REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. A186/2021

DOH: 10 February 2023

1. REPORTABLE: **NO**/YES
2. OF INTEREST TO OTHER JUDGES: **NO**/YES
3. REVISED.

DATE: 17 July 2023

SIGNATURE

In the matter of:

ANDRIES BENJAMIN FREDERIK COETZEE N.O. (In his capacity as trustee of the AFG Family Trust)	First Appellant
ALETTA JOHANNA COETZEE N.O. (In his capacity as trustee of the AFG Family Trust)	Second Appellant
GERHARD REINIER COETZEE N.O. (In his capacity as trustee of the AFG Family Trust)	Third Appellant
ERF 75 PECANWOOD ESTATE (PTY) LTD	Fourth Appellant
ALETTA JOHANNA COETZEE	Fifth Appellant
SOFTUS (PTY) LTD	Sixth Appellant
BROOKLYN CHAMBERS (PTY) LTD	Seventh Appellant

GERHARD REINIER COETZEE Eight Appellant

LENCOE ENTERPRISES (PTY) LTD Ninth Appellant

And

RMB PRIVATE BANK RESPONDENT
A DIVISION OF FIRSTRAND BANK LIMITED

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL / UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 17 JULY 2023

Bam J (Malindi J, et Lenyai AJ concurring)

A. Introduction

1. The question to be resolved in this appeal is whether the appellants' obligation to pay the instalment due to the respondent in December 2016 and those that fell after was reciprocal to the respondent's obligation to authorise cancellation of the mortgage bond registered over one of the appellant companies, the seventh appellant. The court *a quo* per Mokose J, held the two obligations were not reciprocal and rejected the appellants' defence of *exceptio non adimpleti contractus*. It accordingly granted judgment in favour of the respondent. The present appeal is with leave of that court.

2. Before us, the appellants contended that the court erred in failing to recognise that the two obligations were reciprocal. The appellants' case is covered in six broad submissions. They are: (i) The respondent was under a duty to immediately cancel the bond over the seventh appellant's property to allow the sale of shares to proceed; (ii) Reciprocity is not irreconcilable with payment in instalments; (iii) The

existence of the acceleration clause does not militate against reciprocity; (iv) The court a quo's reliance on an unconditional consent to judgement was incorrect; (v) The court erred in holding that the payment of R1.3 million was an admission; and (vi) the fact that the sale of shares between a third party and the seventh appellant was unconditional does not militate against reciprocity.

3. On behalf of the respondent, it was submitted that the entire reciprocity defence, when properly examined against the established facts, lacks merit. It is built on the myth that Steyn (the third party) was entitled to the transfer of shares after payment of the instalment of 15 September 2016, when in fact Steyn would become entitled to such transfer only after the purchase price had been paid in full or in June 2017, submitted the respondents. The respondent further contends that the appellants confuse the respondent's obligation of authorising cancellation of the bond with the actual cancellation. The latter, the respondent argues, was for the appellants to do. They failed, while the respondent was always ready to authorise same. In any event, submit the respondents, the appellants themselves pleaded further defences which clearly contradicted the claims of reciprocity.

B. Background

4. In April 2015, the respondent instituted proceedings to recover outstanding monies from a loan facility advanced to the AFG Family Trust, (the Trust) and further sought a special order to have the mortgaged properties of the 4th, 6th, and 9th appellants declared executable. The parties reached a settlement on 22 February 2016 which was subsequently made a consent to judgement. For the sake of clarity, we refer to the settlement agreement instead of the consent to judgement. The settlement agreement was concluded by the parties against the following background:

5. During September 2015 the first to the third appellants concluded an agreement to sell shares owned by them, in their representative capacity, in the seventh appellant to one Steyn. The material terms of the sale, which was not subject to any resolutive

or suspensive condition, and, in which the appellants gave no warranties, may be summarised thus: For ease of reference, I refer to the sellers as the appellants.

5.1 The purchase price of R 7 050 000.00 was to be paid by way of monthly instalments of R400 000.00, with the first instalment due on 1 November 2015 and thereafter on the first day of each successive month until the full purchase price is paid on or before June 2017. 5.2 All payments would remain in the trust account of Wiese Attorneys until the full purchase price had been paid as security for the transfer of the shares. 5.3 The funds would be invested on behalf of the first to the third appellants and would be paid over to them, together with interest, upon transfer of the shares to Steyn. 5.4 The transfer of shares would be effected once Steyn had paid the purchase price in full.

6. By way of a letter dated 27 December 2015, months after the sale agreement had been concluded, the appellants' attorneys advised the respondent of the sale as follows:

6. 1 The appellants are in the process of negotiating the sale of shares in the seventh appellant.

