IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 11/2003

In the matter between

UITENHAGE TRANSITIONAL LOCAL COUNCIL **APPELLANT**

and

THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Coram: **ZULMAN, NUGENT and HEHER JJA**

Heard: **21 AUGUST 2003**

Delivered: **5 SEPTEMBER 2003**

Summary: SCA Rules 8 and 12 – failure to lodge record timeously – condonation – factors affecting.
Contract – interpretation – agreement to co-operate in pursuit of the claims of the respective parties – meaning.

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JUDGMENT

HEHER JA

HEHER JA:

[1] The appellant was granted leave to appeal to this Court by Ludorf J sitting in the South Eastern Cape Local Division. The learned Judge had dismissed a claim by the appellant for payment of R2 863 097,70 and ancillary relief arising out of a written contract concluded between the parties on 15 May 1996.

[2] In terms of Rule 8(1)(c) of the Rules of this Court the appellant was required to lodge the record of proceedings in the Court *a quo* with the Registrar by 19 January 2002. At the instance of the appellant the respondent granted various extensions in terms of Rule 8(2)(a) for that purpose the last of which expired on 14 October 2002. Thereafter the appellant made a direct approach to the Registrar for a further extension. On 17 October the Registrar addressed a letter to the appellant's Bloemfontein attorneys extending the time until 14 November 2002. The record was not lodged timeously. The appeal lapsed and an application was required to revive it: *Court v Standard Bank of SA Ltd*; *Court v Bester NO and Others* 1995 (3) SA 123 (A) at 139F-H.

[3] On 16 January 2003 the record was lodged. An application for condonation and reinstatement was filed on the same day. The respondent gave notice of its intention to oppose on 9 June but did not file an answering affidavit until 29 July when it too applied for condonation for its failure to comply with Rule 12(2). The appellant thereupon filed a replying affidavit in which it also opposed the grant of that indulgence.

[4] When the matter was called we heard counsel on the condonation applications. The appellant did not persist in its opposition. We indicated that we would reserve our judgment on the question of whether the appeal should be reinstated.

[5] In his affidavit in support of condonation, attested on 19 December 2002, the appellant's attorney, Mr Le Roux, deposed as follows:

'4. U applikant het reeds gedurende Desember 2001 pogings aangewend om skikkingsonderhandelinge aan te knoop met die Respondent, aangesien beide partye staatsinstansies is en die koste van die voorbereiding van die Oorkonde vermy wou word.

5. Sneller Opnames, Port Elizabeth, het probleme ondervind om die oorkonde te tik en gevolglik het u Applikant se regsverteenwoordigers uitstel by die teenkant bekom ten einde die Oorkonde te liasseer op 19 Februarie 2002.

6. U Applikant se pogings om die Oorkonde tydig te finaliseer is intussen verder bemoeilik deur die feit dat die hoflêer verlore geraak het. Gevolglik moes daar pogings aangewend word om die hoflêer op te spoor wat onsuksesvol was. Die rekenaartoerusting van Sneller Opnames is ook in die tussentyd gesteel en alle data daarmee saam. Gevolglik is daar 'n aantal uitstelle deur Respondent verleen vir die finalisering van die Oorkonde en die her-samestelling van die pleitstukke wat tydens die verhoor verskeie kere mondelings gewysig is.

7. U Applikant het weereens gedurende Julie 2002 pogings aangewend om die aangeleentheid te skik en voorbereiding van die Oorkonde is agterweë gehou om nie onnodige kostes aan te gaan nie. Verteenwoordigers van die partye het vergader en formele skikkingsvoorstelle is gemaak op aanvraag van die Respondent.

8 Die skikkingsonderhandelinge was onsuksesvol en gedurende Oktober 2002 is daar ten volle voortgegaan met die finalisering van die Oorkonde. Die Griffier van hierdie Agbare

Hof het ‘n uitstel aan u Applikant verleen om die oorkonde te liasseer teen 13 Desember 2002.

