

SOUTH AFRICA / JUDGMENT

Tornowize (Pty) Limited v Thungela Operations (Pty) Limited (2022/060819)

[2025] ZAGPJHC 222 (28 February 2025)

[2025] ZAGPJHC 222

COURT

South Gauteng High Court, Johannesburg

BEFORE

Aucamp

CASE / FILE NUMBER

2022/060819

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 2022-060819

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

28

February 2025

In

the matter between:

BEFORE

THE HONOURABLE JUSTICE, AUCAMP AJ

TORNOWIZE

(PTY) LIMITED

Applicant

And

THUNGELA

OPERATIONS (PTY) LIMITED

Respondent

JUDGMENT

[1] The process of interpretation in resolving a dispute between two parties is trite:[1]

“The present state of the law can be expressed 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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[2] The respondent summarises the process of interpretation, as follows:

2.1. First, one must start with the words, affording them their ordinary meaning, bearing in mind that words must be construed purposively, and they must be construed consistently with the other relevant provisions of the contract. This, according to the respondent, is the unitary exercise.[2]

2.2. Second, the context must always be considered. The context includes the surrounding circumstances attendant upon the documents coming into existence, the material known to those responsible for its production, and the background to the preparation and production of the document.[3]

2.3. Third, a court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective.[4]

2.4. Fourth, a sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.[5]

2.5. Fifth, pursuant to and in terms of *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*[6] contrary to the submission by the applicant that the process of interpretation involves an objective approach and not a subjective approach and that it does not entail an exercise for a search for the intention of the parties, Lewis J rejected the said approach. Instead she found that the Supreme Court of Appeal has consistently held that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider

all the circumstances surrounding the contract to determine what their intention was in concluding it.

[3] This matter concerns the interpretation of a deed of settlement concluded between the parties which deed was made an order of court. The context to this exercise which includes the surrounding circumstances attendant upon the deed of settlement coming into existence, the material known to those responsible for its production, and the background to the preparation and production of the deed of settlement are:

3.1. The applicant and the respondent on 3 March 2021 concluded a written agreement for the rehabilitation of the Khwezela Colliery operations at Kromdraai. The agreement was to endure from 18 January 2021 to 30 June 2023.

3.2. On 22 September 2022, the parties concluded an addendum to the initial agreement extending the contract period to 31 December 2023.

3.3. On 12 October 2022 the applicant issued the respondent with a 90 day's termination notice. In response, the respondent on 19 October 2022, in writing challenged the purported termination of the main agreement as well as the addendum thereto.

3.4. A request made by the respondent for an undertaking not to invoke the intended termination was not provided and as a consequence, the respondent on 20 December 2022 launched an urgent application which application was set down for hearing on 10 January 2023, seeking certain interdictory relief.

3.5. The matter became settled pursuant to and in terms of a written deed of settlement concluded between the parties, which deed of settlement was made an order of court on 10 January 2023.

3.6. On 13 January 2023, the applicant made payment to the respondent in the sum of R7 516 434 and on 10 February 2023, R 462 246.43, R18 144.77 and R1 127 347.10 on 3 March 2023.

3.7. The parties became embroiled in a dispute as to whether the applicant, having made the aforesaid payments, had discharged its obligations arising from the settlement agreement and in so doing complied with the said agreement. The issue in dispute relates to whether the applicant had paid the preliminary and general payments ("P & G") as provided for in the settlement agreement.

3.8. As a consequence, the applicant approaches this court for a declaratory order, i.e that the applicant complied with its obligations as provided for in the deed of settlement.

[4] The deed of settlement agreement provides:

"WHEREAS the Applicant has instituted urgent proceedings against the Respondent to, inter alia, stay the notice given by Respondent to Applicant to cease and vacate the Khwezela Colliery.

NOW WHEREAS the Applicant and the Respondent have agreed to settle the dispute between them in relation to the Khwezela Colliery on the terms and conditions contained in this Agreement.

1. SETTLEMENT

1.1 The Respondent acknowledges that it is indebted to Applicant in the sums of:

1.1.1 R 5 531 193.39, (“the settlement amount”) representing the amount due, owing and payable to Applicant arising from the services rendered by Applicant for and on behalf of Respondent at Khwezela Colliery, the retention amounts due, the time related preliminary and general payments due, the half portion of the severance packages of the Applicants employees and the disestablishment of Applicant’s site at Khwezela Colliery; and

1.1.2 The amounts due to Applicant for work completed by the Applicant for and on behalf of Respondent, during the month of December 2022 calculated in accordance with the agreement attached as annexure FA3 to the Applicant’s founding affidavit (“works amount”).

1.2 The Respondent shall pay the settlement amount and works amount to Applicant on or before 16 January 2023, in full, and free of exchange, set off or other deduction of any nature. Payment shall be made to the following account and proof of payment shall be emailed to ... :

....

