IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A5048/2020

GLD CASE NO:2015/32685

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

27/7/2022
DATE

SIGNATURE

In the appeal by :

PARAMOUNT PROPERTY FUND LTD	**Appellant**
and	
HAUPT, SEAN PETER	**Respondent**

In re the matter between

HAUPT, SEAN PETER	**Plaintiff**
And	
PARAMOUNT PROPERTY FUND LTD	**Defendant**

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Molahlehi J, sitting as Court of first instance):

1. The appellant's application for condonation for the late filing of the notice of appeal, heads of argument, and practice note is granted;
2. The appeal is reinstated;
3. The appellant is ordered to pay the costs of the application for condonation;
4. The appeal is dismissed;
5. The appellant is ordered to pay the costs of the appeal.

JUDGMENT

MOORCROFT AJ (VICTOR J AND MAKUME J CONCURRING):

Introduction:

[1] The appellant appeals to this Court with the leave of the Court *a quo* against the judgment and order, including the order as to costs, of the Learned Mr. Justice Molahlehi handed down on 21 May 2020, and in terms of which he granted an order that the written agreement between the parties be rectified by

the insertion of the following clause:

> *"4 The Creditor shall ensure that all the goods set out in Annexure "A" (SP2) to this agreement shall be available for collection by Debtor."*

[2] The claim for a money judgment was postponed sine die.

[3] The appellant also seeks an order that its non-compliance with the provisions of Rule 49 (6) (a) and Rule 49 (7) (a) and (b) of the Uniform Rules be condoned, and that its lapsed appeal be reinstated.

Background:

[4] The Sheriff for the Regional Court in Roodepoort attached movable goods at the appellant's premises to secure a rental debt owed by a third party, a close corporation, to the appellant. The appellant (the defendant *a quo*) was a property company that rented out premises to tenants. The respondent (the plaintiff *a quo*) was a businessman who laid claim to certain of the movable goods attached, and who launched interpleader proceedings in the Regional Court. These proceedings halted the sale in execution of the attached goods.

[5] The parties entered into a written agreement whereby the respondent would obtain the release of the goods against payment.

[6] The respondent claimed an order that a written agreement between the parties be rectified in a number of respects, and consequent to the rectification the respondent claimed damages.

[7] This was an appropriate case for the separation of issues since it involved damages and rectification. The damages claim was postponed and the rectification claim was dealt with in terms of Rule 33 (4) of the Uniform Rules.

[8] It was common cause that the agreement did not reflect the common intention of the parties and had to be rectified in a number of respects as discussed below. It was however not common cause that the rectification should include the term quoted in paragraph 2 above.

[9] This was, the respondent contended, a crucial term of the agreement as he was entitled to obtain *all* the goods attached by the Sheriff at the appellant's premises.

Condonation:

[10] Rule 49(6)(a) provides that an appellant must apply for a hearing date within sixty days of delivery of a notice of appeal. Sub-rule (7) requires filing of

the record.

[11] The High Court may condone non-compliance when the reasons have been satisfactorily explained and the demands of justice and fair play justify condonation.[1] Factors to be taken account include[2] negligence by an attorney rather than the appellant.[3]

[12] The appellant's attorney filed a notice of appeal timeously on 1 October 2020. In terms of Rule 49 (6) (a) he was now scheduled to make a written application to the Registrar for a date for the hearing within sixty court days, but by his reckoning he now had sixty days until 27 January 2021 to compile, serve and file the record, heads of argument and practice note, and apply for a date for the appeal. The attorney wrongly assumed that *dies non* applied to the calculation of the period, but the sixty day period already expired in December 2020.

[13] On 14 January 2021 he was informed by the respondent that the appeal had lapsed.

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1 See *Moluele v Deschalets NO* 1950 (2) SA 670 (T), *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) 720E, *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) 477A, *Aymac CC v Widgerow* 2009 (6) SA 433 (W) 441A, and *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC* 2010 (5) SA 340 (GSJ) 344F to 345B. See also *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA).

2 See the discussion by Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* 2015, D1-659.

3 *Jojo v Botha* 1949 (3) SA 417 (E), *Saperstein v Edelstein* 1908 TS 320, *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A), *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) 799B, *Blumenthal v Thomson NO* 1994 (2) SA 118 (A) 121D. and *Aymac CC v Widgerow* 2009 (6) SA 433 (W) 451I to 452B.

[14] The next day he was informed by his counsel that the record he had compiled was incomplete as it did not contain the *viva voce* evidence. The attorney was not aware of the fact that the record had to include the transcription of the evidence.