9. Die Oorkonde, soos verder voorberei deur Sneller Opnames, Bloemfontein, het 14 Volumes beslaan. Die Respondent het aangedring dat die partye se onderskeie bundels gebruik tydens die hof *a quo* verrigtinge beide deel sou vorm van die Oorkonde. Daar was egter oorvleuelings in die bundels en oorbodige dokumente en daar is besluit om ‘n kernbundel saam te stel om die Oorkonde te verklein en dit te laat voldoen aan die Reëls van hierdie Agbare Hof.

10. Die finalisering van die Oorkonde is verder vertraag deur die rekonstruksie van die hoflêer aangesien daar wysigings gemaak is tydens die verrigtinge in die Hof *a quo* en die regsverteenwoordigers van die partye nie ooreenkoms kon bereik oor die samestelling van die Pleitstukke nie.

11. Die besluit om ‘n kernbundel saam te stel het daartoe bygedra dat die Oorkonde langer geneem het om te finaliseer, maar in die proses is die Oorkonde verklein na vier volumes met ‘n kernbundel van vier volumes. Omdat daar nie rekenaar data van die Oorkonde beskikbaar was nie, vanweë die diefstal, moes alle wysigings met die hand gedoen word.

12. U Applikant plaas op rekord dat weens die onvermoë om die Appèlrekord tydig te liasseer, die Appèl intussen verval het.

13. U Applikant doen met eerbied aan die hand dat die versuim om die Appèlrekord betyds te liasseer uitsluitlik veroorsaak is deur omstandighede buite U Applikant se beheer, asook die onvermoë van die partye om die aangeleentheid te skik.’

[6] One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court:

condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.

[7] The appellant's affidavit consists of a number of generalized causes without any attempt to relate them to the time-frame of its default or to enlighten the Court as to the materiality and effectiveness of any steps taken by the appellant's legal representatives to achieve compliance with the Rules at the earliest reasonable opportunity.

[8] The shortcomings in the application were aggravated by the undisputed content of the respondent's answering affidavit from which it appeared that:

(i) on 7 August 2002 the deponent to the appellant's affidavit had written to the respondent's attorneys requesting a final extension of two months from 12 August and undertaking to finalise the appeal record during that period should the negotiations then in prospect not result in a settlement;

(ii) as a result, the respondent agreed to the lodging of the record by not later than 14 October 2002 and the parties jointly notified the Registrar to that effect on 8 August;

(iii) despite their unequivocal undertaking, on 11 October the appellant's attorneys wrote to the respondent's attorneys requesting yet another extension of a

month without offering an explanation for their failure to comply;

(iv) on 14 October the respondent's attorneys asked their colleagues for an explanation as to 'why it has taken such an inordinately long time to file the record'. Before a reply was forthcoming they received from the Registrar a copy of a notification to the appellant's Bloemfontein attorneys that an extension in terms of Rule 8(2)(b) until 14 November had been granted 'whereafter the appeal shall lapse'.

(v) On 21 October 2002 the appellant's attorney replied to the letter of 14 October, the final paragraph of their reply reading

> 'You will note from our letter requesting the extension to file the Appeal Record that we have experienced great difficulties in compiling the record as the Court file disappeared and the computers of Sneller were stolen. We therefore require your co-operation in order to remove or mark faults in the record.'

No particularity of the difficulties referred to was furnished and the letter to the Registrar was not enclosed. It is to be remarked on that in para 6 of the founding affidavit the disappearance of the file and the theft of the computers were set in the context of earlier extensions. The letter also records that an extension had been granted until 13 December 2002 to file the record, contrary to the Registrar's notification.

(vi) On 15 November 2002 the Registrar notified the appellant's Bloemfontein correspondents (with a copy to the respondent's attorneys) that the appeal had lapsed due to non-compliance with the Rules of this Court.

(vii) As late as 3 December the appellant's attorneys arranged a meeting with the respondent's attorneys during which agreement was sought regarding the manner of preparation of the bundles. According to the deponent to the answering affidavit, 'immediate co-operation was furnished to the Appellant's legal representatives . . . and the matter was disposed of without delay'.

(I have not thought it necessary to deal with denials by the respondent's attorneys that agreement could not be reached on the pleadings or that they demanded that the bundles used in the Court *a quo* should form part of the record. They also point out that the record as finally compiled consisted of five volumes plus a core bundle of the same number and not four volumes of each as stated by the appellant's attorney.)

