



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case no: 928/2020

In the matter between:

**CITY OF TSHWANE METROPOLITAN  
MUNICIPALITY**

**APPELLANT**

and

**BROOKLYN EDGE (PTY) LTD  
PIVOT PROPERTY DEVELOPMENT (PTY) LTD**

**FIRST RESPONDENT  
SECOND RESPONDENT**

**Neutral citation:** *City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd and Another* (Case no 928/2020) [2022] ZASCA 23 (1 March 2022)

**Coram:** MATHOPO, VAN DER MERWE, NICHOLLS and MBATHA JJA and SMITH AJA

**Heard:** 29 November 2021

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 1 March 2022.

**Summary:** Contract – sale by municipality of immovable properties – challenge by municipality of order enforcing sale agreement – suggested tacit condition – not necessary for business efficacy of contract – bystander test not satisfied – purchase price not undetermined or undeterminable – compliance by municipality with s 79(18) of Local Government Ordinance 17 of 1939 – s 14 of Local Government: Municipal Finance Management Act 56 of 2003 – no retrospective effect and not applicable – no interest in arrears – *in duplum* rule not applicable – order varied only in respect of interest.

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## ORDER

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**On appeal from:** North Gauteng Division of the High Court, Pretoria (Strijdom AJ sitting as court of first instance):

1 The appeal succeeds only to the extent reflected in para 3 below.

2 The appellant is directed to pay 80% of the first respondent's costs of appeal.

3 Paragraph 6.2 of the order of the court a quo is deleted and substituted with the following:

'6.2 The first plaintiff shall pay the defendant an amount of R8 550 000 plus interest thereon at the bond interest levied by the defendant's approved banker, calculated from 1 February 2005 to date of payment, in respect of which payment the plaintiff shall provide RVK or its successors with a guarantee, acceptable to RVK or their successors, from a bank or financial institution.'

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## JUDGMENT

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**Van der Merwe JA (Mathopo, Nicholls and Mbatha JJA and Smith AJA concurring)**

[1] On 31 July 2003, the appellant, the City of Tshwane Metropolitan Municipality (the City) and the first respondent, Brooklyn Edge (Pty) Ltd (Brooklyn Edge), then known as Nieuw Pivot Investments (Pty) Ltd, entered into a deed of sale. In terms thereof the City sold the immovable properties that I shall describe shortly, to Brooklyn Edge. The deed of sale provided that the properties may be transferred into the name of a nominee of the purchaser. Alleging that Brooklyn Edge had so nominated it, the second respondent, Pivot Property Development (Pty) Ltd, instituted an action in the North Gauteng Division of the High Court, Pretoria in which it essentially claimed enforcement of the deed of sale. As a co-plaintiff, Brooklyn Edge claimed the same relief in the alternative. The court a quo (Strijdom AJ) held that the second respondent had not accepted the purported nomination, but gave judgment in favour of Brooklyn Edge. It refused the City's application

for leave to appeal, which was subsequently granted by this Court. The second respondent did not file a cross appeal. The broad issue in the appeal is whether the court a quo correctly ordered specific performance of the deed of sale.

## **Background**

[2] Erven 162, 163, 164, 165, 193, 194 and portions 1 and 2 of the remainder of erf 195, Muckleneuk (the properties) constituted a public open space within the area of jurisdiction of the City. On 20 June 2003, the council of the City accepted the recommendations of its relevant departments and resolved that the public open space be closed permanently (the closure) and that the properties be sold to Brooklyn Edge at the recommended price. As I have said, the deed of sale was signed on 31 July 2003. It set the combined purchase price of the properties at R9,5 million. A 10% deposit was payable simultaneously with the signing of the deed of sale. Before us, the City does not challenge the finding of the court a quo that the deposit was duly paid.

