Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case Number: A157/2025

In the appeal between:

ARNOTT PANELS (PTY) LIMITED Appellant

and

MATUCCI FARMS LIMITED Respondent

CORAM: [Le Grange, Fortuin, et Sher JJJ]

Issues: Requirements for importing a tacit term- so-called 'bystander test,' applied- tacit term neither clear nor obvious and not imported. Supervening Impossibility - Objective factors causing supervening impossibility -Parties not bound to terms of contract by operation of law.

Judgment: Delivered 11 June 2026

(Delivered electronically to the parties)

Le Grange, J:

Introduction:

[1] This is an appeal and cross-appeal with leave of the court a quo, against the order that the Appellant must repay to the Respondent the sum of USD 279,160.00 ("capital amount"), together with interest from 26 July 2024 and each party to pay its own costs. The Respondent's cross-appeal is against the interest and costs orders made by the court a quo. According to the Respondent, it was entitled to its costs as the successful party and payment of interest from 15 August 2018 until date of final payment.

[2] The core issues in the main appeal are whether the court a quo correctly rejected the Appellant's contention relating to the implied and or tacit term of the 2018 agreement, and whether on the Appellant's own version the 2018 agreement was no longer extant as at end of February 2024 and as such of no force and effect.

Background:

[3] The factual matrix underpinning this matter can be summarised as follows: On 15 June 2018, the parties concluded a written agreement (the "2018 agreement") in terms of which the Appellant would supply and install certain agricultural equipment for commercial poultry production (the "project"). The capital amount of USD 279,160.00 was reflected in a pro forma invoice signed by both parties. The Respondent was obliged to pay "on order placement", and the Appellant was to perform within six to eight weeks of receiving payment. The Respondent made payment on 14 August 2018.

[4] Thereafter, it is not clear on what date, at the instruction of the Respondent's duly authorised agent Roslee of Selectra CC ("Roslee"), the Appellant was instructed to stop all work, pending further instructions. For a period of some five years, from 2018 to 2023, the Appellant received no communication or instruction from the Respondent. The performance period of six to eight weeks came and went without any performance, although the Appellant alleged that after receiving payment it started with preparation work. However, the appellant did not render any invoices in respect of work it allegedly carried out.

[5] In 2023, the Respondent resumed communication regarding the project. A meeting took place in December 2023 ("the December 2023 meeting") where the Appellant's representative (Carika Ras) was present. The contents of what transpired at the

meeting are hotly disputed. It is common cause the representatives of the parties met at a meeting in December 2023. According to the Respondent two options were discussed and the Appellant had to elect whether to commence and complete the work at the agreed consideration of $279 160.00 (USD) for which it had already been paid, alternatively that the agreement would be regarded by both parties as being at an end and no longer extant, resulting in the repayment of the full amount. The Appellant's version is its representative had no mandate to bind it regarding the two options advanced by the Respondent. According to the Appellant it was made clear at the meeting, there would be a price increase because of the lapse of time. Furthermore, the Appellant avers that on 30 January 2024, a further meeting occurred, where updated drawings were discussed. On 31 January 2024, the Respondent furnished the Appellant with revised drawings, which the Appellant alleged differed significantly from the original drawings. Correspondence was exchanged between the parties' attorneys in February and April 2024, but the parties could not reach an agreement.

[6] According to the Appellant it was an implied or tacit term of the 2018 agreement that, in the event of delays in the completion of the works, a revised costing would be done and the contract sum adjusted accordingly. The Appellant remained prepared to complete the project, subject to the revision of costing and the price as a result of the delay caused. The Respondent disputes the implied or tacit term relied upon by the Appellant. The Respondent alleged that at the December 2023 meeting, the Appellant

was given an election to either complete the work at the contract price or refund the monies.

[7] The court a quo, in its judgment disagreed with the Appellant's contention that absent an alleged breach and or cancellation of the 2018 agreement by the Respondent, the said agreement remains extant. The Court a quo held by the end of February 2024, neither party intended to be bound any longer by the 2018 agreement as the parties were unable to reach a new agreement, thereby the Appellant was obliged to refund the capital amount. It further held that due to the particular facts of the matter the Respondent was only entitled to interest on the capital amount as and from 26 July 2024 and not from 15 August 2018.