[9] It is apparent that not only was the affidavit in support of the application seriously inadequate but it was also misleading in relation to the date on which the appeal had lapsed and the awareness of the importance of 14 November on the part of the appellant's attorneys both before and after that date.

[10] The respondent filed a replying affidavit which carries the matter no further save in one respect: according to a supporting affidavit by the appellant's Bloemfontein correspondent he requested an extension of two months from the Registrar on 14 October 2002. After receipt of the notification of an extension until 14 November he discussed the matter with the Registrar and was informed that the date was a typing error and that two months was intended. He accordingly notified the appellant's Uitenhage attorneys that the extension had been granted until 13

December. (Why he did not confirm this in writing with the Registrar is not explained.) However when the letter was received from the Registrar on 15 November 2002 advising that the appeal had lapsed he discussed the contents with the appellant's Uitenhage attorneys

'and it was decided that it should not be contested. Our instructions were that an application for the reinstatement of the appeal will be filed with the Appeal Record simultaneously'.

This merely aggravates the inadequacy of the founding affidavit and raises more questions than it answers, particularly as to why the appellant's attorney stated without reservation in paragraph 8 of that affidavit that the Registrar had granted the appellant an extension until 13 December.

[11] Faced thus with some explanation for the appellant's delay but one which lacked both particularity and candour, we directed counsel to argue the merits of the appeal so as to enable the Court to weigh its assessment of the appellant's prospects of success with all the other relevant circumstances in the case: *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 687A; *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 41C-D. This is not a case where the Court should refuse the application irrespective of the prospects of success, cf *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121I. Large amounts of time and money have been expended by the parties on the case and a substantial prize is at stake.

[12] I proceed therefore with a consideration of the substance of the appeal.

[13] The facts are largely common cause and the disputes fall within a narrow ambit. The appellant is the successor in title to the Kwanobuhle City Council. During the period 1985 to 1987 that council contracted with Spirvin Bottling Co (Pty) Ltd for the supply of tents, water tanks, toilets and other items necessary for the relocation of some 8000 squatter families. After the project was completed the council caused an auditor, one Van der Ryst, to investigate certain irregularities in its execution. His initial report was to the effect that frauds had been perpetrated on the council which warranted further investigation. Criminal charges were preferred against the directors of Spirvin. The police seized all the documents involved. Mr van der Ryst was engaged by the police to carry out a forensic audit. He produced an extensive report concluding that the council had been defrauded to the extent of some R12 million.

[14] In the meantime, in December 1993, Spirvin was placed under a winding up order at the instance of the respondent, who, on 13 April 1994, proved a claim in the insolvent estate in the amount of R49 486 218,82 in respect of income tax, sales tax, penalties and interest during the period from March 1985 to February 1992. It was the only proved creditor. Sprirvin, however, was an empty shell. The respondent, therefore, resorted to proceedings in terms of secs 417, 418 and 423 of the Companies Act 1973 with a view to recovering money in satisfaction of its claim from the former directors and officers of the company. These were conducted by the liquidators and funded by the respondent.

[15] The police docket, which included the second Van der Ryst report, had been

laid before the Attorney-General. He, eventually, declined to prosecute. By that time the appellant had succeeded to the rights of the council. It obtained the police docket and the report. The whole process was plagued by obstructions and delays and was dragged out over a period of years.

[16] The appellant did not, initially, prove a claim in the liquidation of Spirvin as it faced the prospect of becoming a contributory if it did so.

[17] Spirvin was one of a group of companies controlled by a family variously known as Jeeva or Moosa. The proceedings initiated by the respondent were vigorously opposed by certain of the family members.

[18] The appellant and the respondent were represented by the same senior counsel. It was apparent that there would be prospective advantages to both parties in a combination of their energies in pursuing their claims against the company by means of proceedings against the directors. The respondent was anxious to have insight into the second Van der Ryst report and believed that the added pressure which could be applied by the appellant's participation would prove productive in prising a settlement out of the directors or other interested members of the family. The appellant was aware that without the co-operation of and concessions by the respondent there was no point whatsoever in proving a claim in the estate.