[3] The provisions of the deed of sale in respect of the payment of the balance of the purchase price play a central part in the appeal. They state:

‘1.2.2 The balance namely R8 550 000,00 (Eight Million Five Hundred and Fifty Thousand Rand) plus interest thereon at the bond interest levied by the Seller’s approved Banker, against registration of transfer of the Property in the name of the Purchaser. Provided that no interest shall be payable until the closure and rezoning referred to in clauses 7.1 and 7.3, have been completed or for a period of 18 (eighteen) months from the date of signing of the Deed of Sale, whichever period expires first. Provided further that, should the closure and rezoning not be finalised successfully, this transaction shall be deemed to have been mutually cancelled by the parties, in which instance the Seller will refund the Purchaser all payments made by him in terms of this Deed of Sale, excluding those in respect of assessment rates and service charges, if any, plus interest at the rate referred to above.

1.2.3 The Purchaser must provide the Seller with a guarantee from a bank or financial institution for the balance of the purchase price plus interest payable against registration of transfer of the Properties in his name within 30 (thirty) days after being requested thereto by the Seller’s attorney which request however shall not be made before finalisation of the closure and rezoning referred to in clause 7.1 and 7.3 herein.’

[4] Clauses 7.1 to 7.3, in turn, provide as follows:

‘7.1 The Seller shall in terms of the provisions of section 67 of the Local Government Ordinance, 1939 (Ordinance 17 of 1939) close the property as a public open space.

7.2 The Property will only be transferred after the publication of the amendment scheme contemplated in clause 7.3 below.

7.3 The Purchaser shall at his own cost and risk, apply in terms of the appropriate provisions of the Town-planning and Townships Ordinance, 1986 (Ordinance 15 of 1986) and take appropriate steps in terms of other applicable legislation to amend the Pretoria Town-planning Scheme, 1974, by rezoning the Property essentially in accordance with the Annexure B conditions, attached hereto as Annexure C, which conditions however may on request of the Purchaser be amended in the sole discretion of the Seller.’

Clause 7.3 envisages the rezoning of the properties in terms of the City’s town planning scheme to ‘special use’ as well as the removal of restrictive conditions from their title deeds (the rezoning).

[5] In terms of clause 10.1, Brooklyn Edge is obliged ‘prior to or simultaneous with any development’ of the properties, to at its cost relocate the existing sport and recreational facilities on the properties (two clubhouses and six tennis courts) to a property identified by the City within 30 days from the date of the deed of sale. There is no dispute about the identification of this property. Clause 10.1.5 provides:

‘Owing to the fairly poor condition of the existing tennis courts and clubhouse, 50% (fifty percent) of the replacement cost shall be set off against the selling price of the property.’

[6] Section 68 of the Local Government Ordinance 17 of 1939 (the 1939 Ordinance) clothes the City with the power to effect the closure, subject to compliance with the procedure set out in s 67. The City commenced the implementation of this procedure. The objections that had been received in response to the public notice of the intention to close the public open space, were subsequently withdrawn. Section 67(9)(a) required the City to give effect to the closure by giving notice thereof to the Surveyor-General and the Registrar of Deeds. This formal notification is colloquially referred to as a ‘closure certificate’. The City failed to comply with this requirement. The relief claimed in the action

included an order directing the City to submit a closure certificate in respect of the properties to the Surveyor-general and the Registrar of Deeds.

[7] The City also obstructed the finalisation of the rezoning. It accepted Brooklyn Edge's application and processed it, but unreasonably delayed its determination. As a result, Brooklyn Edge appealed to the member of the Executive Council for Development and Planning (the MEC), in terms of s 7 of the Gauteng Removal of Restrictions Act 3 of 1996. The appeal was successful and the MEC approved the rezoning. The City was finally notified hereof by letter dated 21 November 2011. In terms of s 7(16) of the Gauteng Removal of Restrictions Act, the Registrar (defined as a designated provincial official) has to give notice of the decision of the MEC without delay, by publication in the provincial gazette, but has not yet done so. By way of the joint minute of town planning experts, the parties agreed that the publication of the required notice would bring the rezoning into effect. According to the evidence, the notice must make reference to an amendment scheme map and schedule thereto. These must be prepared by the City. The publication of the notice is in terms to town planning parlance referred to as the publication of the amendment scheme.