1.3 Payment of the settlement amount and works amount shall be in full and final settlement of any and all disputes arising between the parties.

1.4 The Applicant, subject to the Respondent effecting payment of the settlement amount and works amount in full on or before 16 January 2023:

1.4.1 Accept the Respondents’ notice of termination for convenience issued on 12 October 2022;

1.4.2 Shall complete the disestablishment of its site at Khwezela Colliery on or before 19 January 2023.

2. BREACH

2.1 Should Respondent fail to make payment of the settlement amount and works amount on due date, either in full or at all, or breach this Agreement in any manner whatsoever, then in such event, the balance then outstanding in respect of the settlement amount shall accrue interest at the prime rate of interest as quoted by Nedbank Limited, from time to time, plus [insert] calculated from 16 January 2023 to date of final payment both days inclusive and the Respondent shall be liable to pay the Applicant’s costs incurred in connection with these proceedings on the scale as between party and party.

3. GENERAL

3.1 No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the parties hereto.

3.2 No waiver of any of the terms and conditions of this Agreement will be binding and effectual for any purposes unless in writing and signed by the party giving same. Any such waiver will be effective only in the specific instance and for the purpose given. Failure or delay on the part of any party in exercising any right, power or privilege hereunder will not constitute or be deemed to be a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any another or further exercise thereof or the exercise of any other right, power or privilege.

3.3 The Parties agree that this Agreement may be made an Order of Court.

4. SIGNATURE

4.1 This agreement is signed by the parties on the dates and places indicated below.

4.2 This agreement may be signed and executed in counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same agreement as at date upon which the counterpart signed by the party last signing same.

4.3 Where the Agreement is signed by such electronic signature, each Party agrees that this method of signature is conclusive of its intention to be bound by this Agreement as if signed by each Party's manuscript signature."

THE RESPECTIVE POSITIONS OF THE PARTIES

[5] The applicant submits that in terms of the deed of settlement, it was to make payment to the respondent in the sum of R5 531 193.39, excluding VAT (clause 1.1.1 thereof, representing the "settlement amount"), an amount due by the applicant to the respondent for works completed by the respondent for and on behalf of the applicant during the month of December 2022 calculated in accordance with annexure FA3 ("works amount") (clause 1.1.2 thereof). The applicant further submits that all amounts were to be paid on or before 16 January 2023 to the nominated bank account of the respondent (clause 1.2) and that all payments were made in full and final settlement of any and all disputes between the parties.

[6] The applicant furthermore submits that:

6.1. The subsequent payment(s) were accompanied by correspondence dated 13 January 2023 wherein the respondent, was informed that the payment of R7 516 434.59, exclusive of Vat was in respect: (a) R5 531 193.39 excluding Vat as per clause 1.1.1 of the settlement agreement and (b) R1 985 241.20 excluding Vat as per clause 1.1.2 settlement agreement. Reference to clause 1.1.1 of the settlement agreement is relevant as it relates to the (i) retention amounts due; (ii) the time related preliminary and general payments due ("P&G's"); (iii) 50% of the severance package in respect of the respondent's employees and the disestablishment of the site, (iv) R1 985 241.20 in respect of work completed during the month of December 2022.

6.2. As a consequence, on 10 January 2023, the December P & G's were included in clause 1.1 of the settlement agreement.

6.3. Prior to the conclusion of the settlement agreement and as set out in clause 2.2 of the then counter proposal of the respondent, R1 646 000.00 was quantified. Furthermore, in the said letter, an invoice reflecting the settlement amount and works amount was so requested, as the applicant undertook to make payment of the Vat amount upon a correct Vat invoice. In the very same letter, the respondent was made aware that the Vat payment will be made once a Vat invoice in compliance with section 20(1) of the Vat Act, 89 of 1991 was so provided.

6.4. The applicant labels the settlement agreement as a compromise agreement which had the result of the parties having reached a compromise, in full and final settlement, including the P & G's for December 2022. The settlement agreement made provision for what was so payable, the settlement amount was so calculated in terms of clause 1.1.1 of the settlement agreement and the works amount as set out in clause 1.1.2.

6.5. The respondent's contention that the P & G's were not included in the settlement agreement loses sight of the fact that all amounts due for December 2022 were included in clause 1.1.2 in that it made specific provision for all works so contemplated during the month of December 2022 and that it is dated 10 January 2023.

