CASE NO: 40390/2020

DATE: 2022-05-19

In the matter between

DELETE WHICHEVER IS NOT APPLICABLE

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

19 August 2022
DATE

SIGNATURE

HLANO FINANCIAL SERVICES (PTY) LTD **Applicant**

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS **First Respondent**

MS K TOOTLA NO **Second Respondent (in the counter application)**

JUDGMENT

Victor J

Introduction

[1] At the heart of this matter lies the proper approach to the interpretation of an agreement concluded between the applicant and the first respondent and the validity of Expert's award and whether it can be made an order of Court.

[2] For a 10 year period between 1987 and 1997 the applicant and other lenders advanced home loans to homeowners in the low-income market which were secured by mortgage bonds registered over the properties. By 1995 most of the mortgagors were in default in respect of their repayments to the mortgagees including the applicant. These were considered to be non-performing loans. Notwithstanding their default the owners remained in occupation.

[3] The situation pertaining to non-performing loans was interpreted within the context of the political situation in South Africa prior to the democratic election in 1994 and a constructive and humane was necessary.

[4] The housing market was unstable and in order to meet this challenge the Legislature passed the Housing Act No 107 of 1997 (The Housing Act) which came into effect on 1 April 1998. It was aimed at addressing the housing need of the poor.

[5] In October 1994 pursuant to the provisions of the Housing Act, the National Department of Housing concluded an agreement with the Association of Mortgage Lenders. Since the applicant was not a member if the Banking Council a Process Agreement was concluded with it.

[6] In terms of the Process Agreement in the event of a dispute the matter was to be referred to an independent expert. This was done and Ms Tootla was appointed the Expert.

[7] The expert Ms Tootla, made the following award and ordered the first respondent to pay the applicant as follows:

- The sum of R116 729 249. 90:
- Interest on the aforementioned sum at the Moro rate of 8.75 percent calculated from 30 April 2020 until date of full and final payment and all costs incident to the alternative dispute resolution process and the costs of this application on a party and party scale in favour of Hlano;

- The Expert also ordered that the fist respondent pay the agreed costs of the expert in the sum of R45 000.

[8] The essence of this dispute is really the proper interpretation of the Process Agreement that was concluded between the parties. All the appropriate parties signed the Process Agreement and the last signature was on 29 August 2017.

Parties

[9] The parties in this matter are Hlano Financial Services (Pty) Ltd formally known as Khayalethu Home Loans with its principle of business in Bryanston, Johannesburg. The first respondent is the executive member of the Executive Council responsible for human settlements in Gauteng whose offices are situated in Kyalami. The second respondent is Ms K Tootla, the Expert and the second respondent in the counterclaim.

Relevant background history

[10] The brief background is as follows. Between the years 1987 to 1997 the applicant and other lenders advanced numerous home loans to persons in the then low income market who became owners of these properties. By 1995 the majority of the mortgagors whom the applicant advanced home loans to were in default and they were considered as nonperforming. The defaulting owners remained in occupation of the properties and it would have been inhumane to evict them.

[11] The nonperforming loans were ascribed to the political situation that existed in South Africa prior to 1994 and after the advent of the new democracy the unstable housing market became a source of concern. It resulted in the Parliament passing the Housing Act 107 of 1997 (the Housing Act) which came into effect on 1 April 1998 and in terms of Section 2(1) it provided that National, Provincial and Local spheres of Government were to give priority to the needs of the poor in respect of housing development and to make as wide a choice available having regard to the financial ability of the prospective purchases' to pay.

[12] In terms of S 3(2) of the Housing Act the Minister of the Department determined national policy. Section 3(4)(d) empowered the Minister to allocate funds for the national housing programs. So the legislative framework for the provision and administration of home loans was set in place. The National Department of Housing concluded an agreement with the Association of Mortgage Lenders and this agreement is known as the Record of Understanding (ROU).

[13] In terms of Section 26(2) of the Constitution, the Housing Act constituted national legislation which was required to give and facilitate housing for the poor. Section 7 of the Housing Act provided that the Provincial Government acting through the Executive Council would promote and facilitate this housing policy and it is therefore in this respect that the first respondent became involved.

[14] What happened then, the Minister of Housing declared the national policy including norms and standards for sustainable housing development by publishing a National Housing Code herein referred to as the 2000 Code.