[19] Once the principle of the appellant's participation was agreed upon the matter resolved itself into the negotiation of acceptable terms. This was achieved on 15 May 1996 when a short written agreement was signed by the parties.

[20] The material terms of the agreement were the following:

'2. The parties both have substantial claims against Spirvin Bottling Company (Proprietary) Limited (in Liquidation). The parties have agreed to co-operate with each other with regard to the pursuit of their respective claims.

3. The parties agree to share the proceeds of any amounts recovered in the liquidation of Spirvin Bottling Company (Proprietary) Limited (in Liquidation) in a ratio determined by the amounts of the respective claims of the parties in the liquidation, as accepted by the liquidators.

4. The Commissioner for Inland Revenue hereby agrees to waive any preference it may enjoy in respect of the proceeds of the liquidation of Spirvin Bottling Company (Proprietary) Limited (in Liquidation).

5. Each party will be liable for its own costs incurred to date in respect of the pursuit of its claim against Spirvin Bottling Company (Proprietary) Limited (in Liquidation).

6. Each party will be responsible for its own costs, from date hereof, in respect of the further pursuit of their respective claims against Spirvin Bottling Company (Proprietary) Limited (in Liquidation).'

[21] The appellant proved a claim in the estate of Spirvin in the amount of R11 428 849,29 which, after some resistance by interested members of the Jeeva family, was accepted by the liquidators.

[22] The respondent proceeded with the enquiries under the Companies Act. It admits that it received such co-operation as it requested from the appellant.

[23] On 15 November 1996 the Receiver of Revenue wrote to the liquidators requesting a reduction in its proved claim against Spirvin to R14 253 073,04. This

was a necessary consequence of the operation of the provisions of the Final Relief on Tax, Interest, Penalty and Additional Tax Act 101 of 1996 which created a tax amnesty for persons who made the prescribed application. (We are not told whether this step emanated from the directors or the liquidators, but, whatever the case, there was no dispute about its effectiveness in reducing Spirvin's tax liability.)

[24] On 27 February 1997 the liquidators notified the respondent that the Master had effected the reduction of the claim accordingly. In the meantime, on 28 January 1997 an agreement had been signed between the liquidators and Walad Properties (Pty) Ltd (a company controlled by the family) in which that company agreed to pay R8 million into the estate over a period of three years secured by the registration of bonds. The liquidators undertook to postpone *sine die* the proceedings under s 423 of the Companies Act and the enquiry in terms of s 417 and not to proceed with either in the event of Walad complying with its obligations. It was further agreed that, in the event of such compliance the respondent would have no further claims in respect of Spirvin. The appellant was not consulted about the settlement or notified of its conclusion.

[25] During May 1997 the appellant, having become aware of the settlement, considered its position. Advice obtained from two senior counsel was that it was entitled to share in the proceeds received by the respondent from Walad in the ratio of about 12:50 being the proportion which the claim of the appellant bore to the unreduced claim of the respondent. The appellant accepted that advice. It also

resolved that no civil actions be proceeded with against the erstwhile directors of Spirvin.

[26] Walad defaulted in its payments under the settlement agreement. On 25 June 1998 the liquidators obtained a judgment against the company. On 5 November 1998 a further agreement was reached in terms of which Walad undertook to pay R7,3 million in cash on 11 December 1998 and the balance (with interest) and costs by 28 February 2000. Even with this arrangement there were hiccups. By the time that the appellant issued summons against the respondent in June 2000 the appellant had received only R6 433 927,43 in the liquidation of Spirvin.

[27] On 10 March 2000 the appellant's attorneys wrote to the Receiver of Revenue, Port Elizabeth demanding payment of 45,2414% of the amount distributed to the respondent with interest thereon from 11 November 1998. The demand was rejected in its entirety.

[28] On 1 February 2001 Walad was placed under a final winding up order at the instance of the respondent bringing the protracted struggle, vigorously contested throughout, to a close.