- [7] The respondent submits that the dispute between the parties is whether the amount of R823 000.00 being an amount the applicant invoiced as being for the preliminary and general payments (P & G's) for the month of December 2022 – as contemplated in clause 1.1.2 of the settlement agreement, falls to be paid by the respondent. The contention of the respondent is that it need not pay the applicant this invoiced amount because it made payments for the P & G's pursuant to clause 1.1.1 of the settlement agreement is opportunistic, inconsistent with the terms of the settlement agreement and lacks commercial logic.
- [8] The structure of the relevant clauses in the settlement agreement are such that they are divided into two parts. The first part (clause 1.1.1) and the second part (clause 1.1.2). The distinction is important as it shows that the two provisions cater for two situations. The first part relates to payments that were known and quantified. The second deals with payments which are not quantified and relate to one specific month (December). It was intended to deal with work done – and payments that would be due – for the month of December 2022.
- [9] The applicant's assertion that the P & G's for December 2022 were included in the settlement agreement amount and are therefore not payable is incorrect in that the settlement amount did not and could not include the December 2022 P & G's as well as the volumes moved after 22 December 2022 because those amounts were not yet "due". No invoice had been issued in respect of the said amounts.

- [10] The main agreement provides that an amount becomes due and payable 30 days after the presentation of a tax invoice. As at the time of the conclusion of the settlement agreement the P & G's were not due and therefore could not be included in the settlement amount recorded in the settlement agreement. They naturally had to be included (as contemplated) in the amounts due per clause 1.1.2 of the settlement agreement.
- [11] As such it follows that the P & G general work completed by the respondent for the month of December 2022, calculated in accordance with the main agreement were to be paid separately from the amounts set out in the settlement amount; such payments had to be made pursuant to clause 1.1.2 of the settlement agreement.
- [12] The settlement amount recorded the settlement then due prior and excluding the December 2022 amounts as they related to the P & G's dues. P & G dues for December 2022 only became due and payable on presentation of the invoice for the entire month of December 2022, which was only presented on 12 January 2023 post the settlement agreement's conclusion. Therefore, the settlement agreement cannot be interpreted to include P & G dues for December 2022. To do so would be contrary to logic, the provisions of the main contract, the terms of the settlement agreement itself and more importantly commercial sensibility.
- [13] The applicant's interpretation also ignores the meaning of the word "due" in clause 1.1 of the settlement agreement. The clause repeatedly refers to the word. It refers to "retention amount due" and the "time related preliminary and general payments due". Clause 1.1.1 is very specific in relation that which is due, it itemises them, and states a fixed amount.
- [14] The meaning of the word "due" in the settlement agreement must be understood within the factual and historical context, which includes, the nature of the dispute which precipitated and formed the settlement agreement, and in turn encompasses the state of affairs at the time of conclusion of the settlement agreement.
- [15] The word "due" must be interpreted with regard to the provisions of the main agreement, for it is that agreement which tells us, when and how the payments became "due" in the context of the relationship between the parties. The main agreement provides that amount for any and all work done, became "due". Clause 16 of the contract data deals with the "Time for Payment". It provides that payment would be due, "30 (thirty) days from the last day of the month in which the Company receives the relevant tax invoice."
- [16] Also relevant is clause 12.2.8, which provides that: "[t]he Contractor's payment application shall include the following information (as applicable) (a) details of the amounts to which the Contractor considers itself to be entitled ... The structure of the settlement agreement itself is consistent with the way in which the parties understood the meaning of the words "due" in the context of payments that were liable to be made. Clause 1.1 specifies a quantified amount of R5 531 193.39 – and also sets out the items falling within the said amount. This could only have been because those items and amounts were considered "due" after the respondent had rendered an invoice for the November 2022 period. The parties neither discussed nor agreed upon the December 2022 P & G's prior to the conclusion of the

settlement agreement, precisely because they did not know what they entailed. What was fixed and “due” in consequence of the invoices provided to the respondent (prior to the conclusion of the settlement agreement) were the P & G’s for November 2022. These were “due” within the meaning of the word as contemplated by the contractual matrix in this case.

- [17] It follows that the assertion that the December 2022 P & G’s were included in paragraph 1.1.1 of the settlement agreement is incorrect. It would mean that both the applicant and the respondent agreed to the unknown. It makes no commercial sense whatsoever to agree to something which has not been quantified – or the quantification of which has not occurred, It must be re-iterated that, at the time of the conclusion of the settlement agreement, that which had been quantified and thus known (as regards the nature of the work done and the expenses incurred) consisted of costs relating to November 2022 (and before) in other words, work, which had been duly invoiced.
- [18] On the requirement that that a contract must be interpreted purposively. It is clear that clause 1.1.2 contemplates future payments which not yet been computed. This is why it contemplates that such payments would be computed in accordance with the provisions of the main agreement. That is its purpose.
- [19] The “work completed” for the month of December 2022 – and for which payment would be “due” upon presentation of an invoice – obviously includes the P&Gs for that specific month. A contrary interpretation would render the clause meaningless, if not superfluous. But as stated, it is a fundamental principle of interpretation that no word or provision should be rendered meaningless or superfluous.¹⁹ It follows that Tornowize’s interpretation is consistent with the purpose of the clause – and indeed with the two-part structure of clause 1.1.