[15] The 2000 Code incorporated the Record of Understanding under Chapter 7 of Part III of the National Housing Code and was referred to as the Housing Subsidy Scheme and the Relocation Scheme which really provided for those borrowers who could not meet their obligations to be relocated in a humane and dignified manner.

[16] In 2017 the applicant and the first respondent concluded a Process Agreement. This gave rise to the situation where the lenders, in this case, who were not part of the Banking Council were to be paid out in respect of the loans they had made available to the citizens who could ultimately not afford to repay the Mortgagee in that sub economic group.

First Respondent's case

[17] The first respondent has raised a number of defences all of which were never placed before the Expert but emerge in these proceedings. In essence the first respondent argues that the proper process in accordance with the Process Agreement

was not followed by the applicant. In addition, the first respondent refers to problems with the List provided by the applicant and attached to the Process Agreement as Appendix A.

[18] The first respondent submitted that the Expert never considered the matter carefully, was satisfied with the papers presented to her by the applicant, made a decision by default and simply rubber stamped the claim.

[19] The first respondent argued that any payment to the applicant comes from public money and there have to checks and balances. It is the Process Agreement that has the necessary checks and balances must be complied with before the applicant can be paid. The first respondent argued that the checks and balances come as no surprise since the Government in the early years attempted to make affordable housing accessible. A rubber stamping process was never envisaged. The Process Agreement placed a burden placed on the Lenders which burden they assumed. In the result the first respondent argued that the applicant must comply with requirements of the Process Agreement which incorporated the ROU and the Housing Code. The first respondent further submitted that the very dispute resolution clause was inserted to deal with problems like the List and the verification process. If this was not so then there would be no need for a dispute resolution mechanism.

[20] The first respondent argued that the absence of the verification process and the defective List justifies non-payment of the applicant's claim. The applicant submitted that the very purpose of the Process Agreement was to agree the identity of some 5160 beneficiaries who constitute the Hlano claims. Clause 4.2 of the Process Agreement provided that once the certificate was handed over by the Watching Brief Conveyancers the certificate could be handed to the Department. That list would then reflect that all the conveyancing documents are under the control of the conveyancer.

[21] The first respondent participated in the settling of the Process Agreement and now challenges the List without seeking rectification of the Process Agreement. Ms Van der Westhuizen of the first respondent without signing a confirmatory affidavit

challenged the Hlano claims. This is in the face of the National Department approving the Process Agreement and it also did not object to the Hlano claims or the List of names.

[22] The first respondent also submitted that the Expert does not have the lawful authority to grant an award by default. The expert does not act in a judicial capacity and the dispute resolution clause does not make provision for this. The first respondent also submitted that if there is no *lis* pending in a particular court then an agreement cannot be made an order of that court. In addition, the first respondent submits that there was a misunderstanding about the hearing date before the expert.

Issues

[23] The following issues require determination.

22.1 The proper interpretation of the Process Agreement

22.2 Did the Expert make an award which was lawful?

2.3 Can the Expert's award be made an order of court in the absence of an existing *lis* in the court between the parties?

2.4 Was the award made in the absence of the first respondent's legal representatives because of a misunderstanding about the date and time of the final meeting before the Expert.

Proper interpretation of the Process Agreement

[24] The interpretation of the Process Agreement is in dispute. The applicant contends that it has complied with its obligations in terms of the Process Agreement. The first respondent contends that the verification process has not taken place in terms of clauses 4.2. and 4.3 of the Process Agreement. It is important to consider very carefully the terms of the Process Agreement and in doing so one is mindful of the caselaw which makes provision for how an agreement should be interpreted and as indicated in the case of *Capitec,* the question of interpretation does not mean that one can simply interpret an agreement in such a flexible way that the agreement

itself loses its meaning. Unterhalter AJA explained the approach to the proper interpretation of an agreement:

> [25] Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings' consent was indeed required. The much-cited passages from Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni) 2 offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, '(t)he inevitable point of departure is the language of the provision itself'. 3
>
> [26] None of this would require repetition but for the fact that the judgment of the High Court failed to make its point of departure the relevant provisions of the subscription agreement. Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni license judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable." [1]

[25] As stated further by Unterhalter AJA in *Capitec* at paragraph 51:

"[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."

[26] This brings me to the process agreement. A sensible and businesslike interpretation must be given to it. The facts in this case must lead to result where the outcome is moored to the facts of the case.

