IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Not reportable

Case no: 1830/2017

In the matter between:

ELLIE MARIA DE BEER N.O.	**FIRST PLAINTIFF**
PETRUS JOHANNES JANSEN VAN RENSBURG N.O.	**SECOND PLAINTIFF**
and	
TRIFECTA TRADING 329 (PTY) LTD	**FIRST DEFENDANT**
VAN RENSBURG PROKUREURS	**SECOND DEFENDANT**

Coram: Wessels AJ

Judgment reserved: 8 April 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 14h00 on 7 July 2026.

Summary: Sale of immovable property — second written agreement between the same parties, at a reduced price — whether it novated or merely amended the first agreement — novation never presumed, inferred from all the circumstances including conduct of the parties — held to be an amendment — alternatively, conduct of the parties (acceptance of late payment, signing of transfer documents) established a waiver entitling reliance on earlier payments in any event.

Absolution from the instance — test at close of defendant's case, where no evidence led, distinguished from test at close of plaintiff's case — held that plaintiffs proved their case and application refused.

Evidence — absence of receiving-bank confirmation of payment not fatal where paying bank's records showed funds leaving the purchaser's account and defendant, despite undertaking to produce contrary evidence, led none — adverse inference drawn.

Sale — failure to transfer within a reasonable time after full payment entitles cancellation — seller's plea attributing delay to a third party's failure to issue a statutory clearance certificate held not to excuse delay exceeding a year.

Agency — claim against conveyancing attorneys for repayment of a discrete sum dismissed for want of a pleaded basis for personal liability — held, however, that receipt by an agent within its mandate is receipt by the principal, entitling restitution of that sum from the seller despite dismissal of the claim against the agent.

JUDGMENT

Wessels AJ

Introduction

[1] Mr Willem Petrus de Beer bought Erf 3[...], Retiefspark, Extension 3, Lichtenburg ('the property') from the first defendant, a property developer, in 2012. He paid for the property but was never given a transfer and instituted action in 2017 for cancellation of the agreement and repayment of what he had paid. He died before the trial could be completed, and the first and second plaintiffs, the executors of his estate, were substituted in his place. I will refer to the first and second plaintiffs together as 'the plaintiffs', and to Mr de Beer as 'the deceased'.

[2] Two defendants are cited. The first defendant, Trifecta Trading 329 (Pty) Ltd, is the seller of the property. I will refer to it as 'Trifecta'. The second defendant is the firm of attorneys that acted as Trifecta's conveyancer throughout, which I will refer to as 'the conveyancer'. The plaintiffs seek an order cancelling the agreement of sale and directing Trifecta to repay the purchase price of the property. Against the conveyancer, the plaintiffs seek repayment of a further sum paid toward conveyancing costs.

[3] The plaintiffs led two witnesses, the deceased and Mr Ashley Wilson, an employee of First National Bank, called to prove the underlying banking records. After Mr Wilson's evidence, the plaintiffs closed their case and applied for absolution from the instance. That application was refused. The defendants

then closed their case without leading any evidence and now apply for absolution a second time, at the close of all the evidence.

Background facts

[4] On 2 December 2012, the deceased and Trifecta, represented by Mr Willem Schalk Faul, concluded a written agreement for the sale of a residential erf measuring 4 927 square metres ('the property'). I will refer to this as 'the first agreement'. The purchase price was R714 000, of which R500 000 was payable on signature and the balance by 31 January 2013. The property was not transferred to the deceased within the time contemplated. On 1 March 2016, the deceased and Trifecta concluded a further written agreement in respect of the same property following negotiations around the interruption of electricity supply, which I will refer to as 'the second agreement'. The purchase price under the second agreement was reduced to R600 000, again payable as R500 000 on signature and the balance by 1 April 2016. Both agreements record that the transfer would be attended to by the conveyancer and that the deceased would bear the costs of transfer on demand.

[5] The deceased's evidence, corroborated by the evidence of Mr Wilson to which I return below, was that he made five payments of R100 000 each to Trifecta on 20 and 21 December 2012, totalling R500 000, and a further payment of R115 400 to the conveyancer's trust account on 7 June 2016. That payment consisted of two distinct amounts paid together, being R100 000 as the balance of the purchase price due under the second agreement, and R15 400, being conveyancing costs that matched the itemised statement of account rendered by the conveyancer.