THE EVALUATION

- [20] First and foremost, it has to be remembered that the parties, subsequent to a contractual arrangement extending over a period of time, became embroiled in a dispute, more specifically in relation to the premature termination thereof. This dispute was ultimately resolved by agreement between the parties in the conclusion of the deed of settlement.
- [21] In *Eke v Parsons*[7] the Constitutional Court held that for an order to be competent and proper, it must, in the first place, relate directly or indirectly to an issue or lis between the parties. Secondly, the agreement being made an order of court, should not be objectionable and thirdly the agreement must hold some practical and legitimate advantage. The Constitutional Court continued to hold that once the settlement

agreement is made an order of court, it is an order like any other. It will be interpreted like all orders:

“The starting point is to determine the manifest purpose of the order. In interpreting a judgement or order, the court’s intention is to be ascertained primarily from the language of the judgement or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgement or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.”

- [22] The respondent concedes that the settlement agreement, had the effect of bringing the relationship between the parties to an end. This is in line with the ratio expressed in Eke supra:[8]

“The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, ‘a matter judged’). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; and example being a mandamus.”

- [23] Secondly, the deed of settlement expressly provides that: “Payment of the settlement amount and works amount shall be in full and final settlement of any and all disputes arising between the parties.” The phrase “full and final settlement of any and all disputes arising between the parties” suggests that, once the payments are made, the parties waive any further claims against each other regarding the subject matter of the settlement.
- [24] In Breitenbach v Breitenbach[9] a settlement agreement that was made an order of court was treated as a final disposition of the dispute between the parties and could not be reopened unless there were exceptional circumstances such as fraud, misrepresentation, or a material mistake. In Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd[10] it was held that – a compromise (transaction) is binding and excludes parties from litigating further on matters already settled.
- [25] By agreeing to a “full and final settlement,” the parties waived their right to bring any further claims related to the dispute. A valid compromise creates new rights and obligations and replaces the original cause of action.[11]
- [26] Thirdly, the respondent’s contention that the structure of the deed of settlement, i.e the two parts referred to and the fact

that the P & G’s in respect of December 2022, as at the date of the conclusion of the settlement agreement (10 January 2023) were not as yet due for payment and that no invoice in respects of such amounts had been issued by the respondent is without merit. I say this because it ignores the fact that the conclusion of the settlement agreement and the subsequent making thereof an order of court, had the ex lege consequence of destroying the underlying agreement(s) and replacing same with the deed of settlement. The reliance on the fact that the P & G’s for December 2022 was not as yet due and payable is with reference to the underlying agreement and

not the deed of settlement. The only aspect that remained alive from the underlying agreement was the computation of the amounts due to the respondent for work completed by the respondent for and on behalf of the applicant during the month of December 2022. The computation of the said amount was to be determined with reference to the relevant provisions of the underlying agreement. The payment, more specifically the payment date(s) of the settlement amounts, and work amounts had to be made pursuant to and in terms of the deed of settlement and not in terms of the underlying agreement.

[27] I find that the case presented by respondent, is not supported by the ordinary meaning of the words used in the deed of settlement,

is not in accordance with the whole of the deed of settlement, especially clause 1.3 thereof and accepting the approach adopted by the respondent would render clause 1.3 ineffective. I finally hold that the interpretation of the respondent does not constitute a sensible interpretation and will result in an absurd or leads to an unbusinesslike result. The intention of the parties was to bring their contractual arrangement to an end and to part ways on a clean slate once the deed of settlement was duly executed.

RELIEF

[28] In the result I make the following order:

28.1. It is declared that the applicant complied with its obligations as provided for in a deed of settlement so concluded between the applicant and the respondent dated 10 January 2023, which was made an order of court on 10 January 2023.

28.2. The respondent is to pay the applicant's party and party costs of this application, such costs to be taxed in accordance with scale C.

S AUCAMP

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on-28 February 2025

Heard on: 29 January 2025

Date of Judgement: 28 February 2025

For the Applicants:

Adv J.W Kloek

Instructed by: Hogan Lovells, Johannesburg

For the Respondents: Adv M. Tsele

Instructed by: KWA Attorneys

- [1] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)
- [2] Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA)
- [3] Endumeni supra
- [4] African Products (Pty) Ltd v AIG South Africa 2009 (3) SA 473 (SCA)
- [5] Endumeni supra
- [6] 2016 (10 SA 518 (SCA)
- [7] 2016
- (3) SA 37 (CC) at Para [25]
- [8] At Para [31]
- [9] 1971
- (2) SA 81 (T)
- [10] 1978
- (1) SA 914 (A)
- [11] Schierhout v Minister of Justice 1926 AD 99

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