the form of the proceeds of the resale of the Yacht. That

restitution stands on its own. In terms of the court order dated 21 November 2023, the plaintiff was ordered to restore to the defendant the amount of £49 473.66, representing the proceeds of the resale of the boat during 2015. It was envisaged by the judgment of this court that the restitution consisted of restoring the boat or the proceeds thereof at any given point in time. Once the amount was paid over to the defendant, the plaintiff had no further obligation to the defendant as regards that part of the restitution.

[41]. As was held by this court, where the property to be restored has deteriorated or depreciated, restitution need to be made only of the proceeds of the property sold. The property that was tendered in part payment of the purchase price in terms of the cancelled agreement, is a yacht, which would have naturally depreciated in value over the years. This is particularly so in light of the fact that the yacht was purchased new by the defendant and would have immediately become second-hand and lost value once it was handed over. There is no suggestion in the papers that the yacht had lost value due to any conduct on the part of the plaintiff.

[42]. The simple point in relation to the restitution of the Yacht is, as submitted by the Ben-Zeev, Counsel for the plaintiff, that no interest calculable in respect of the yacht accords with the wording of this Court's order. There is no basis for a departure therefrom. It also bears emphasising that the proceeds of the sale of the yacht were held in escrow in an account in the United Kingdom since 2015 and no interest accrued on this amount until it was paid. The failure to apply interest to the proceeds of the yacht therefore will not result in the plaintiff being enriched. On the contrary, if interest were charged on this amount, it would result in her being unjustly impoverished.

[43]. I therefore reiterate that no further sums are payable by the plaintiff in relation to her duty to make restitution of the amount of £49 473.66 now that that sum has been paid over to the plaintiff. I confirm, in particular that no interest is payable in respect of that sum.

[44]. In sum, the plaintiff is liable to make payment to the defendant of the sum of R798 948.63, together with interest thereon at 10% per annum from 31 May 2018. An order giving effect to my foregoing conclusions should therefore issue.

Costs

[45]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*³.

[46]. *In casu*, the defendant has had a measure of success in that I intend ordering the plaintiff to make payment to him of the substantial sum of R798 948.63, plus interest thereon. Defendant is therefore entitled to a costs order as against the plaintiff in relation to the quantum of the matter.

Order

[47]. In the result, Judgment is granted in favour of the defendant against the defendant for: -

- (a) Payment of the sum of R798 948.63.
- (b) Payment of the sum of R613 548.77, representing interest at 10% per annum on R798 948.63 from 31 May 2018 to date of this order (7 years and 248 days).
- (c) Payment of interest on R798 948.63 at the rate of 10% per annum from 3 February 2026 to date of final payment.
- (d) The plaintiff shall pay the defendant's costs, in relation to the quantification of the amount of the plaintiff's restitution, from 21 November 2023 to date, inclusive of Counsel's charge on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.

³ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

A handwritten signature in dark ink, consisting of a large, stylized capital 'A' followed by several loops and a final flourish. The signature is positioned above a solid black rectangular redaction box.

L R ADAMS

*Judge of the High Court
Gauteng Division, Johannesburg*

HEARD ON:	30 September and 1 October 2025
CLOSING ARGUMENT ON:	8 October 2025
JUDGMENT DATE:	3 February 2026
FOR THE PLAINTIFF:	Advocate O Ben-Zeev
INSTRUCTED BY:	Bouwer Cardona Incorporated, Parktown North, Johannesburg
FOR THE DEFENDANT:	Advocate Dave Watson
INSTRUCTED BY:	Christelis Artemides, Rosebank, Johannesburg