[15] The appellant's attorney then informed the respondent's attorneys that the appellant would apply for condonation. On 18 January 2021 he gave instructions for the record to be compiled on an urgent basis. The record became available on 19 May 2021 and counsel again advised him that the record was defective.

[16] On 10 June 2021, three weeks later, the attorney was diagnosed with the viral disease Covid19 and he only returned to the office at the beginning of July 2021. He was inundated with work and only saw to the completion of the record in mid-August 2021 for a consultation with counsel on the 18th of August 2021.

[17] There were further defects that that needed to corrected.

[18] On 22 October 202 the appellant applied for a date.

[19] The appellant's attorney disclosed the reasons for the delay fully and frankly in his affidavit and pleaded *mea culpa*. The appellant was not to blame for the delay. The appellant also tendered the respondent's costs of the condonation application, including costs of opposition and Mr. Van Vuuren, counsel on behalf of the appellant quite correctly conceded that the opposition was justified.

[20] The litigation between the parties took five years to finalise and the respondent was partly to blame for the delay. It took the respondent four years and a number of amendments to accurately formulate its claim. Under these circumstances I am of the view that condonation ought to be granted and the appeal ought to be reinstated, and I so order.

The merits of the appeal:

[1] As indicated above, the respondent had launched interpleader proceedings in the magistrates' court that halted the sale of the goods at the instance of the appellant, then the execution creditor.

[2] This litigation flows from the written settlement agreement entered into in terms of which, *inter alia*, the respondent contracted for the release of *'all the goods'* attached by the Sheriff at certain leased premises pursuant to a judgment obtained against a close corporation, the judgment debtor in the magistrates' court, and for the removal of those goods. A consideration of R360 000.00 was payable.

[3] The agreement as signed provided for sale of these items but it was common cause in the amended pleadings that the items were to be released to the respondent rather than sold to him, and that the agreement had to be rectified in certain respects dealt with more fully hereunder.

[4] It was stated in the settlement agreement that the respondent was already the owner of *'a number of the goods.'*

[5] The agreement recorded that the respondent wished to obtain *'all items on the premises'* and *'has offered to make payment for the attached goods and withdraw the interpleader summons so that all goods can be removed from the premises and released from the attachment.'*

[6] It was agreed that the respondent *'will remove all attached goods from the premises'* after payment of the consideration.

[7] It was thus agreed that the subject matter of the agreement was the goods attached at the premises in satisfaction, or partial satisfaction, of a debt owed by the judgment debtor. The goods were not expressly described or exhaustively identified in the settlement agreement, other than the agreement stating that the goods are the *'attached goods.'*

[8] The case for the respondent was that it was a term of the agreement that the items listed in the inventory were still on the premises. This was alleged in the amended particulars of claim to be an express, or an implied, or a tacit term. The term was clearly not an express term in the agreement; it could conceivably be an implied term or a tacit term.

[9] In the alternative the plaintiff relied on rectification of the settlement agreement to import the term as an express term.

Analysis:

[10] When interpreting an agreement the interpretation that leads to validity rather than an interpretation that leads to invalidity is to be preferred.[4] The settlement agreement must be interpreted in its context, having regard to the purpose of the agreement and the information at the disposal of the parties.[5] If possible, effect must be given to the agreement.

[11] In order for the phrase *'attached goods'* to have any meaning in the context of a settlement agreement entered into between a judgment creditor and a claimant in an interpleader involving goods attached by a Sheriff and listed in an inventory, the phrase must, *prima facie* and unless of course a different meaning is apparent, be a reference to those goods that were attached and are the subject of the interpleader proceedings.

[12] When analysing the agreement before the Court in this matter no other interpretation presents itself to justify a departure from this *prima facie* view.

[13] It is therefore obvious from reading the agreement that the goods that were the subject of the agreement, were the goods attached by the Sheriff at the premises leased or occupied by the close corporation and that the parties

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4 See *Boland Bank (Bpk) v Steele* 1994 (1) SA 259 (T).

5 See *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) paragraphs 39–40,*Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* paragraphs. 18–19 and *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd 2013 (6) SA 520 (SCA)* paragraph 16.

were contracting for the release of those goods, and all those goods, to the respondent. These goods are identified in the Sheriff's inventory attached to the particulars of claim as "SP2".