[6] On 13 June 2017, the deceased's attorney wrote to the conveyancer on the deceased's behalf, demanding that electricity supply to the property be connected within 30 days, failing which the deceased would take steps to cancel the agreement and reclaim his deposit with interest ('letter of demand'). The letter of demand refers, expressly and only, to the agreement concluded on 20 December 2012, that is, the first agreement. The relevant parts of the letter of demand read:

'On 20 December 2012, my client concluded a purchase agreement with your client for Erf/Plot 3[...], Retiefpark, Extension 3, Lichtenburg... There was an implied condition that there would be municipal services and more specifically provision of electricity... There is still no electricity supply... It is moreover my instruction to inform you that should the electricity supply not be installed and functioning properly within 30 (thirty) days with effect from the date of the present writing, my client will take the necessary steps to cancel the agreement with refund of the deposit together with interest'.

[7] Transfer of the property was never given. On 21 June 2017, the conveyancer, writing on behalf of Trifecta, responded as follows:

'Please find herewith in attachment a copy of the agreement entered into between the seller and the buyer following the negotiations around the interruption of electricity supply by the local Municipality. As you will see, the purchase price was decreased to R500,000.00. Your client has also already signed transfer documents, and the only outstanding item is therefore the clearance certificate'

[8] I note that the figure of R500 000 in this letter does not match the price of R600 000 recorded in the second agreement itself, a discrepancy neither party has explained and which I do not need to resolve, since nothing in this judgment turns on the accuracy of that figure.

[9] The deceased issued summons on 27 October 2017, seeking cancellation of the agreements and repayment of R615 400 from Trifecta and, in the alternative, R15 400 from the conveyancer, together with interest and costs. Trifecta and the conveyancer filed substantially identical pleas. Each denies that the second agreement amended the first and instead pleads that it was a new agreement standing on its own. The conveyancer has no interest in the merits of the sale agreement, and I accordingly refer to Trifecta's plea only when dealing with those issues below. The conveyancer's plea differs from Trifecta's only in its special plea, which I deal with separately, later in this judgment. Trifecta denies receipt of the full purchase price, save for an admitted payment of R100 000 in 2012 and the R115 400 paid to the conveyancer in 2016. Trifecta further pleads that the delay in transfer was occasioned by the Ditsobotla Local Municipality's ('the local municipality') failure to resolve a dispute over electricity supply to the area wherein the property is situated. It is the version of Trifecta that this matter is outside its control and that the reduction in the purchase price from R714 000 to R600 000 was agreed to accommodate that difficulty. The conveyancer raises a special plea that no basis is pleaded for holding it personally liable to repay the R15 400.

[10] The deceased's evidence was taken before Gura J on 16 September 2019, pursuant to an order obtained specifically for that purpose, given the deceased's imminent illness, on an expedited basis because his doctors had given the deceased a prognosis of some six months to live. The deceased was examined by counsel for the plaintiffs and cross-examined by counsel for the defendants. He confirmed the conclusion of both agreements, with his signature on each. In evidence, the deceased confirmed, more than once, that the second agreement replaced the first. Throughout, the deceased testified that he had paid the full purchase price, though he was inconsistent as to the precise dates on which the December 2012 payments were made. He confirmed that nothing in the written

agreements refers to the supply of electricity to the property. The deceased died shortly after giving this evidence.

[11] The matter resumed in 2025 when Mr Ashley Wilson ('Mr Wilson') gave evidence for the plaintiffs. Mr Wilson is an admitted advocate employed by First National Bank in its subpoena and quality assurance department. He gave evidence identifying the deceased's bank accounts, the account into which the December 2012 payments were made, and the underlying transactional records, extracted from the bank's electronic ledgers, corresponding to the payments reflected in the deceased's bank statements. Mr Wilson was cross-examined at length on the reliability of those records, and in particular on the absence of any corresponding record from the receiving bank confirming that the payments were in fact received into Trifecta's account.

[12] After Mr Wilson's evidence, the plaintiffs closed their case. The defendants applied for absolution from the instance. I was satisfied that the plaintiffs had made out a prima facie case on each element of their claim, and I refused the application for absolution on 6 May 2025. The defendants then closed their case without leading any evidence. In their heads of argument and in argument in closing, the defendants apply for absolution from the instance a second time, at the close of the defendants' case.