[8] After hearing evidence, the court a quo made the following order:

- '1. The defendant is directed, within 7 (seven) days of this Order, to submit to the Surveyor-General and to the Registrar of Deeds, Pretoria a closure certificate confirming the closure of Erven 162, 163, 164, 165, 193 and 194 and Portions 1 and 2 and the Remainder of Erf 195 Muckleneuk Township ("the properties") as public open space in terms of the provisions of Section 67(9)(a) of the 1939 Ordinance (the "submission"), read with Section 68 thereof;
2. The defendant is directed, within 7 (seven) days of this Order, to render such assistance to the Registrar as to enable the publication of the amendment scheme by the Registrar in terms of Section 7(16) of the Gauteng Removal of Restrictions Act, 1996 in order to give effect to the rezoning of the properties as granted by the MEC;
3. It is declared that the provisions of section 14(2) of the MFMA do not apply to the transfer of ownership of the property in terms of the deed of sale;
4. The Defendant shall, within 7 (seven) days of submission of the Closure Certificate and publication referred to above, instruct Roestoff, Venter and Kruse Attorneys ("RVK") or their

successors, immediately and without delay, to proceed with the transfer of Erven 162, 163, 164, 165, 193 and 194 Muckleneuk Township into the name of the first plaintiff and Portions 1 and 2 and the Remainder of Erf 195 Muckleneuk Township into the name of the first plaintiff, and to sign all transfer documents and to take all steps necessary or required in order to pass transfer;

5. In the event of the defendant failing to instruct RVK or their successors as aforesaid or failing to sign all transfer documents and to take all reasonable steps necessary to pass transfer of the aforesaid erven to the first and second plaintiff respectively within 7 (seven) days and not remedying such failure within 10 (ten) days of being given notice to do so, the plaintiffs shall, at their election:

5.1 Request the Sheriff, who is hereby authorized, to instruct RVK or their successors to sign all documentation necessary for purposes of giving effect to the aforesaid transfer of immovable property and to take all reasonable steps in regard thereto; or

5.2 Cancel the deed of sale and claim damages;

6. Against transfer:

6.1 The defendant shall be entitled to the deposit of R950 000.00 paid to RVK on 3 August 2003, and all interest accrued thereon;

6.2 The first plaintiff shall pay the defendant an amount of R17 100 000.00, being the balance of the purchase price plus interest thereon up to the maximum amount of the capital debt by application of the common law *in duplum* rule, in respect of which payment the plaintiff shall provide RVK or their successors with a guarantee, acceptable to RVK or their successors, from a bank or financial institution;

7. The defendant shall consider and, if acceptable, approve architectural drawings and plans submitted or to be submitted by the first plaintiff in respect of the relocation of sport and recreation facilities, consisting of 2 (two) club houses and 6 (six) tennis courts to either the same existing standards and sizes or such standards and sizes as may otherwise be agreed upon between the parties, and shall confirm the substituting properties to which such facilities must be relocated;

8. The first plaintiff shall, pursuant to the approval by the defendant of architectural drawings in respect of the sport and recreation facilities and compliance with all statutory requirements, at its cost and to the reasonable satisfaction of the defendant's City Planning Division and General Manager: Land and Environmental Planning, relocate the existing sport and recreational facilities to, or construct sport and recreational facilities on, the substituting property identified by the defendant;

9. The first plaintiff shall be entitled to recoup from the defendant 50% of the reasonable relocation and construction costs;

10. The defendants shall pay the plaintiffs' costs on the party and party scale, including the costs attendant on the employment of senior and junior counsel.'

[9] Both parties do not persist with several of the contentions that they advanced in the court a quo. On appeal, the City challenges the order only on the following grounds, which I shall consider in turn:

(a) that the deed of sale is unenforceable because a tacit suspensive or resolutive condition was not fulfilled or failed;

(b) that the deed of sale is void for vagueness because the purchase price is not determined or determinable;

(c) that the deed of sale is void *ab initio* because of failure to comply with s 79(18) of the 1939 Ordinance;

(d) that the deed of sale is invalid for non-compliance with s 14(2) of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA);

(e) that the claim for the transfer of the properties is premature;

(f) alternatively, that Brooklyn Edge's claims have prescribed; and

(g) further alternatively, that the *in duplum* rule is inapplicable.