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[1] *Capitec Bank Holdings Ltd And Another v Coral Lagoon Investments 194 (Pty) Ltd And Others* 2022 (1) SA 100 (SCA)

[27] There are two definitions in the Process Agreement are important. The Hlano Claims in clause 1.1.10 are defined as:

> "means all of Hlano's claims that arise in respect of monies lent and advanced by Hlano to the Gauteng ROU Beneficiaries, the detail of which appears in Appendix A"

[28] Clause 1.1.8 provides that:

> "The Gauteng ROU beneficiaries – means those persons who were initially granted mortgage bond finance by Hlano for the acquisition of the housing Units and who subsequently qualified for the benefits arising from the ROU (a list of whom appears in Appendix A hereto) and that make up the Hlano Claims and is finally confirmed pursuant to the verification process envisaged in clause 4.2 and 4.3 below."

[29] The agreed processes are defined in clause 4. The applicant warranted that it has caused to be collated an inventory of the Title Deeds on hand and applied for. Clause 4.2 provides for the Title Deed verification process where the Watching Brief Attorneys have to give the applicant a certificate to confirm that all the documentation is to hand to achieve cancellation of the mortgage bonds. This was done and the applicant delivered the certificate to the Department.

[30] Clause 4.3 provides for ROU beneficiary Verification and Hlano Claims confirmation.

> "4.3.1 provides that the parties must embark on a process to verify, confirm and reach agreement on the identity of the Gauteng ROU Beneficiaries and on the total amount of the Hlano Claims.

[31] The applicant put up the List which was not impugned until this application came to court.

[32] Clause 4.3.2 provided that in the event that the parties could not reach agreement by 30 September 2017 then the disputes between them shall be referred for dispute resolution as envisaged in clause 7 of the Process Agreement

[33] The recordal and the import of this Process Agreement is set out very carefully and crafted with care. The recordal in 2.1 records that Section 26 of the Constitution of the Republic of South Africa guarantees the human right of South African citizens to have access to adequate housing and places, a duty on the Government within its available recourses to achieve that progressive realisation of the right.

[34] In this regard the recordal specifically makes mention that certain mortgage lenders, that included Hlano entered into the ROU in terms of which they undertook to assist the beneficiaries of the ROU to find a solution to their right to housing. Since 1994 there have been a plethora of schemes, programs and institutions created to deal with the challenges pertaining to housing to resolve these historical injustices. The recordal specifically mentions that the Hlano Housing Loan Portfolio is an example of correcting this historical injustice. One attempted solution was the housing scheme known as the Relocation Assistance Program of those beneficiaries who needed to be relocated to affordable housing.

[35] So the recordal goes on to list very carefully the obligations of both parties and in particular mentions the fact that Hlano's claim was excluded from the Servcon deal. This was where the Banks belonging to the Banking Council were settled and thousands of homeowners were given free and unencumbered home ownership.

[36] What is clear from the recordal in 2.9 and 2.10 is the that the first respondent recognised and accepted that it had to settle its indebtedness to Hlano and these are the Hlano claims and has ring fenced an amount of R150 million in the 2017/2018 financial year in part settlement of the Hlano claims so as to provide free and unencumbered title of the housing units to be Gauteng ROU beneficiaries. This resulted in the conclusion of the Process Agreement.

[37] Once those claims had been verified then the money became due and payable to Hlano. The payment of the full balance outstanding to Hlano was envisaged to be paid by no later than 30 September 2019. There has still not been payment. The

parties tried to settle the matter and could not do so. The whole dispute was dealt with in accordance with the dispute resolution procedure in clause 7 of the Process Agreement. The Expert could not be agreed between the parties and the Law Council appointed Ms Tootla.

- In terms of Clause 7.4 the Expert had extensive powers, he or she could exercise -use their full discretion with regard to the proceedings;
- could investigate or cause to be investigated in any matter fact or thing which it considered necessary;
- dispense with wholly or in part with formal submissions and pleadings, could;
- interview and question under oath any of the parties to the dispute and or their respective directors or employees under oath any of the parties:
- to decide the dispute according to what is considered by the expert to be just and equitable in the circumstances
- award any cost order it deemed fit and
- the Expert was entitled to fix a date and place where the hearing would take place and that decision would be final and binding in the absence of any manifest error in calculation or on the parties effected thereby and therefore there was really very little room for the Expert's finding to be rejected.
- It was final and binding in the absence of being manifest error.

Events leading to the default award.