The issues

[13] The issues for determination are the following: (a) whether the second agreement replaced the first agreement in its entirety, or merely amended it; (b) whether the plaintiffs have proved payment of the purchase price due under the operative agreement; (c) if the December 2012 payments were made under the first agreement, whether the conduct of the parties nonetheless entitles the

plaintiffs to rely on them as satisfying the price payable under the second agreement; (d) whether there was a term, tacit or otherwise, obliging Trifecta to procure an electricity supply to the property; (e) whether the plaintiffs are entitled to cancel the agreement on the ground that a reasonable time for transfer has elapsed, and (f) whether the conveyancer is liable to repay the R15 400 paid to it.

[14] I deal with each of these in turn, but first, it is necessary to deal with the evidence before me and the weight I attach to it.

Evaluation of the evidence

The deceased's evidence

[15] The deceased gave his evidence seated, on oxygen, in circumstances that clearly affected the fluency of his answers. Counsel for the defendants made much, in cross-examination, of the deceased's shifting account of the date of the December 2012 payments. He testified, in examination in chief, that he paid R500 000 in cash on 2 December 2012. Under cross-examination, the evidence of the deceased changed to a payment made within a few days in January 2013, and then a payment made in the last few days of December and the first few days of January 2013. Counsel for the defendants put to him, not unfairly, that this inconsistency reflected poorly on his reliability.

[16] I do not think this criticism should be allowed to unseat the substance of the deceased's evidence as he explained, when pressed on the point, that his memory was affected because he had brain cancer. This is not inconsistent with his description of his illness in his founding affidavit in the application to lead his evidence before a commissioner that he was diagnosed with cancer in June

2019, and that his doctors subsequently confirmed the cancer had spread to his lungs and to his brain. A person in that condition, testifying about payments made seven years earlier, cannot reasonably be expected to recall an exact date. What matters is not whether the deceased's evidence on the date of payment was 2 December 2012 or January 2013, but whether the payments were in fact made, and that is a question the documentary evidence answers independently of his recollection. I return to this below.

[17] There is another concern with the deceased's evidence and it is one the defendants made much of. The deceased repeatedly confirmed that the second agreement replaced the first and that, in his own words, the first agreement was 'null and void' once the second agreement was concluded. He also confirmed that the second agreement accurately reflects the terms agreed between the parties. I accept that this evidence was given freely and was not the product of any misunderstanding of the questions put to him. However, it does not automatically mean that the December 2012 payments are unrelated to the events under the second agreement. I return to this question when I deal with the conduct of the parties. For the rest, I found the deceased's evidence to be that of an honest witness doing his best in difficult circumstances. He remained steadfast on the central issue of this evidence, namely that he paid the purchase price in full, that he signed the transfer documents, and that he was never told why the transfer did not follow.

Mr Wilson's evidence

[18] Mr Wilson's evidence was directed at proving, through the bank's electronic records, that five payments of R100 000 were made from the deceased's accounts on 20 and 21 December 2012, and that a further payment of R115 400 was made to the conveyancer on 7 June 2016. He explained, in some

detail, how those records are generated, archived, and identified by a unique trace identifier common to both the sending and receiving legs of a transaction.

[19] Counsel for the defendants objected to this evidence as hearsay, given the absence of a formal affidavit or notice in terms of the Civil Proceedings Evidence Act[1]. That objection was raised on 13 November 2024 before Morei AJ and before Mr Wilson was called to testify. This issue was resolved when it emerged that Mr Wilson's affidavit had, in fact, been served and filed but had not come to the attention of the defendants' correspondent attorney or the presiding judge at the time. When Mr Wilson eventually gave his evidence, a further objection was raised, this time that he was giving opinion evidence on matters outside his qualification. That objection was provisionally overruled and Mr Wilson was permitted to continue subject to argument on the weight of his evidence. I am satisfied that Mr Wilson had personal knowledge of the process by which the annexures to his affidavit were compiled, that he did not merely repeat what another told him, and that his evidence is accordingly not hearsay in any relevant sense. What he says about how the records were extracted, and what those records show, is admissible.

[20] Mr Wilson was constrained to concede, under cross-examination, that a real-time payment option was not selected for the December 2012 payments, and that, in the ordinary course, one would therefore expect to find a corresponding credit entry reflected in the receiving bank's records within a day or two. He could point to no such record. His evidence does not conclusively establish that the money was received into Trifecta's account, but it does establish that the money left the deceased's accounts, described in the reference field as payments to Trifecta Trading.

[1] Civil Proceedings Evidence Act 25 of 1965.