[29] The appellant, averring that it had fulfilled its obligations, alleged in its claim that the liquidators of Spirvin paid the respondent the sum of R6 433 927,43 on 16 November 1998 as the nett proceeds of the amount recovered by them in the liquidation of that company. The appellant had proved a claim for R11 428 849,29 and the respondent one for R14 253 073,04. Accordingly it claimed that the

respondent was obliged to share the amount received (and any future recoveries) in the ratio of 44,5% for the appellant and the balance for the respondent.

[30] The respondent met the appellant's allegations by pleading that the latter's entitlement, if any, to share in the proceeds of any amounts recovered was subject to certain terms 'partly express and partly implied, alternatively partly tacit' which it framed as follows:

'2.1.1 The Plaintiff's entitlement to share in any such proceeds would arise only upon the final completion by the liquidators of the winding-up of Spirvin; and

2.1.2 Both the Plaintiff and the Defendant were obliged actively to pursue their claims in the winding-up of Spirvin by taking all reasonable steps to ensure that monies were recovered in such winding-up by appropriate legal action against the former directors, shareholders and officers of Spirvin.'

(Reliance on the defence set up in paragraph 2.1.1 was abandoned in counsel's heads of argument on appeal.)

[31] While not disputing that the appellant had performed the acts relied on in its particulars of claim, the respondent denied that such performance amounted to a fulfillment of the respondent's alleged obligation to pursue its claim actively by taking all reasonable steps to ensure that monies were recovered in the winding-up. Having set up particulars of a series of steps taken by the liquidators and the respondent which culminated in the obtaining of a judgment against Walad and the recovery from it of the moneys which enabled the liquidators to make the distribution to the respondent, the respondent pleaded as follows:

'3.3.10 While the Defendant funded all its own and the liquidators' legal costs in respect of all the aforegoing proceedings, the Plaintiff did not assist in, contribute or indeed play any role in any of the aforegoing proceedings whatsoever; and

3.3.11 the Plaintiff has taken no meaningful steps whatsoever to pursue its claim in the winding-up of Spirvin or to ensure that monies were recovered in such winding-up in the manner referred to in paragraph 2.1.2 hereof and accordingly is not entitled to share in amounts recovered in the winding-up.'

Having regard to the formulation of the terms of the agreement set out in paragraph 2.1 of the plea *(supra)* the contribution which paragraph 3.3.10 can make to the respondent's case is unclear; presumably it is set up as an example of how the appellant fell short of its obligation to engage in active pursuit of its claim.

[32] With regard to the proportion of the appellant's entitlement, if any, to share in the dividend, the respondent pleaded that the ratio to be applied was 18.76% of recoveries for the appellant and the balance for the respondent having regard to the following allegations:

'4.2.1 at the time of the conclusion of the agreement the defendant was a proved creditor in the liquidation of Spirvin in an amount of R49 486 218,02 as then accepted by the liquidators. This amount was reduced by the Master of the High Court on 25 February 1997 to the amount of R14 253 073,04, by virtue of the provisions of the Final Relief on Tax, Interest, Penalty and Additional Tax Act, 101 of 1996;

4.2.2 the aforesaid amount of R49 486 218,02 is accordingly the amount of Plaintiff's claim for the purposes of calculating the ratio on which the parties are to share in the proceeds of amounts recovered in the liquidation of Spirvin, if the Plaintiff is so entitled (which is denied).'

[33] Extensive evidence was led at the trial concerning the circumstances surrounding the conclusion of the agreement.

[34] In the result Ludorf J held that the onus rested on the appellant to prove that it had fulfilled its obligations under the agreement. He found that the agreement was clear and unambiguous:

'both parties . . . have substantial claims against the company in liquidation . . . and . . . both parties undertake and become obliged in terms of the agreement to pursue such claims, obviously to fruition. The prime, and only object being to recover funds. The parties are also obliged to co-operate with one another in pursuance of their respective claims against Spirvin.'

[35] The learned Judge found that the appellant had not proved that it had pursued its claim within the meaning of the agreement and, thereby, fulfilled its contractual obligations. Nor was there a tender on its part to do so. The claim was therefore dismissed with costs. The learned Judge made no reference to the implied or tacit terms raised in the respondent's plea, that being unnecessary in view of his finding as to the plain wording of the agreement. Before us on appeal counsel for the respondent expressly disavowed reliance on such terms, being content to support the reasoning of the trial Judge and emphasising the factual matrix in which the agreement germinated.