[38] The applicant details how it went about the entire process and refers to the meetings that were held and then the various incidences where the first respondent either did not attend the meeting; chose not to do so and that is set out in a very detailed schedule provided by the parties to the Court. It would seem that the problem of non -cooperation by the first respondent arose very early in the dispute resolution process. The first respondent simply could not deliver its case in writing. This was despite requests for time to do so.

[39] By 7 February 2018 the first respondent adopted an age criteria of the beneficiaries, meaning further analysis had to be undertaken. During April to June

2018 the first respondent advanced the position that it was impermissible to affect payment in terms of the process agreement, consequent upon problems with system issues. During April to June 2018 there was a succession of scenarios whether the first respondent refused to capture applications based on a flawed basis and no further verifications were done. The systems problem was an issue which was completely within the control of the first respondent. The applicant cannot be blamed or its claim delayed indefinitely because of the internal data problems of the first respondent.

[40] When the coding problems on the HSS system could not be captured on the system with no end to the resolution of the problem in sight, the applicant formally declared a dispute on 17 June 2020. At that first hearing on 17 September 2020 the dispute between the parties was defined. The applicant was directed to provide written submissions regarding the defined dispute which it did on 28 September 2020. This was done. The second hearing took place on 7 October 2020 and this was postponed at the request of the first respondent. The expert then directed the first respondent to provide written submissions by 23 October 2020.

[41] By 23 October 2020 the first respondent had failed to provide written submissions regarding the defined dispute and on 28 October 2020 at the third hearing, the first respondent's failure to provide written submissions regarding the defined dispute continued and it requested a postponement by one day to make a settlement proposal. The hearing was postponed for twenty-four hours and no settlement proposal was made.

[42] By 29 October 2019 when the fourth hearing took place, again, the first respondent failed to provide written submissions regarding the defined disputes and then on that date there was also no appearance by the first respondent. On 29 October 2020 the Expert then made an order but suspended that order for fourteen days to afford the first respondent a further opportunity to make representations as to the reason why the expert order should not be made final.

[43] No representations were made during that period and the Expert's order then became final and binding. That was in accordance with the dispute resolution process referred as Clause 7 of the Process Agreement. It is therefore puzzling why the first respondent in that further fortnight did not raise the defences and difficulties it now raises. Even if there was a misunderstanding on the hearing date it is inconceivable that the first respondent did not address the situation during that period. Instead it acquiesced.

Counter application

[44] The applicant set out to enforce its order and it is this that now serves before this Court. Once the application had been served, I do not deal with the delays in relation to that, the first respondent then launched a counter application and it opposed the award being made an order of court. Firstly, it submitted that the award was improperly and indeed erroneously granted in the absence of the first respondent.

[45] Secondly, the ruling ordering the first respondent to pay the applicant the sum of R116 million R729 249, 90 is at odds with the process agreement. The first respondent contended that its interpretation of the process underpins any indebtedness by the Department to the applicant.

[46] Thirdly, the first respondent in its counter claim stated that it did not owe the said sum and that the award is unlawful and that the application is fraught with disputes of fact. It sought that the matter either be referred back to the Expert or that an independent new expert be appointed and that the relief in the counter application be granted.

Default order

[47] Both parties set out a history of what took place. It is in the counter application that the detailed history of the first respondent's non-attendance at the fourth hearing is unravelled. It is clear that where the first respondent claimed that it could not attend a meeting because of unavailability of Mr Milford, this was untrue as Mr

Milford blind copied the applicant in on the email. That email shows that Mr Milford was available for the fourth hearing before the Expert but did not attend as he did not have instructions. From what is stated above there was another two week period where the alleged misunderstanding regarding the meeting could have been raised.

[48] When the first respondent claims that the default order was improperly granted in its absence, this cannot be sustained on the facts which are clear and referred to above.

[49] That blind copy of the email shows that the first respondent knew very well that the matter was to proceed before the Expert on that day, but it chose not to attend. It deliberately chose not to make any representations; it was given ample opportunity to do so and what is more, the importance of the fourteen day time period which the Expert granted was an ideal opportunity for the first respondent to revert back. The first respondent therefore was given a further chance to deal with the situation. By that stage the respondent already had some six weeks to produced it defence but it failed to do so.