### **Tacit condition**

[10] The City's argument proceeds along the following lines. It is a tacit suspensive or resolutive condition of the deed of sale that the closure and the rezoning have to be successfully finalised within a reasonable time after 31 July 2003. The tacit condition is to be found in the second proviso to clause 1.2.2. A period of 18 months, or, at best for Brooklyn Edge, 36 months, constitutes a reasonable period of time in the circumstances. The action has to fail because the closure and the rezoning have to date not been successfully finalised.

[11] At the outset it is necessary to refer to the City's reliance on evidence as to what transpired between the parties prior to the signing of the deed of sale. The evidence was the following. After the resolution of the council of the City of 20 June 2003 (the council

resolution), the attorney that facilitated the transaction furnished a draft deed of sale to the internal legal adviser of the City. This took place on 14 July 2003. In terms of clause 2 of the draft, the sale would be subject to various proposed conditions precedent. These included that the seller successfully executes the closure within three months and that the purchaser successfully rezones the properties within 18 months from the date of the sale. If any of these do not take place within the stipulated time period or any agreed extension thereof, according to the draft, the agreement would lapse and be of no further force and effect.

[12] The legal adviser responded in writing on 16 July 2003. She stated, *inter alia*, that the whole of the proposed clause 2 had to be deleted and that the draft had to be reformulated to comply with the council resolution. It specified the essential terms of the intended sale and did not contain any condition precedent. To all intents and purposes clause 1.2.2 of the deed of sale is the same as para 2.1.2 of the council resolution.

[13] Clause 5 of the deed of sale provides that it contains the total agreement between the parties and that no addition, amendment or suspension of any provision thereof shall be effective unless reduced to writing and signed by both parties. The deed of sale was therefore intended to be the sole memorial of the agreement between the parties. The City relies on direct evidence of preceding negotiations that could hardly be said to be part of the contextual setting of the deed of sale. It therefore appears to offend against the integration rule and I very much doubt whether it is admissible. See *Van Aardt v Galway* [2011] ZASCA 201; [2012] 2 All SA 78 (SCA); 2012 (2) SA 312 (SCA) para 9 and *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 48. But even if it is admissible, the evidence does not assist the City. As I have demonstrated, it makes clear that no suspensive condition was agreed upon during the negotiations.

[14] The provision that commences with the second 'Provided' in clause 1.2.2 (the deemed cancellation clause), is not a true proviso. Unlike the proviso that temporarily suspends the accrual of interest, the deemed cancellation clause does not qualify or limit



a principal matter to which it stands as a proviso, but is an independent provision. See *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A); [1974] 4 All SA 536 (A) at 645 and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 6. It is certainly not a suspensive condition. It is trite that a suspensive condition suspends the operation of the obligations to which it relates until the occurrence of a future uncertain event. The deed of sale does not in any way provide that the finalisation of the closure and the rezoning are conditions precedent to the operation of any obligations thereunder. On the contrary, its import is that the closure and the rezoning have to be effected forthwith and should they not be finalised successfully, there shall be a deemed mutual cancellation of the contract. For this reason, the decision in *Hanuscke Beleggings CC v Kungwini Local Municipality* [2012] ZASCA 112; 2012 JDR 1654 (SCA) is of no relevance. There it was common cause that the sale was subject to three suspensive conditions and that a reasonable time for their fulfilment had already lapsed by the time summons was issued (paras 2 and 14).

[15] Pending the fulfilment of a resolutive condition, the contract is fully operative and the parties must perform their obligations in terms thereof. A resolutive condition generally terminates the obligations flowing from the contract upon the occurrence of a future uncertain event. I am prepared to accept, without deciding, that the deemed cancellation clause could be described as a resolutive condition. However, the real question raised by the City's argument is whether the deemed cancellation clause is tacitly subjected thereto that the closure and the rezoning have to take place within a reasonable period of time. That is the issue that I now turn to.