<u>Argument</u>

[8] The Appellant's argument before us can be summarised as follows: First, it was an implied or tacit term of the 2018 agreement that in the event of delays being caused by the Respondent, revised costing would be done and the price would be revised accordingly as the increase of costs relating to suppliers, transport, shipping and labour was inevitable. Secondly. the Appellant's representative lacked a mandate and the actual discussion in December 2023, was about a price difference and not about an agreed election that the Appellant needs to exercise. Thirdly, the Respondent's revised drawings as provided on 31 January 2024 significantly changed the plant layout which

required a new, time-consuming costing process and not the performance under the 2018 agreement. Lastly, according to the Appellant the court a quo should have accepted its version on the *Plascon-Evans*[1] principle as it was not far-fetched or clearly untenable. Furthermore, the Appellant has stated repeatedly, it remained ready to perform under the 2018 agreement, subject to updated costs.

[9] The Respondent argued the appeal is meritless because the court a quo correctly decided by the end of February 2024, neither party intended to be bound by the 2018 agreement and there was no agreement on a new price because the scope of work had radically changed from the original plan. Furthermore, the Respondent contended the contract became impossible to perform without fault of either party as the Appellant was unwilling to perform for the original price, and no new agreement was reached, rendering the 2018 agreement void *ab initio*. According to the Respondent on the common cause facts there is no room for the implied or tacit term to be imported into the 2018 agreement as both parties contemplated the Appellant would carry out its obligations within a period of six to eight weeks upon payment being made. Furthermore, the Appellant never alleged the Respondent was obligated to accept a unilaterally determined new price, meaning no contract was ever concluded for the revised work. It was also argued that the Appellant did not file a counter-application for the value of any work performed since 2018, confirming it had performed nothing and was unjustly enriched.

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C.

[10] In the cross-appeal, the Respondent contended that the court a quo erred by not applying the general rule of costs, being that a successful party gets its costs. According to the Respondent, it was entirely successful in recovering the capital amount and should have been awarded its costs. The Respondent further argued it was entitled to the interest earned on its money by the Appellant from the day after payment, being 15 August 2018, because the Appellant had the benefit of the capital amount and the interest it generated from that date.

Discussion

[11] The Appellant's case hinges on the alleged tacit or implied term that the price would be revised, in the event of delays caused by the Respondent. The Appellant recorded the following in the answering affidavit: "[I]t was an implied term or tacit term that, in the event of delays being caused by the Applicant (Respondent), revised costing would be done, and the price would be revised accordingly. That would have been necessitated by the inevitable increase of costs relating to supplies, transport, shipping and labour." This contention was reiterated in the letter of the Appellant's attorney dated 2 April 2024 where the following was recorded:

> *"5. Our Client is more than willing to supply the work as agreed but the project costs must be updated to 2024 costs."*

[12] As an implied term is one which is implied by operation of law, the parties accepted that the term which the appellant sought to rely on was a tacit one, and not an implied one. In this regard the test of the so-called 'bystander test', for establishing the existence of a tacit term which our higher Courts have often recognised and applied, was fully discussed in *Consol Ltd. t/a Consol Glass* [2]. There the Supreme Court of Appeal held as follows:

> *[50] …"A term can only be implied if ... it is such a term that it can confidently be said that if at the time the contract was being negotiated someone has said to the parties: "What will happen in such a case" they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties have not expressed.'*
>
> *[51] Over the years the courts have, through refinement, enhanced the practical functionality of this test. So, for example, it was decided by Colman J in Techni-Pak Sales (Pty) Ltd v Hall 1968 (3) SA 231 (W) 236H-237A that the inference of a tacit term can only be justified if the bystander's question 'would have evoked … a prompt and unanimous assertion of the term' from both the contracting parties. If the inference is that one of the parties would have sought some clarification or some time to consider before giving an answer, the tacit term suggested would not pass the bystander test. A further requirement that has*