[50] The assertion is also made in the counter claim that the amount is not due. An attempt was made to persuade the Court that the Excel spreadsheet reflecting the claims attached to founding affidavit are incorrect and a number of purported irregularities were referred to and this was done by matching identity numbers against the Department of Home Affairs Population Register, the various Deeds, and data bases such as the Deeds Registry Office and also the National Housing Subsidy Database managed and maintained by the Department of Home Affairs and also the General Housing Subsidy Database.

Systems problem

[51] However, it is Ms Van der Westhuizen of the first respondent who undertook the systems analysis and it would seem that she then had all these difficulties with 1 231 beneficiaries. She also stated that sixty one of the alleged persons listed in Appendix A did not exist on the Population Register of the Department of Home

Affairs and that four hundred and forty eight were deceased. None of this was placed before the Expert. In addition, it seems that the data bases were problematic and she was really relying on hearsay information.

[52] The systems problem as described by the first respondent was a little bit confusing. It seems that the first respondent had full control of these various systems and nonetheless expected the applicant to be able to do some sort of verification where the first respondent's systems were flawed. The applicant's role in resolving the first respondent's flawed internal processes was clearly not envisaged in the Process Agreement. In fact, it is arising out of the Process Agreement in relation to the verification process that the dispute arose, bearing in mind that attached to the process agreement was the long list of beneficiaries. This Process Agreement was specifically and expressly concluded on the basis of those names in Appendix A. So where the names had to be verified in terms of Clause 4.3.1 by confirming or reaching agreement on the identity of the beneficiaries, this then was referred to for dispute resolution.

[53] The first respondent had time and opportunity to deal with the verification process also to resolve all the disputes that it claimed through Ms Van der Westhuizen and which could not be verified. What is important is that the Process Agreement does not incorporate the Housing Code

[54] On behalf of the first respondent, it was submitted that because there is reference in the Process Agreement to the Gauteng ROU Housing Loan Portfolio and the verification processes had to be done. This meant according to the first respondent meant that the Code and the Gauteng ROU was specifically incorporated. On a proper interpretation of the process Agreement this was not the case. In applying the principles in *Capitec* a salient and coherent interpretation of the Process Agreement is required. The text and the structure of the Process Agreement could not be interpreted to delay the applicant's claim and reinforce the first respondent's system problems which could not be resolved to the prejudice of the applicant.

[55] Therefore, at the end of the day the applicant's case is simple one. It took those areas between the parties that were in dispute to dispute resolution in terms of the Process Agreement and the first respondent had ample opportunity to deal with the disputes. It could have asked for extensions of time, even if at that late stage being when the expert gave the first respondent fourteen days in order to make sure that it had yet a further opportunity to bring all these difficulties or what it perceived as difficulties and system problems to the attention of the Expert. Instead it sat back and paralyzed the process.

[56] The basis of the counter application is that the expert's award is unlawful and that it ought to be set aside. Also that the amount awarded by the Expert is not due and payable. The first respondent seeks that the matter must either go back to her or to an independent expert for determination. The belated defence of the alleged errors in calculation could also have been dealt with at the appropriate time. The first respondent cannot claim after the award that there are errors. The Process Agreement specifically provides that the Hlano claims must be paid by 30 September 2017. The first respondent had more than three years to clarify its position before the matter was referred to the Expert. Instead it did nothing constructive to resolve its list and verification problems.

The problems with a re-hearing

[57] The applicant submitted that for the matter to go back to an adjudicator or to an expert, really amounts to a statutory or contractual appeal in the wide sense and a complete rehearing and a fresh determination with additional evidence. Voluminous new evidence would have to be presented at a re-hearing to deal with the List of many names. The applicant submits that in this case there is no right of such an appeal and let alone the kind of relief that the first respondent seeks. No case has been made out by the first respondent that the Expert has not applied the principles of natural justice. The counterclaim amounts to a form of appeal of the Expert's award.

[58] The applicant referred to *Tickly and Others v Johannes NO and Others*[2] where Trollip J described various categories of appeal. Where he stated:

> 'The word "appeal" can have different connotations. Insofar as is relevant to these proceedings it may mean:
>
> (i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information;
>
> (ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;
>
> (iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly"

[59] This formulation has been affirmed in many cases, and was recently adopted by the Constitutional Court which stated that:

> '(I)t can be seen that the three types of appeals that may fall under the word "appeal" are an appeal in the wide sense, an appeal in the ordinary strict sense and a review[3].

[60] This is certainly not one of those appeals where a complete rehearing with fresh evidence and additional evidence is appropriate. That time has long gone for the first respondent to seek such relief.