6.2 The sale proceeds will be R5. 5 million[1].

6.3 The purchase price is expected to be paid by the end of September 2016.

6.4 The sale of shares is 'obviously subject to the settlement and/or of pending the current litigation' between the parties.

[1] The purchase price had not been changed. It remained R7 050 000.00. The price mentioned in the letter is incorrect.

6.5 Upon receipt of the instalment of 15 September 2016 the respondent would authorise the cancellation of the bond registered over the property belonging to the seventh appellant to allow for the finalisation of the transfer of shares.

6.6 The remaining property owned by the fourth, sixth and ninth appellants will be ample security for the outstanding balance of the facility. Our clients will then repay the remaining balance and interest thereon, at reasonable monthly instalments until paid in full.

7. A letter from the appellants' attorneys to the respondent dated 19 February 2016, carried the following details, which would eventually find their way into the settlement agreement:

7.1 'Paragraph 3 of the settlement agreement is acceptable to our client, however, it is our instructions that our clients will not be able to pay the balance then outstanding after the payment of 15 September 2016 on or before 30 September and propose the following:

7.2 Our clients will pay a further R3 000 000.00 in satisfaction thereof on or before the 31 December 2016.

7.3 Our clients further undertake to settle the entire outstanding amount on the facility on or before the last day of June 2017.'

8. The resultant settlement agreement recorded: That the appellants are liable to the respondent in the sum of R 11 967 298.41 plus interest at the rate of prime plus 2.5% per annum, effective from 19 February 2016 until date of final payment, on 30 June 2017, both days inclusive, calculated daily and compounded monthly. The amount would be liquidated by way of instalments as follows:

R1 million - on or before 22 February 2016;

R 2 million - on or before 15 July 2016;

R 1.5 million - on or before 15 September 2016;

R 3 million - or before 31 December 2016; and

Balance - on or before 30 June 2017.

9. Clause 3 of the agreement provides that upon receipt of the instalment of 15 September 2016, the respondent will immediately authorise cancellation of the bond registered over the property belonging to the seventh respondent to allow the appellants to finalise the transfer of the shares to a third party.

10. The appellants paid the first four instalments, including the instalment of 15 September 2016. They defaulted on the instalment of R3 million that was due on 31 December 2016 and paid only R1.3 million. On 8 January 2017, the appellants, through their attorney, sent a letter to the respondent's attorneys seeking indulgence and citing '*unforeseen difficulty in raising the total instalment due timeously*'. In a follow-up letter of 11 January the appellants promised to pay the remaining R1.7 million on or before 31 March 2017. The letters of 8 and 11 January 2017 made no mention of an outstanding obligation on the part of the respondent, reciprocal or otherwise. Payment was not made on 31 March. Instead Coetzee, on behalf of the appellants, sent a proposal directly to the respondent. The respondent's application was launched during April 2017 in which the respondent sought, *inter alia*, execution of the bonded properties, excluding the property owned by the seventh appellant.

11. In their answering affidavit, deposed to by Mr ABF Coetzee, the third appellant, the appellants explained the reason for defaulting on the instalment, stating that it was brought about by the unsuccessful attempts of the sixth appellant to sell its immovable property. The intention was to utilise the proceeds to supplement the

December instalment. The sixth appellant had also attempted to borrow money but the property was already bonded. Thus, its attempts were unsuccessful. The situation according to Coetzee was also aggravated by the current litigation.

C. Proceedings before the court *a quo*

12. The broad thrust of the appellants' case in the court *a quo* was that the settlement agreement did not embody the intention of the parties due to a common mistake. On grounds of the alleged common mistake, the appellants sought rectification of clause 3[2] to reflect what they called 'common intention'. Later in the affidavit, and tangentially[3], the appellants mentioned the issue of reciprocity. It was the only defence that remained after the appellants chose to abandon all other defences.

13. In rejecting the defence, the court held that the ordinary language of clause 3 does not give rise to reciprocity and this was evident from the acceleration clause and the unconditional consent to judgement. We interpose that the reference to the unconditional consent to judgement was an oversight. The consent to judgement , as the content suggests, can only be invoked in the event of breach. The court further reasoned that it is evident from the consent order that all the respondents remained liable to settle their indebtedness in the agreed instalments and the obligation to pay the amounts after September 2016 continued albeit the indebtedness would no longer be secured by a mortgage bond over the seventh respondent's immovable property. This, the court found, was irreconcilable with reciprocity.

14. The court referred to the letter of 8 January 2017 and concluded that it was an admission that the instalment of R3 million was due despite the mortgage still enduring over the seventh respondent's immovable property. The learned judge concluded that the conduct of the respondents was indicative of the fact that

[2] Caselines 1-64, paragraphs 9.4 -9.5 answering affidavit
[3] Caselines 1-65, paragraph 11.2

reciprocity was never intended to apply and the appellants' reliance on same was misplaced.