---

2 Consol Ltd t/a Consol Glass v Twee Jonge Gazellen (Pty) Ltd & Ano 2005 (6) SA 1 (SCA) paras 50-51.

developed appears from the following statement by Trollip JA in Desai and Others v Greyridge Investments (Pty) Ltd *__1974 (1) SA 509__* *(A) 522H-523A:*

> '… I do not think that it is either clear or obvious which of those forms of the term should prevail, and hence none of them can be implied. The reason is that the implication of a term depends upon the inferred or imputed intention of the parties to the contract … and "once there is difficulty and doubt as to what the term should be or how far it should be taken it is obviously difficult to say that the parties clearly intended anything at all to be implied".'

[13] Applying the abovementioned test in this instance, there is simply no room for the implied or tacit term to be imported in the 2018 agreement. The parties at the time of entering into the contract clearly intended or contemplated that the appellant would carry out its obligations in terms of the agreement within six to eight weeks upon payment being made. The parties could therefore not have contemplated or intended that there would be a delay since performance by the Appellant of its obligations was to be within a very short period.

[14] However, even if a delay was contemplated, the implied or tacit term contended by the Appellant is neither clear nor obvious. In this regard the exchange of correspondence between the parties' attorneys in February and April 2024 is instructive. The Respondent's letter of 12 February 2024 demanded performance "as agreed" within

thirty days, alternatively repayment. Significantly, no mention was made of the alleged December 2023 oral agreement. This suggests that even the Respondent did not, at that stage, place much reliance on an alleged agreement as a separate source of obligation. The Respondent's primary position was that the 2018 agreement should be performed, and if not, the money should be returned.

[15] In response, the Appellant on 2 April 2024 recorded that it was "more than willing to supply the work as agreed but the project costs must be updated to 2024 costs." The latter response is telling. The Appellant no longer regarded itself bound by the 2018 price. What the Appellant acknowledged however, is a willingness to negotiate a new price. The difficulty with the alleged imported term is the silence as to what must happen in the event the parties cannot agree on a new price. If the 2018 price no longer governs the contractual relationship between the parties, the obvious question must be on what basis is the Respondent obliged to keep the contract alive?

[16] It is not the Appellant's case that the imported tacit term will grant it an open-ended or unilateral right, to determine a new price without the Respondent's agreement. On a plain reading the difficulty with the term is that it brings doubt as to how far it should be taken. In the absence of an agreement on such a fundamental term in a contract, it is obviously challenging to say that the parties clearly intended anything at all to be implied.

[17] On these facts, the dictum in *Desai and Others v Greyridge Investments (Pty) Ltd*, is instructive. Therefore, the Appellant's contention that the 2018 agreement remained extant with the implied term that due to the delay, the Respondent is obliged to pay an increased price for work which had been agreed upon in 2018, is unsustainable and falls to be rejected.

Cancellation of Contract:

[18] In the absence of the implied term, the question remains whether the 2018 agreement remains valid or whether it was terminated by virtue of impossibility of performance. The Respondent did not give formal notice of terminating the agreement. What it did do on 12 February 2024, was to put the Appellant on terms to either repay the money within 30 days or face a liquidation application as it would be deemed to be unable to pay its debts when due and payable. The Appellant elected not to pay.

[19] It is well-established in our law that a party cannot be discharged from performing a contract because it is non-profitable for that party[3]. This principle is critical

[3] *Freestone Property Investment (Pty) Ltd v Remake Consultants CC and Another* 2021 (6) SA 470 (GJ) para 23. See also *Maher v Avianto (Pty) Ltd* [2025] 1 All SA 410 (GJ) where the following was held:

> "In modern South African contract law, *casus fortuitus* is described as a species of *vis maior*. Importantly, Christie explains that these events include any happening, whether due to natural causes of human agency, that is unforeseeable with reasonable foresight and unavoidable

to the present matter. The Appellant's complaint about increased costs due to the passage of time is a matter of commercial difficulty or reduced profitability, not objective impossibility. The Appellant does not allege that performance of the 2018 agreement in supplying and installing the specified equipment is objectively impossible. Only that performance at the 2018 price has become uneconomical.