[21] I am of the opinion that this gap in Mr Wilson's evidence is not fatal to the plaintiffs' case for the following reasons. Firstly, the reference to Trifecta Trading on each of the five entries was, on Mr Wilson's evidence, inserted by the person making the payment, that is, the deceased himself. It is evidence of the deceased's intention to make the payment and is consistent with his testimony that Trifecta was the recipient. Secondly, and more significantly, the defendants' counsel foreshadowed, in cross-examining the deceased, that evidence would be presented showing that Trifecta could find no record of having received R500 000. Defendants' counsel put it to the deceased as follows:

> 'Now, if need be, evidence will be presented by Trifecta in due course, that they cannot find any proof of payment of R500 000 as you said. Do you want to comment on that? --- Yes. Yes? --- I can apply at the bank to give me the proof of payments'

[22] That was a conditional undertaking to rebut the deceased's evidence if the need arose. Mr Wilson's subsequent evidence is the kind of evidence that elicited evidence from Trifecta in rebuttal. Such evidence was never out before this Court. Trifecta had every opportunity to place its own banking records before this Court to show that the money never reached its account. In *Elgin Fireclays Ltd v Webb*[2] the Supreme Court of Appeal ('SCA') found that where a party who is in a position to contradict evidence chooses not to, a court is entitled to draw an inference that the evidence would not have assisted that party. I draw that inference here.

[23] I accept, on the whole of the evidence, that the deceased paid R500 000 to Trifecta in December 2012 and R115 400 to the conveyancer in June 2016.

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[2] *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) at 392 - 393.

Legal principles

[24] The starting point is the now trite approach to interpreting a written instrument, including a contract. Interpretation as a unitary exercise, is stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3], as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[25] I apply this approach to both the question of which agreement governs and the admissibility of the evidence of context and conduct dealt with below.

[26] Novation is the extinction of one obligation by the substitution of a new one, by agreement of the parties. Whether a later agreement between the same parties, relating to the same subject matter, novates an earlier agreement or merely varies it, is a question of the intention of the parties, which is never presumed and must be inferred from all the circumstances of the case[4]. *In National Health Laboratory Service v Lloyd-Jansen van Vuuren*[5] the SCA found that in the case of novation, a court is entitled to have regard to the conduct of the parties, including any evidence relating to their intention. That is itself an

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[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] All SA 262 (SCA) para 18.
[4] *Acacia Mines Ltd v Boshoff* [1958] 4 All SA 212 at 218-218.
[5] *National Health Laboratory Service v Lloyd-Jansen van Vuuren* (20044/14) [2015] ZASCA 20 para 16.

application of the *Endumeni* approach, since the parties' intention is to be found in the document read in its context, and not in an isolated form of words taken on their own.

[27] In my assessment of this matter, I have been careful not to ignore the parol evidence rule as cautioned in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*[6]. In this matter, the SCA remarked that the parol evidence rule precludes a party from leading evidence to vary, contradict or add to the terms of a written agreement intended to be the exclusive memorial of the transaction.

[28] It is necessary to emphasise that the parol evidence rule does not preclude my consideration of the evidence of the context in which an agreement was concluded, or of the parties' subsequent conduct, where that evidence is led not to alter the terms of the agreement but to establish facts, such as waiver, that operate upon those terms without changing them. The following remarks of the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*[7] are apposite.

> 'Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.'

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[6] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para 39.
[7] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para 68.

[29] A party to a contract may waive strict compliance with a term inserted for its own benefit by conduct clearly inconsistent with an intention to insist upon it[8]. Waiver is not lightly inferred, and the onus rests on the party alleging it.

[30] Lastly, it is of some importance to refer to the time-worn principle laid down by the SCA in *Nel v Cloete*[9] where an agreement of sale fixes no date for transfer, the seller must effect transfer within a reasonable time, and a purchaser who has performed is entitled, after placing the seller in *mora* and allowing a reasonable time to elapse, to cancel for the seller's failure to do so. What is a reasonable time depends on the circumstances of each case.

Which agreement governs

[31] The plaintiffs plead that the second agreement amended the first as to the purchase price. In contrast, Trifecta pleads that the second agreement was a new agreement standing on its own, entirely replacing the first. The deceased's own evidence, given repeatedly and in his own words, was that the second agreement replaced the first and that the first agreement was null and void once the second was concluded. I do not treat that evidence as decisive of the question. A lay witness's characterisation of the legal effect of a document he signed is not proof of that legal effect, any more than a lay witness's view on any other question of law carries weight. In lay terms, the deceased described a new document having been signed for the same sale at a reduced price. That observation is not evidence of the legal consequence of novation that Trifecta would have me draw from it.