[16] A tacit term is an unexpressed provision of a contract. It is inferred primarily from the express terms and the admissible context of the contract. A court will not readily infer a tacit term, because it may not make a contract for the parties. The inference must be a necessary one, namely that the parties necessarily must have or would have agreed to the suggested term. A relevant factor in this regard is whether the contract is efficacious and complete or whether, on the other hand, the proposed tacit term is essential to lend business efficacy to the contract. The 'celebrated' bystander test constitutes a practical

tool for the determination of a tacit term. To satisfy the test the inference must be that each of the parties would inevitably have provided the same unequivocal answer to the bystander's hypothetical question. Even if the inference is that one of the parties might have required time to consider the matter, the tacit term would not be established. See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531H-532A and 532G-533B; *Wilkins NO v Voges* [1994] ZASCA 53; [1994] 2 All SA 349 (A); 1994 (3) SA 130 (A) at 136H-137C and 142C-I and *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO* [2005] ZASCA 75; [2006] 1 All SA 561 (SCA); 2006 (3) SA 488 (SCA) paras 19 and 20.

[17] In my view the proposed tacit term is not by necessary implication required to give business efficacy to the deed of sale. It clearly sets out the obligations of each party in respect of the closure and the rezoning. It is a notorious fact that these processes are often beset with difficulties and delays. In this regard it is significant that clause 1.2.2 envisages that the deed of sale would remain extant after the expiry of the period of 18 months during which the accrual of interest is suspended, but sets no further time limit. I agree with Brooklyn Edge that this counts against an intention that the deed of sale would lapse if the closure or the rezoning are not achieved within a specified period of time.

[18] I am also by no means satisfied that if an innocent bystander posed this question to the parties at the time of entering into the deed of sale, both would necessarily have agreed that the closure and the rezoning had to take place within a reasonable time thereafter. At least one of the parties might very well have said that such a term could create uncertainty and lead to disputes, because these processes might be held up by unexpected events. In my view the proper interpretation of the deemed cancellation clause in its context is that the parties agreed that each party would undertake all efforts to procure the closure and the rezoning, irrespective of how long they take. Only if that objectively proves to be unachievable, would there be a deemed cancellation. In the result I find that the deed of sale does not contain the alleged tacit condition. It follows that it is unnecessary to consider what a reasonable time would have been.

### **Purchase price**

[19] The purchase price of the properties as such is clearly determined in the deed of sale. In terms of clause 1.1 the purchase price is R9,5 million, being R716 000 for portions 1 and 2 of erf 195 and R8 784 000 for the remainder of the erven. The City's argument is that clause 10.1.5 renders the purchase price indeterminable. It will be recalled that it provides that 50% of the replacement costs of the clubhouses and tennis courts 'shall be set off against the selling price'.

[20] The validity of the contention is in the first place dependent on the proposition that the deed of sale provides that the replacement has to take place prior to or simultaneously with the transfer of the properties. If not, paras 7, 8 and 9 of the order of the court a quo could not be faulted. For the reasons that follow, I am of the view that despite the reference to setoff, the deed of sale allows the relocation of the sports facilities and the accounting in respect of half the costs thereof, to take place after the transfer of the properties to Brooklyn Edge.

[21] First, clause 2 provides that the transfer shall take place 'after all moneys payable in accordance with this agreement have been paid or duly guaranteed'. Neither clause 2 nor clause 1.2.3 subjects the transfer to an adjustment of the purchase price in respect of the replacement costs. Secondly, in terms of clause 3, occupation of the property shall be given from the date of transfer, subject to the provisions of clause 10.1.4. It reads:

'The Seller shall only for purposes of such relocation and sport and recreation facilities allow occupation of the property and the substituting property by the Purchaser prior to the date of transfer for purposes of demolition and erection of such facilities which activities if any shall be executed at the Purchaser's exclusive risk and cost.'