[36] The respondent's case as pleaded was not that the appellant was in breach of the obligation to co-operate *per se* but rather that it was in breach of the alleged obligation to actively pursue its own claim. Whether there was such an obligation is the central issue in this appeal.

[37] I consider first the ordinary meaning of the language chosen by the parties to express their intention, without recourse to the background facts. The obligation created by the second sentence of clause 2 requires each to 'co-operate' ie to work or act with the other, in regard to the 'the pursuit of their respective claims', ie the claim which relates to the other party. I do not think the language can, without doing violence to the choice of words, be extended to include an obligation by the party obliged in relation to his own claim. There is no express obligation on either party to pursue his own claim at all or to any extent. The phrase 'with regard to the pursuit of their respective claims' is purely identificatory of the field of co-operation. It is perhaps indicative of the strained nature of the interpretation attached by the respondent in paragraph 2.1.2 of the plea that it was found necessary to use such words and phrases as 'actively', 'all reasonable steps', 'to ensure that monies were recovered', 'by appropriate legal action' and 'against the former directors, shareholders and officers of Spirvin' none of which is inherent in the plain language.

[38] But the respondent contended otherwise. Counsel rested his submission on the factual matrix. I have difficulty in accepting that, given the unequivocal intention which the language conveys and which I have analysed, the background facts can change or supplement the plain meaning in the absence of a claim for rectification. But cf *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912B-E. Nevertheless, the question not having been debated before us, I shall give due consideration to the facts said to support the submission.

[39] Those facts are the following-

1. By September 1995 perceived police obstructiveness in relation to the provision of information to the appellant had been overcome. On 26 October 1995 the appellant resolved that its attorneys be instructed to institute action against all persons considered to be civilly liable to it and for this purpose to instruct senior and junior counsel. The second Van der Ryst report was available to the appellant and the extent of the fraud had been calculated at about R12 million. The appellant's attorneys prepared a memorandum for the Attorney-General of the Cape Province on 22 November 1995 stating that the final report of Mr Van der Ryst conclusively confirmed civil liability.

2. A meeting was held on 1 February 1996 attended by Hodes SC (as senior counsel for the appellant) and Buchanan SC (as junior counsel for the appellant and senior counsel for the respondent), appellant's attorney, Van der Ryst and the appellant's acting town clerk. The transcript of the proceedings reveals that-

(1) the appellant's attorneys confirmed that they were authorized to brief counsel to pursue civil proceedings to reclaim the appellant's losses;

(2) the acting town clerk said that his council would persist in its instructions to its attorneys;

(3) it was made clear to the acting town clerk that the appellant would not recover money without incurring substantial costs and that the Jeevas would not pay at the drop of a hat;

(4) it was emphasized that

(i) there were no assets in Spirvin;

(ii) the appellant had an action directly against the former directors of Spirvin separate from that of the respondent;

(iii) the said directors were personally liable and were possessed of substantial assets;

(iv) the appellant would have a full opportunity of fighting the case 'very far up front' (which I take to mean both early and prominently) by employing the procedures of the Companies Act;

(v) it would be unconscionable for the appellant not to pursue its claim based on the fraud;

(vi) that one of the companies in the Jeeva group, Walad Properties (Pty) Ltd was worth millions of Rands, and the group itself consisted of many companies;

(vii) that the directors would do anything to stay out of the witness box but would pay if the prospect was inevitable;

(viii) that there were at least six distinct avenues of attack open to the appellant for the purpose of recovering the moneys due to it;

(ix) the appellant did not mind paying but wanted to see results.

3. Subsequent to the meeting referred to the previous sub-paragraph a further recommendation was submitted to the appellant council in favour of civil

action against the directors.

4. To the knowledge of the appellant the appellant was, at the time the agreement was concluded, engaged in a wide range of legal activities designed to prise money out of the directors, the family or the group companies to which end it had already disbursed more than R500 000,00 in legal fees. It was anticipated that in collaborating with the respondent the appellant would go a long way to proving its own claim.