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[8] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) paras 15 to 19.
[9] *Nel v Cloete* 1972 (2) SA 150 (A).

[32] What the documents themselves show points toward variation, not novation. The first and second agreements deal with the same immovable property, Erf 3[...], Retiefspark, Extension 3, Lichtenburg, between the same seller and the same purchaser. Every term of the first agreement is reproduced in the second. The clause dealing with payment is, but for the amount and the date, worded identically in both. In this regard, the first agreement reads:

'Should my/our offer be accepted, then I undertake to pay the purchase price as follows: R500 000.00 (five hundred thousand Rand) on the date of signing; The balance before or on the 31st of January 2013'

[33] In the same regard, the second agreement reads:

'Should my/our offer be accepted, then I undertake to pay the purchase price as follows: R500 000.00 (five hundred thousand rand) on the date of signing; The remaining balance before or on 1 April 2016.'

[34] The only term that changed throughout the second agreement was the price, reduced from R714 000 to R600 000, a change that the defendants' plea attributes to a reduction in the purchase price to accommodate the delayed electricity supply. A substitution of one contract for another ordinarily involves some change in the nature of the obligation, the identity of the parties, or the *causa* of the agreement. None of that is present here. All that occurred was a renegotiation of the purchase price of the property against the backdrop of an otherwise unchanged transaction, which is the hallmark of a variation, not a novation. In determining whether that intention was present, I have regard to the parties' actions rather than to the label they gave it. I accordingly find that the second agreement amended the first as to price and that the first agreement was not extinguished by its conclusion. This is, moreover, the case the plaintiffs

themselves pleaded, and the issue was fully canvassed in evidence and in argument by both sides.

[35] On this primary finding, the position is straightforward. The deceased's obligation to pay for the property was a continuing obligation, the amount of which was later reduced to R600 000. The deceased paid R500 000 in December 2012 and a further R100 000 on 7 June 2016, together making up the full reduced price of R600 000. The remaining R15 400, paid on the same date, was a separate amount for conveyancing costs and is not part of the purchase price.

[36] If I am wrong in my primary finding and the second agreement in fact replaced the first, the question is whether the outcome of this case would change and I deal with that question next.

The conduct of the parties

[37] If the second agreement is treated as a novation, the R500 000 paid in December 2012 would, in principle, have discharged whatever obligation the deceased owed under the first agreement. The first agreement would no longer exist and the obligation it imposed, once performed, would be at an end. Considered in isolation, that would present a difficulty for the plaintiffs, as the second agreement required payment of R500 000 on 1 March 2016, and there is no evidence of any payment made on or after that date corresponding to that requirement, save for the R100 000 balance paid, together with a separate R15 400 for conveyancing costs, on 7 June 2016.

[38] I do not think, however, that the matter could be considered in isolation from the actions of the parties once the second agreement was concluded. The plaintiffs contend that the conduct of Trifecta, after 1 March 2016, shows that the parties treated the December 2012 payments as having already satisfied a substantial part of the reduced price and that Trifecta is not entitled to insist on the strict payment dates recorded in the second agreement. I accept that submission. Trifecta's plea provides the starting point. It pleads that the price was reduced from R714 000 to R600 000, specifically to accommodate the delay caused by the electricity dispute. A reduction, by its nature, operates on something that already exists, as one cannot reduce a price unless there is a prior price and a prior relationship for the reduction to apply. If the second agreement had truly created a new, unconnected obligation for R600 000, there would have been nothing to reduce at all. The parties would simply have agreed on a new price. By pleading a reduction, Trifecta treats the second agreement as continuous with the first and regards what the deceased had already paid as still relevant to what he still owed. Such a plea is inconsistent with treating the R600 000 as owed afresh, with the earlier payments simply falling away.

[39] Trifecta's conduct that followed the conclusion of the second agreement points in the same direction. The deceased paid the R100 000 balance to the conveyancer's trust account on 7 June 2016, more than two months after the 1 April 2016 deadline recorded in the second agreement for payment of the balance. The conveyancer accepted that payment without disapproval. No letter was written placing the deceased in breach and no demand was made for payment of the balance of the purchase price. Instead, the deceased was permitted to sign the transfer documents and the conveyancer's letter of 21 June 2017 said so directly:

‘Your client has also already signed transfer documents, **<u>and the only outstanding item is therefore the clearance certificate</u>**’. (own emphasis)

[40] That letter makes no mention of any shortfall in payment. It would not have been written in those terms had Trifecta regarded the deceased as owing money under the second agreement. Trifecta could not then be heard to say that the December 2012 payments do not count towards the price payable under the second agreement, when their own conduct at the time accorded precisely that.