[20] Commercial impossibility does not give rise to the principle of supervening impossibility. A party cannot be discharged from performing a contract because it is non-profitable for that party. However, the instant case presents a nuance. The Respondent does not rely solely on increased costs as a supervening impossibility of performance but that the agreement could no longer be performed in accordance with

---

with reasonable care, and includes legislative changes introduced after the conclusion of a contract which renders the performance impossible.

[26] While their origin is Roman law, *force majeure* has been adopted by civil law countries. It is not formally recognised as part of the South African legal system but is often contained in a contractual clause. A *force majeure* clause protects both parties from extraordinary events beyond their control. It relaxes the obligation and limits strict liability imposed on a party to perform in terms of the contract when the events listed or defined in the *force majeure* clause arise.

[27] Without a *force majeure* clause, the contracting parties must rely on the common law doctrines of supervening impossibility since that is the default position in South Africa. In this case, performance becomes objectively impossible after the contract has been concluded due to no fault of either party and as a result of unforeseen and unavoidable events. In such a case, the rule is that the obligation to perform and the corresponding right to performance is extinguished. In other words, both parties are excused from performing since the impossibility of the performance is due to an event beyond the control and foreseeable expectation of the parties, which impacts their intention of performing in terms of the agreement. Nobody can be obliged to do the impossible.

[28] Two requirements need to be met for performance to be regarded as objectively impossible. Firstly, performance must be objectively impossible and not merely difficult, more burdensome, or economically onerous. Secondly, the impossibility must have been unavoidable by a reasonable person. (Footnotes omitted)

its original terms because the work in the meantime had changed dramatically, and the price was no longer acceptable to the Appellant.

[21] In *MV Snow Crystal* [4] Scott JA said the following about supervening impossibility.

> *'As a general rule impossibility of performance brought about by vis major or casus fortuitous will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, the relationship of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving impossibility will lie upon the defendant.'*

[22] The impossibility must therefore be absolute or objective as opposed to relative or subjective. In *Unibank Savings and Loans* [5] , the following was held:

---

[4] *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA), para 28.
[5] *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W), at 198B-C,

"[A] contract is, however, terminated only by objective impossibility (which always or normally has to be total).

Further, it was held[6], that:

'Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.'

[23] On the objective facts, by the end of February 2024 despite the commercial circumstances, the parties were undeniably unable to reach a new agreement. On the Appellant's own version, the revised drawings furnished by the Respondent on 31 January 2024 differed "significantly" from the original drawings, and the entire plant layout had changed since the costing in 2018 which was for specific goods and services as described in the pro forma invoice. If the work required in 2024 was significantly different, involving an entirely different plant layout, then the 2018 agreement according to both parties could not simply be continued or revived. It required a new agreement to be concluded. The Appellant has admitted that amicable discussions with the Respondent were impossible. The latter underscores that the parties had reached an impasse. Neither party was able to extract the other from this impasse.

[6] Id at 198D-E.

[24] In the result, following the instructions by the Respondent to stop work in 2018, performance became inevitably impossible due to a combination of objective factors: namely, the passage of time, changed circumstances, and the inability to agree on new terms[7]. The Respondent was therefore not at fault for claiming that the essence of the contract became impossible to perform in its original terms. In fact, the absence of a counter-application for the value of any work performed, of which there was none, despite the assertion by the Appellant that it commenced with its preparation for performance in terms of the 2018 agreement, reinforces this conclusion. Looking at the nature of the contract, the relationship of the parties, the circumstances in this case, and the nature of the impossibility invoked by the Respondent, the foundation of the contract had collapsed due to no fault of either party. It follows that the 2018 agreement could no longer be performed in accordance with its original terms.