[14] One is dealing with a badly drafted agreement. The fact that the standard of drafting is poor does not mean that the agreement cannot be meaningfully interpreted: The respondent was obtaining the release of the items attached and listed by the Sheriff and kept in the leased premises where the items were attached, and the release was to be obtained against payment of money. Those items are listed in the inventory annexed to the particulars of claim. The respondent was obtaining the release of specific items, and not *'whatever may be on the premises'* i.e., as Mr. Venter for the respondent labels it, a *'lucky packet.'*

[15] Had the hypothetical bystander[6] asked when the parties were negotiating their contract if they were contracting for the goods attached by the Sheriff and listed in the inventory, it is at least on a balance of probabilities (if not overwhelmingly) so that both parties would have answered *'yes, of course.'*

[16] In my view the learned trial Judge quite correctly concluded that the respondent *'has on the balance of probabilities clearly shown that he is entitled*

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6 The test is referred to in the Judgment *a quo* paragraphs 33 to 35 and it has been universally applied. See *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25 31 *Haunt v Paramount Property* 2020 JDR 1372 (GJ) paragraph 33, *Sontsele v 140 Main Street Kokstad Properties CC* 2018 JDR 0551 (ECM) paragraph 61, *Nondabula Vuyisile Zamindlela trading as Umzimkhulu Garage v Shell Downstream South Africa (Pty) Ltd* 2020 JDR 1653 (GP) paragraph 62.

to have the averments made in paragraphs 5.9 and 5.10 of the particulars of claim implied as part of the provisions of the agreement …'[7]

[17] My reading of the judgment is that the learned Judge used the term *'implied'* in the meaning of an unexpressed provision of a contract that derives from the common intention as inferred from the express terms and the surrounding circumstances.[8] These terms may also be referred to as *'tacit terms'*[9] or *'implicit terms.'*

[18] The trial Judge went on to say that even if he was wrong in his conclusion, the respondent would in any event be entitled to rectification.[10] I agree.

The respondent's delay in relying on a tacit or implied term, alternatively on rectification:

[19] The respondent instituted action in September 2015. He gave notice of an intention to amend in November 2015 and again in January 2018. Only in March 2019 did the respondent introduce an amendment to rely on tacit or implied

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7 Judgment paragraphs 37 to 39.
8 See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531E to 532H.
9 See *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A) 214 to 215.
10 Judgment paragraph 40. See *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) paragraph 15 *et seq*, *Brits v Van Heerden* 2001 (3) SA 257 (C) 282C to 283.

terms, or alternatively on rectification. In cross-examination it was put to the respondent that rectification first raised its head on 16 May 2018.

[20] It is indeed unsatisfactory that the respondent waited almost four years to introduce the amendment. A belated amendment may easily create the impression that a cause of action was being manufactured belatedly. The respondent explained in evidence however that the amendment was introduced when his attorney briefed counsel for trial and counsel then advised that the amendment was necessary. I find this explanation to be acceptable.

[21] The appellant pleaded to the respondent's amended particulars of claim. In response to the implied or tacit terms pleaded in paragraphs 5.9 and 5.10 of the particulars of claim, the appellant pleads a bare denial in paragraph 4 of the plea but not does plead a version of the agreement that would enable a Court to identify the subject matter of the settlement agreement. It is therefore not apparent from the plea what the respondent was procuring the release of.

[22] In paragraphs 5 to 7 of the plea the appellant -

22.1 admits that the settlement agreement did not correctly reflect the intention of the parties as the intention was not that the respondent would make payment for the attached goods in a contract of sale, but instead provided that payment would be made to *'release from attachment the attached goods';*

22.2 admits that the agreement did not correctly reflect the intention when it referred to *'the goods purchased by the Plaintiff'* as the intention was that the agreement would relate to *'the goods that Plaintiff procured the release of';'*

22.3 admits that the reference to a *'purchase proposal'* should read *'agreement';*

22.4 admits that the incorrect recordal was due to a common error in the bona fide but mistaken belief that the document recorded the true agreement between the parties;

22.5 denies that similarly due to a common error the agreement did not provide that the goods attached by the Sheriff and reflected in the inventory marked "SP1" and annexed to the particulars of claim, were still within the premises;

22.6 fails to plead its version of what the attached goods were that the agreement provided for the release of.

Conclusion:

[23] On an analysis of the pleadings and the evidence I am satisfied that the Judge correctly found that the respondent proved its case on a balance of probabilities at trial and was entitled to the rectification as claimed.

[24] I therefore make the order set out above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

M VICTOR
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

M MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic

file of this matter on CaseLines. The date of the judgment is deemed to be 27/7/2022

COUNSEL FOR THE APPLICANT:	J L C J VAN VUUREN SC
INSTRUCTED BY:	SSLR INC
COUNSEL FOR RESPONDENT:	A J VENTER
INSTRUCTED BY:	SYMES INC
DATE OF HEARING:	13 APRIL 2022
DATE OF JUDGMENT:	27/7/2022