Clause 10.1.4 is clearly a permissive provision that places no obligation on the purchaser. Finally, as I have said, clause 10.1 obliges the purchaser to relocate the facilities 'prior to or simultaneous with any development of the property'. The development of the properties could clearly only take place after the transfer thereof to Brooklyn Edge.

[22] Thus, Brooklyn Edge is entitled to effect the relocation simultaneously with the development of the properties after it took transfer thereof. The deed of sale is not void

for vagueness as alleged. Therefore it is unnecessary and premature to consider whether the relocation costs are objectively determinable in terms of the deed of sale.

### **Section 79(18) of the 1939 Ordinance**

[23] Here the City's argument is based on alleged non-compliance with its own obligations, in two respects. The first is that the advertisement of the intended sale that it published on 16 July 2003, did not comply with s 79(18)(b). The publication took place after the council resolution and before the deed of sale, as required. See *Emalahleni Local Municipality and Another v Propark Association and Another* [2012] ZASCA 177; [2013] 1 All SA 277 (SCA) para 26. The second is that the City did not cause a valuer to evaluate the properties in terms of s 79(18)(d)(ii).

[24] The first contention is baseless. The City simply did not identify any respect in which the advertisement was allegedly non-compliant. As to the second contention, the City rightly accepts that it had to prove that the properties had not been evaluated in terms of s 79(18)(d)(ii). The City did no such thing. However, Brooklyn Edge adduced the evidence of Mr Espagh, who had been a specialist valuer in the employment of the City at the time. He said that in terms of the standard procedure of the City, the legal services division would request a valuation of a property that the City considered selling. The market value of the property would then be determined by a valuer employed by the City. The acceptability of the valuation would thereafter be considered by the Properties Committee of the City. It consisted of senior valuers. The witness was a member of this committee. The witness confirmed that the legal services division had requested a valuation of the properties. He testified that the Properties Committee had considered the market value of the properties and was satisfied with the proposed purchase price. That in itself amounted to compliance with s 79(18)(d)(ii). In any event, the witness convincingly explained that although he could not remember the detail because of the passage of time, a valuation of the properties must have been done in terms of the standard procedure. On this evidence it was at least more probable than not that the market value of the properties had been determined prior to the deed of sale.

[25] As I have demonstrated, these contentions of the City are devoid of a factual basis. It follows that it is unnecessary to consider whether the City could in law be permitted to rely on its own non-compliance with these statutory provisions, without seeking the review and setting aside of the council resolution.

### **Section 14(2) of the MFMA**

[26] Sections 14(1) and (2) of the MFMA read:

‘14. (1) A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

(2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public–

(a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and

(b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.’

[27] The council resolution and the deed of sale were validly completed juristic acts under the 1939 Ordinance. They gave rise to enforceable rights. The date of commencement of the MFMA is 1 July 2004. Should s 14(2) be applicable to the transaction, it would retrospectively interfere with vested rights. There is a strong presumption that new legislation is not intended to be retroactive. There is also a presumption against the reading of legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations by, for instance, invalidating existing agreements. A statute will only have retroactive operation if that is clearly indicated by the legislature. See *Kaknis v Absa Bank Limited and Another* [2016] ZASCA 206; [2017] 2 All SA 1 (SCA); 2017 (4) SA 17 (SCA) paras 37 and 38. No such meaning was pointed out or could be detected in s 14 of the MFMA or its context. It follows that s 14(2) is not applicable to the deed of sale. The City’s challenge based on s 14(2) must also fail.

### **Premature claim**

[28] The contention that Brooklyn Edge prematurely claims transfer of the properties, can be briefly disposed of. It is based on a misconception of the relief claimed and the import of the order granted. In terms thereof, the City is directed to formally finalise the closure by the submission of a closure certificate and to render the assistance necessary to enable the publication of the amendment scheme.

[29] This is in accordance with the City's obligations under the deed of sale. The City is obliged in terms of clause 7.1 to follow the closure procedure and to successfully finalise it if it is objectively possible, as is the case. There can be no doubt that the City is also contractually obliged to assist in procuring the successful finalisation of the rezoning by providing the amendment scheme map and schedule thereto to the Registrar. Only thereafter will Brooklyn Edge be entitled to transfer, against payment of the balance purchase price and interest thereon.