D. The appellants' case

(i) The respondent's failure to perform

15. The contention is that the respondent was under a duty to cancel the mortgage over the seventh appellant's property to allow the sale of shares transaction to proceed. In breach of the agreement, the respondent waited for the appellants to default on the 31 December instalment and then unlawfully invoked the acceleration clause. The appellants contend that their obligation to pay the December instalment and those that came after was reciprocal to the respondent's obligation to cancel the mortgage. Both before the court *a quo* and in this court, the appellants' claim appear to vacillate between the respondent's obligation to authorise cancellation and at times, cancel the mortgage bond. It is thus necessary to first examine clause 3 to establish the exact obligation incurred by the respondent. Once that is done, it must be ascertained whether the obligations were indeed reciprocal.

16. Interpretation according to *Natal Joint Municipal Pension Fund* v *Endumeni Municipality*

> '..is the process of attributing words used in a document, having regard to the context provided by reading the particular provision or provisions in 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 light of the ordinary rules grammar and syntax; the content 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 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.'[4]

17. Clause 3 of the settlement agreement uses the words 'authorise cancellation …to allow the sale of shares transaction to proceed…' The letter of 27 December 2015 issued by the appellants' attorneys also mentioned the words, 'authorise cancellation… to allow for the finalisation of the transfer of shares'. The respondent correctly so in our view, argues that the appellants conflate the obligation placed on the respondent of authorising cancellation with cancellation. The respondent submits that the latter, (cancellation of the bond) was for the appellants to do and they never did. The respondent is correct. A perusal of clause 3 and the rest of the settlement agreement, including the background correspondence, conveys that the respondent committed itself to authorise the cancellation of the mortgage bond. Authorising cancellation is not the same as the actual cancellation. We conclude there is no merit to the argument that the respondent was under a duty to cancel the mortgage.

Whether the two obligations were reciprocal

18. The appellants as already mentioned defaulted on their December instalment. They explained the reason for such default in the answering affidavit with reference to the unsuccessful attempts to sell the 6th appellant's property and later the sixth respondent's failed attempt at borrowing. In their letter of 8 January 2017, the appellants made no mention of any outstanding obligation on the part of the respondent but merely cited unforeseen challenges and sought an indulgence. It must be assumed that the reference to unforeseen challenges was a reference to the failed attempts at selling and borrowing. Neither of the two letters sent by the appellants in January 2017 made mention of any outstanding reciprocal obligation on the part of the respondent.

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[4] (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012), paragraph 18

19. An examination of the sale of shares agreement makes plain that the parties had intended that the funds paid by Steyn would remain invested in the attorney's trust account until full payment of the purchase price in June 2017, upon which the transfer of shares would take place. It can safely be concluded from the plain wording of the agreement that the parties had not intended that the transfer of shares would take place at any time before the payment of the full purchase price.

20. The reference in clause 3 of the settlement agreement to 'allow the transfer of shares to continue', considered against the background of the terms of the sale of shares and the settlement agreement as a whole can be attributed only to the incorrect details set out in the letter of 27 December 2015, which failed to convey the correct details of the sale. It will be recalled that in that letter the purchase price was recorded as R5.5 million as opposed to R 7 050, 000. 00. It was further anticipated according to the letter that the purchase price would be paid in full on 15 September 2016. The respondent submitted, correctly in our view, that the idea of 'allowing the sale of shares to proceed' was born out of the incorrect premise that the purchase price would be paid on 15 September, which as we know was incorrect. We conclude that it was never the intention of the parties that the two obligations be reciprocal. Thus, the court *a quo* was correct in its overall conclusion.

21. There is a further reason that defeats the appellants' contentions that the two obligations were reciprocal. For purposes of this argument, we assume in favour of the appellants that the obligations were indeed reciprocal. Keeping in mind the actual obligation incurred by the respondent, namely to authorise the cancellation of the bond, which the respondent says it was always ready to do, the question that must be asked is what effect would such authorisation of cancellation have had on the goal of transferring shares to Steyn. The answer is none, since the property would have remained bonded until the mortgage had been cancelled at the Deeds Registry, a process that would likely take a good number of months. So, the claim that the immediate authorisation of cancellation was reciprocal to enable Steyn to take transfer and raise funds to pay the remainder of the purchase price is simply

not supported by fact. In addition, the agreement makes no reference to a suspensive term relating to Steyn obtaining finance.