[41] Whether the matter is approached on the primary finding that the second agreement amended the first, or on the alternative finding that it novated the first, the result is the same. In the result, I find that the deceased paid the full purchase price of R600 000, and that this was accepted by Trifecta. The further R15 400 paid on 7 June 2016 was a separate amount, for conveyancing costs, which I deal with later in this judgment.

The electricity supply

[42] The plaintiffs plead, in the alternative, that it was a tacit or implied term of the agreements that electricity would be available at the property, and that Trifecta’s failure to procure it constituted a repudiation that the deceased accepted. I do not accept this. The deceased confirmed under cross-examination that nothing in the second agreement refers to electricity supply. The second agreement contains a non-variation clause and records that the property is sold voetstoots, without any representation or warranty by the seller. A tacit term cannot be imported to contradict the plain and unambiguous language of a written agreement in these terms and there is, in any event, no evidence from which such a term could properly be inferred. The plaintiffs simply failed to substantiate this part of their claim.

Failure to transfer within a reasonable time

[43] The plaintiffs' primary case, however, does not depend on the supply of electricity. It rests on the proposition that the deceased performed and that Trifecta did not, within a reasonable time, or at all, give transfer. The second agreement was concluded on 1 March 2016. The final payment was made and accepted in June 2016. Transfer had still not been given by the time the conveyancer wrote his letter of 21 June 2017, which attributed the delay to the local municipality's failure to issue a clearance certificate, more than a year later, and had still not been given when summons was issued a further four months after that. Trifecta admit, in its plea, that the local municipality failed to issue the clearance certificate despite being obliged to do so. No date for transfer was fixed by the agreement and Trifecta was accordingly obliged to effect transfer within a reasonable time of performance by the deceased. On any interpretation, a period exceeding a year, attributable, in Trifecta's own case, to a municipal failure. Trifecta has not shown that it was unable to overcome the failure and has exceeded what is reasonable.

[44] I have already found that Trifecta received full payment. Its plea that it need not transfer until the purchase price is proved to have been paid, accordingly, no longer avails it. No document presented in evidence demands a transfer specifically before the summons was issued. The letter of 13 June 2017 demanded electricity, not a transfer, and concerned the first agreement rather than the second. The conveyancer's response of 21 June 2017 is nonetheless significant to the length of the delay itself. It confirms, in Trifecta's own words, that as at that date, more than a year after final payment had been accepted, transfer had still not been given, and that the only outstanding item was the clearance certificate. The reasonable time within which Trifecta was obliged to give transfer accordingly ran from June 2016, when final payment was

accepted, and the summons itself, issued in October 2017, placed Trifecta unambiguously on terms to perform. Its failure to give transfer within a reasonable time thereafter entitles the plaintiffs to cancel. In the result, I find that the plaintiffs are entitled to an order cancelling the agreement, and to repayment of the R600 000 paid to Trifecta, that being the price ultimately agreed and paid in respect of the property.

The claim against the conveyancer

[45] The claim against the conveyancer stands on a different footing and concerns only the R15 400 in conveyancing costs, not the R100 000 balance of the purchase price, which happened to be paid into the same trust account on the same date. The particulars of claim plead this claim in the alternative, only if Trifecta denies that the conveyancer received that amount on its behalf. There is no evidence that the conveyancer retained the R15 400 for its own benefit, rather than receiving it and applying it in the ordinary course of its mandate as the conveyancer acting for Trifecta. Any obligation on the conveyancer to account for that money lies in its capacity as attorney and agent for Trifecta, not as a party personally liable to repay it for its own account. The conveyancer's special plea that no factual basis is pleaded to hold it personally liable is well taken. The particulars of claim allege that the conveyancer received the R15 400 either on behalf of Trifecta or for its own benefit, but no evidence was led to establish the latter alternative, and the former, if correct, points to liability on the part of Trifecta, not the conveyancer.