### **Prescription**

[30] This alternative defence is that the rights to seek the closure and the rezoning of the properties have prescribed. But neither of these are debts within the meaning of the Prescription Act 69 of 1969. It has repeatedly been decided that a debt in this context is an obligation to make payment, deliver goods or render services. See *Brompton Court Body Corporate v Khumalo* [2018] ZASCA 27; 2018 (3) SA 347 (SCA) para 11 and the authorities cited there. Only the claim for transfer of the properties (delivery of goods) would qualify as a debt, but as I have demonstrated, it is not yet due.

### **Interest *in duplum***

[31] The common law *in duplum* rule essentially provides that interest stops running when the unpaid interest equals the amount of the outstanding capital. The rule is based on public policy and cannot be waived. Its overarching purpose is to protect debtors from being exploited by creditors. See *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* [1997] ZASCA 94; [1998] 1 All SA 413 (A); 1998 (1) SA 811 (SCA) at 827H-828E. This was confirmed in all three judgments of the Constitutional Court in *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited*

[2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC). (The majority of the Constitutional Court overruled *Oneanate* only to the extent that it held that the *in duplum* rule is suspended *pendente lite*).

[32] The City contends that the *in duplum* rule applies only to arrear interest and that in terms of the deed of sale there is no arrear interest. I agree with the City in both respects. Our courts have repeatedly made clear that the *in duplum* rule limits arrear interest to the outstanding capital sum. See the full court judgment in *Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T); [1947] 1 All SA 266 (T) at 581, *LTA Construction Bpk v Administrateur, Transvaal* [1991] ZASCA 147; [1992] 3 All SA 1007 (A); 1992 (1) SA 473 (A) at 480F, 481I-J and 482B, *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2005] ZASCA 98; [2006] 3 All SA 325 (SCA) paras 10 and 18 and *Paulsen v Slip Knot Investments supra* paras 42, 107 and 122. This accords with the purpose of the rule. The agreed accrual of interest on a capital sum, the payment of which has been postponed, can hardly amount to the exploitation of a debtor.

[33] The relevant provisions of the deed of sale constitute an agreed formula for the adjustment of the purchase price to be paid in the future, to account for the passage of time. At no time was interest in arrears. It follows that Brooklyn Edge is in terms of clause 1.2 obliged to pay interest on the outstanding balance of the purchase price at the bond interest levied by the City's approved banker, for the period commencing 18 months after the signing of the deed of sale until date of payment. Paragraph 6.2 of the order of the court a quo should be amended accordingly.

### **Costs**

[34] It remains to consider the costs of the appeal. As the City has some success on appeal, it should not be directed to pay all the costs of appeal of Brooklyn Edge. In the exercise of our wide discretion in respect of costs, I believe that it is fair and just that the City pay 80% of Brooklyn Edge's costs of appeal.

[35] For these reasons the following order is issued:

1 The appeal succeeds only to the extent reflected in para 3 below.

2 The appellant is directed to pay 80% of the first respondent's costs of appeal.

3 Paragraph 6.2 of the order of the court a quo is deleted and substituted with the following:

'6.2 The first plaintiff shall pay the defendant an amount of R8 550 000 plus interest thereon at the bond interest levied by the defendant's approved banker, calculated from 1 February 2005 to date of payment, in respect of which payment the plaintiff shall provide RVK or its successors with a guarantee, acceptable to RVK or their successors, from a bank or financial institution.'

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C H G VAN DER MERWE  
JUDGE OF APPEAL



Appearances:

For appellant: T Strydom SC (with him T Mkhwanazi)

Instructed by: Mpoyana Ledwaba Incorporated, Pretoria  
Honey & Partners Incorporated, Bloemfontein

For respondents: E C Labuschagne SC (with him H P Pretorius)

Instructed by: Adams & Adams Attorneys, Pretoria  
Phatshoane Henney Attorneys, Bloemfontein