[40] The respondent's submission, on the strength of the matters set out above, is that the necessary inference is that in concluding the agreement both parties regarded the pursuit by the appellant of its claims in the liquidation as a legally binding obligation.

[41] I am unable to accept the submission. There is no doubt that both parties hoped and believed that the appellant would become actively involved in pursuing and cornering the Jeevas. That however does not justify as a necessary inference that the parties intended to convert their hopes to a legal obligation. Indeed, other facts, not emphasized by the respondent's counsel, are consistent with a contrary intention. These include the following: that the council was known to be subject to chronic financial constraints; that the agreement required it to bear its own costs; that the Jeevas were notorious for fighting inexorable rearguard actions that involved raising every conceivable legal obstacle and carrying the fight to the highest court; that they possessed the means to resist for as long as defences were

available to them; that litigation is inherently risky. It may be added that even if either party had understood the agreement to embody such an obligation there was no indication to be found in the conduct of either, whether before or after its conclusion, until the respondent was called upon by the appellant's letter of demand for payment, that such an obligation existed or was being breached.

[42] I conclude therefore that the plain meaning of clause 2 in the context of the agreement and with or without regard to admissible background facts cannot sustain the interpretation placed on it in para 2.1 of the plea. As it was common cause that the appellant was not otherwise in breach of its obligations it follows that the *exceptio non adimpleti contractus* on which the defendant relied should not have been upheld by the trial judge.

[43] The only remaining dispute between the parties relates to the proportion of the amount recovered by the respondent in the liquidation to which the appellant is entitled: Should it be based on the respondent's original or reduced claim?

[44] The expression 'in a ratio determined by the amounts of the respective claims of the parties in the liquidation, as accepted by the liquidators' must, of course, be interpreted in the light of the facts known to the parties at the date of the agreement. The one which mattered for present purposes was that the respondent had a proved claim in the amount of R49 486218,82 and that the liquidators had accepted that claim. (The legal acceptance occurred when the

liquidators, having examined the books and documents relating to the estate, decided not to dispute the respondent's claim: ss 45(2) and (3) of the Insolvency Act 24 of 1936.) There was, at the time that their agreement was concluded, no contemplation of a change in this position. In fact, the subsequent reduction in the respondent's claim took place as a consequence of law beyond the control of the respondent. Nor was there any question of the liquidators having to 'accept' the reduced claim; they were confronted with a *fait accompli* and such evidence as there is shows that they merely referred it to the Master for confirmation.

[45] The result is that the appellant should succeed in its claim in the proportion of 18,76%. The parties are agreed that the equivalent amount is R1 207 004,78.

[46] The appellant's application for condonation is saved by the merits of the appeal. The cursory manner in which the merits of the application were prepared and the lack of attention to matters which obviously required explanation warrants censure. An appropriate costs order will requite the Court's displeasure.

[47] The following order is made:

1. The respondent's application for condonation of its failure to file its answering affidavit in the appellant's condonation application is granted. The costs of the application are to be paid by the respondent.
2. The appellant's application for condonation of its failure to lodge the record timeously is granted. The appeal is reinstated. The costs of the

application are to be paid by the appellant.

3. The appeal succeeds.

4. The costs of the appeal incurred before 14 November 2002 are to be paid by the respondent.

5. Each party is to bear its own costs in the appeal incurred from 14 November 2002.

6. All costs are to include the costs consequent upon the employment of two counsel.

7. The order of the Court *a quo* is set aside and replaced by the following:

   (1) Judgment is granted in favour of the plaintiff for payment of R1 207 004,78 with interest thereon at 15.5% per annum from 16 November 1998 to date of payment.

   (2) It is declared that the plaintiff is entitled to payment of 18.76% of all further amounts recovered by it in the liquidation of Spirvin Bottling Co (Pty) Ltd.

   (3) The defendant is ordered to pay the costs of the action, including the costs of employing two counsel.

J A HEHER

JUDGE OF APPEAL

ZULMAN JA)Concur
NUGENT JA)