[46] I am not satisfied that the plaintiffs succeeded in proving a claim against the conveyancer on a balance of probabilities. This is not a claim to be met with absolution, since the evidence has been fully tested and found wanting. It falls to be dismissed, with costs on Scale B. The reasons for the scale of the costs are

addressed later in this judgment. The conveyancer met the claim on a distinct cause of action with its own special plea, and that special plea disposes of the claim against it. The fact that the same attorneys and counsel acted for both defendants throughout does not disentitle the conveyancer to its costs of successfully resisting a claim properly brought and argued against it.

Interest

[47] The deceased, in his evidence in chief, was asked directly whether he sought interest, and answered that he wanted his money back with no interest, nothing. That answer was unprompted, unequivocal, and never resiled from. The defendants conducted the remainder of the trial, including the cross-examination of both witnesses and their argument on absolution, on the footing that interest was no longer claimed. It would not be fair, at this late stage, to revive a claim the deceased himself, under oath, disclaimed. Accordingly, I make no order for interest.

Conclusion

[48] For these reasons, I find that the plaintiffs have proved, on a balance of probabilities, that the second agreement amended the first as to price, alternatively, if that finding is wrong, that the conduct of the parties nonetheless entitles the plaintiffs to rely on the payments made toward the second agreement, that the full purchase price of R600 000 was in either event paid and accepted, that Trifecta failed to give transfer within a reasonable time, and that the plaintiffs are entitled to cancel the agreement and recover what was paid. The second application for absolution from the instance, insofar as it relates to Trifecta, is refused, and judgment is granted in the plaintiffs' favour against

Trifecta. I also find that the plaintiffs have not proved a claim against the conveyancer, and that claim is dismissed.

[49] The dismissal of the claim against the conveyancer does not end the matter of the R15 400. Receipt of money by an agent acting within the scope of its mandate is, in law, receipt by the principal. The relationship between an attorney or conveyancer and a client, despite its special character, is generically one of agency[10] and receipt by the conveyancer in that capacity is accordingly attributed to the principal it represents[11]. I have found that the conveyancer received the R15 400 as Trifecta's agent, in the ordinary course of its conveyancing mandate, and not for its own account.

[50] Cancellation of the agreement entitles the plaintiffs to restitution of what was paid under it, and that restitution is not confined to the R600 000 purchase price. The R15 400 was paid in connection with the same agreement for a transfer that never took place, and there is no basis for it to remain irrecoverable simply because it passed through the conveyancer's trust account rather than an account held directly by Trifecta. The plaintiffs are accordingly entitled to recover the full sum of R615 400 from Trifecta.

Costs

[51] Costs follow the result. Trifecta must pay the plaintiffs' costs of suit. Although the costs of the first application for absolution were granted on Scale A, the complexity of the issues raised in the closing argument warrants costs on Scale B.

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[10] *Goodrick v Auto Protection Insurance Co Ltd* 1968 (1) SA 717 (A) at 722H.
[11] *Du Toit and Others v Du Toit-Smuts & Partners and Another* [2023] ZAMPMBHC 22 para 23.6.

[52] The costs of the appearance on 12 and 13 November 2024 stand on a different footing. The matter did not proceed on 12 November 2024 for reasons unconnected with either party, and on 13 November 2024 an objection to Mr Wilson's evidence was raised but never resolved on its merits, the affidavit in question having, in fact, been served and filed, even though it had not come to the attention of either the defendants' correspondent attorney or the presiding judge. Neither party is shown to have caused that day to be wasted. Each party will bear its own costs of that appearance.

Order

[53] Resultantly, the following order is made:

1 The application by the first and second defendants for absolution from the instance, at the close of all the evidence, is refused.

2 The agreement of sale concluded between the deceased, Willem Petrus de Beer, and the first defendant on 2 December 2012, as amended on 1 March 2016, is cancelled.

3 The first defendant is ordered to pay the first and second plaintiffs the sum of R615 400.

4 The claim against the second defendant is dismissed, with costs on Scale B.

5 The first defendant is to pay the plaintiffs' costs of suit, on Scale B.

6 Each party is to pay its own costs occasioned by the appearances on 12 and 13 November 2024.

M WESSELS

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Appearances

For plaintiff(s)	:Adv D Smit
Instructed by	:Maree & Maree
	:Mahikeng
For defendant(s)	:Adv H van Nieuwenhuizen
Instructed by	:Bosman & Bosman
	:Lichtenburg
	:c/o Labuschagne Attorneys
	:Mahikeng