[25] The Appellant has also submitted that the principles of reciprocity and *exceptio non adimpleti contractus* [8] entitle it to withhold performance until the costing and price are revised and the difference in price is paid by the Respondent. It is correct that the principles of reciprocity and the *exceptio* entitle a party to withhold its performance until the other party performs its reciprocal obligation[9]. But this right only operates while the contract is still extant. If the contract has been terminated the *exceptio* falls away. This principle applies with equal force where performance has become impossible or where

---

[7]. See *World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W), paras 8-10 and the cases referred to therein.

[8] See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 418B-419H.

[9] In *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 808H-809A, Corbett J (as he then was) held that reciprocity requires that the performances be "concurrent conditions": meaning each performance is conditional upon the other.

the contract has failed because the parties could not agree on revised terms necessary for its continuation[10].

[26] When a contract is terminated by operation of law because it is impossible to perform, as in this instance, the general rule is that what has been performed under the contract must be restored. This principle is rooted in the concept that no party should retain a benefit conferred under a contract that has ceased to exist[11].

[27] To sum up: The court a quo correctly found that, on the Appellant's own version, the 2018 agreement had terminated by the end of February 2024. The Respondent's instruction to stop work, the passage of five years, the provision of significantly revised drawings, the inability of the parties to agree on a revised price, and the Appellant's insistence that it would only perform at an increased price all demonstrate that the 2018 agreement could no longer be performed in accordance with its original terms. The doctrine of supervening impossibility of performance applies, and the Appellant is obliged to restore the capital amount to the Respondent. The Appellant's reliance on the alleged tacit term is misplaced because (a) the parties never agreed on the revised price, (b) the work had changed significantly, and (c) the tacit term could not give the Appellant the right to demand a unilateral price increase.

---

[10] See: *Maher v Avianto (Pty) Ltd* [2025] 1 All SA 410 (GJ) paras 46-49.

[11] ibid

[28] It follows that the Appellant has no valid cause to retain the monies and is obliged to repay the Respondent the capital sum of USD 279 160.

The Cross-Appeal

[29] The awarding of costs ordinarily falls within the discretion of the court, and the general rule is that costs follow the result. In *Trencon Construction* [12] the Constitutional Court held that when a lower court exercises a discretion in the true sense (as in costs matters), "it would ordinarily be inappropriate for an appellate court to interfere, unless it was satisfied that this discretion was not exercised judicially, or that it had been influenced by wrong principles, or a misdirection on the facts or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself." The threshold is therefore high, reflecting the principle that costs are within the "true discretion" of the trial court. This is particularly so where the appeal is against a costs order only, in which case exceptional circumstances must generally be shown.

[30] In the present matter the court a quo considered that both parties to some extent contributed to the impasse. The Appellant, by failing to perform within the six to

[12] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) para 88.

eight week period (even if delayed by the Respondent's instructions), and the Respondent, by instructing the Appellant to stop work and then delaying for five years before seeking to revive the project. The court a quo also noted the absence of a counter-application and the fact that the Appellant was not in willful default. Given these circumstances the court a quo was not inclined to order the payment of interest on the capital sum from the date when it was paid over, but only from the time when demand was made for repayment, after the contract became incapable of being further performed.

[31] In these circumstances, I cannot say the court a quo exercised its discretion so unreasonably that no court properly directing itself could have made it. No exceptional circumstances have been shown to allow interference on appeal.

[32] It follows that the cross-appeal on costs and the interest payable should be dismissed. In my view, the respondent should not be mulcted for the costs of two counsel as far as the cross-appeal is concerned.

[33] In the result the following order is made:

1. The appeal is dismissed with costs, such costs to include the costs of counsel .
2. The cross-appeal is dismissed with costs, such costs to include the costs of counsel.

3. The order of the court a quo is confirmed.

I agree

____

FORTUIN, J

I agree

____

SHER, J

It is so ordered.

____

LE GRANGE, J

APPEARANCES:

For the Appellant: R van Rooyen SC with L Carey-Wessels

Instructed by: Cliffe Dekker Hofmeyr Inc, Cape Town

For the Respondent: S P Pincus SC

Instructed by: Mouyis Cohen Inc, Sandton (c/o Gishen Attorneys, Cape Town)