(ii) Reciprocity and payment instalments

22. The appellants submit with reference to the SCA judgement of *Miloc Financial Solutions (Pty) Ltd* v *Logistic Technologies (Pty) Ltd*[5] that reciprocity applies even where the performance of the defendant must be rendered in instalments and the plaintiff is subject to a duty that must be fulfilled before or on the date of the defendant's instalment[6]. The point made is that the court *a quo* erred in its finding on reciprocity and instalments. This is true. Thus, to the extent that the court found that the continued obligation on the remainder of the appellants to pay the instalments militated against reciprocity, it was incorrect. Having said that, the point in our view takes the appellants' case no further for the facts in *Miloc* are simply not comparable to the present case.

23. In *Miloc*, the court concluded on the basis of the contracts referred to as the Moolman-Sigma and the USA contracts, and the undisputed facts, as contained in the letter written by the appellant on 20 February 2008 to the respondents, which accorded with the contract, that the parties had intended that reciprocity apply. In terms of the Moolman-Sigma contract, it was stated that upon payment of the full purchase price to the appellant, the securities (share certificates) pertaining to Sigma shares, held by the appellant as security, would be released. In the letter of 20 February 2008, the appellant confirmed its understanding that the securities had to be released to enable the eleventh respondent to use same to raise funds with financial institutions in order to pay the remaining balance of R3.5 million on the USA contract. The appellant however, had tried to vary the contract for reasons not

[5] (233/07) [2008] ZASCA 40; [2008] 3 All SA 395 (SCA); 2008 (4) SA 325 (SCA) (28 March 2008)
[6] Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd, (1212/2016) [2017] ZASCA 185; 2018 (3) SA 65 (SCA) (6 December 2017), paragraph 21

explained by demanding guarantees for the remaining R3.5 million prior to releasing the securities.

24. The court found that the appellant was not entitled to claim the remaining amount, until it had released the Sigma share certificates. That is not the same as the present case. The letter of the 27 December from the appellants' attorney's failed to convey the correct facts. The contract signed with Steyn unequivocally makes provision for Steyn to obtain transfer of the shares only upon payment of the purchase price in June 2017. There is no reference anywhere in the sale of shares agreement that the shares were to be accessed by Steyn at any time before the purchase price was paid in full. The letters of 8 and 11 January attributed the appellants' failure to meet the December instalment to matters that had nothing to do with any reciprocal obligation owed by the respondent. It may be that the sale of shares to Steyn was the appellants' solution to the debt owed to the respondent but that is as far as the similarities between the two cases go. The overall circumstances of the present case demonstrate that the parties had not intended reciprocity. The point is of no assistance to the appellants' case.

(iii) The existence of the acceleration clause

25. It is important to recognise that the court *a quo* made its finding that the parties had not intended reciprocity on the basis of the circumstances of the case as a whole. The assertion by the appellants that the existence of an acceleration clause does not militate against reciprocity does not take the appellants' case any further. There is no merit to the point.

(iv) Unconditional consent to judgement

26. This, as already mentioned, was an oversight on the part of the court *a quo*. The settlement agreement makes plain that it is only upon breach that the respondent would be entitled to invoke the acceleration clause and exercise its rights against the appellants. Considered on its own, the oversight does not assist the appellants. There is no merit to the point.

(v) Subsequent events

27. The appellants contend that the court erred in holding that the payment of the R1.3 million was an admission as Coetzee was preserving the relationship with RMB. The correct facts are that the court recognised the letter of 8 January 2017 as an admission that payment was due to the respondent notwithstanding that the mortgage still endured over the seventh appellant's property. As already explained the conclusion we have reached considers the conduct of the appellants as a whole and the circumstances of the case. This point too carries no merit.

(vi) Sale of shares not unconditional

28. The appellants submit that the mere fact that the sale of shares was not made conditional upon settlement of the suit between the parties and the transfer of shares was due only in April 2017 did not militate against reciprocity. The court, according to the appellants failed to analyse clause 3. As soon as the court accepts that the effect of the cancellation of the bond would be to allow the sale of the immovable property or the shares to a third party then there is reciprocity. The transfer of shares, as we said, is provided for in the sale of shares agreement. A consideration of that agreement with the relevant clause in the settlement agreement in light of the circumstances of the case does not point to reciprocity at all. On the basis of our findings, the appeal has no merit and falls to be dismissed. There is no reason why costs should not follow the result.

E. Order

29. The appeal is dismissed with costs.

BAM NN

JUDGE OF THE HIGH COURT,

PRETORIA

Date of Hearing:	**10 February 2023**
Date of Judgement:	**17 July 2023**

Appearances:

Appellants' counsel:	**Adv S.W Davies**
Instructed by:	Wiese and Wiese Attorneys Lynnwood, Pretoria
Respondent's Counsel:	**Adv N.J Horn**
Instructed by:	Werksmans Attorneys % Serfontein, Viljoen, & Swart Attorneys Brooklyn, Pretoria