[61] In fact, it is clear that in the event that an Expert did not conduct him or herself fairly and reasonably in the exercise of making the award not applied the principles of natural justice then in that case the award could possibly be set aside and reheard. The first respondent has not made out a case justifying the rehearing of the matter.

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[2] *Tickly and Others v Johannes NO and Others* 1963 (2) SA 588 at 590 to 591

[3] *National Union of Metalworkers of South Africa on behalf of M Fohlisa and Others v Hendor Mining Supplies (a Division of Marschalk Beleggings* (Pty) Ltd) (2017) 38 ILJ 1560 (CC) (2017 (7) BCLR 851; [2017] ZACC 9) para 135, judgment by Zondo J (Mogoeng CJ, Jafta J and Mhlantla J concurring). *National Union of Mineworkers v Hendor Mining Supplies*

[62] The attack on the List therefore comes very late in the day. It is based on hearsay facts and in particular really came after the first respondent realised that the applicant was bent on having the expert award made on order of court and it is important to note that the attack came after the applicant had commenced the proceedings.

[63] If indeed there was this very important and genuine attack on the List this would have come at a very early stage, bearing in mind that the payment date was due in 2017 and the dispute resolution processes started during 2020. It was very late in the day that the counter application came and the applicant contends that it is a contrived attack on the List. That List has been in existence from the time that the agreement was signed in 2017 and therefore it is important to note that this attack on the List comes at this late stage and with very little basis for the attack.

[64] As regards the verification attack, it is a process which lies in the hands of the first respondent. Its data systems are flawed and seemingly can't be easily repaired. Accordingly, there was nothing further that the applicant could do and was obliged to do yet it now contends that the verification process was not done properly and the so-called system issues which was really the incorrect coding of the system should be considered. These attacks they have little detail and having come so late in the day after this application was instituted.

Must there be a lis pending to make an award an order of court?

[65] A further submission by Ms Hassim SC was that a settlement agreement cannot be made an order of court and in this regard I was referred to two cases the one of the Constitutional Court in *Eke v Parsons* [4] and the judgment Budlender AJ in *Avnet South Africa (Pty) Ltd and Lesira Manufacturing (Pty) Ltd and Sibiya.* [5]

[66] In particular, Budlender AJ raised the question as to whether an agreement of settlement can be made an order of court where there is no *lis* between the parties

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[4] 2015 ZACC 30

[5] *Avnet South Africa (Pty) Ltd v Lesira Manufacturing (Pty) Ltd And Another 2019* (4) SA 541 (GJ)

where a settlement agreement arises without prior litigation. Although obiter he doubted that it could be done. In this regard he also placed reliance on *Eke* and the misgivings expressed by Van der Linde J in the matter *National Youth Development Agency v Dual Point Consulting:*

> "The settlement agreement is sought to be made an order of court principally to have the sword of Damocles hang over the debtor's head. It seeks thus to engage the court as debt collector, and that in respect of debt collection that did not first come to this Court."[6]

The above principles relied on by the first respondent do not apply in this case where there is already a *lis* between the parties. In *Eke v Parsons* [7] where a settlement was sought to be made an order of court where the law did not underpin the settlement. In other words, the order would have resulted in the underlying cause of action not to be in accordance with the law.

> "Ordinarily a settlement order is that in the event of non-compliance the party in whose favour it operates should be in a position to enforce it through execution or contempt proceedings, the efficacy of the settlement orders cannot be limited to that. The Court may choose to be innovative in ensuring adherence to the order."[8]

[67] In *Eke vs Parsons* Madlanga J explained that:

> "a court must thus not be mechanical in its adoption of the terms of a settlement agreement. 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'. Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. On this Hodd says: "If two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to court to have that agreement made an order, merely on the ground that they preferred the agreement to be in the form of a judgment or order because in that form it provided more expeditious or effective remedies

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[6] *National Youth Development Agency v Dual Point Consulting (Pty) Ltd and Another* (06982/2016) [2016] ZAGPJHC 114 (19 May 2016

[7] *Eke v Parsons* 2016 (3) SA 37 (CC)

[8] Id para 24

against possible breaches, it seems clear that the court would not grant the application.' That is so because the agreement would be unrelated to litigation."[9]

He went on to say

"In sum, what all this means is that, even with the possibility of an additional approach to court, settlements of this nature do comport with the efficient use of judicial resources. First, the original underlying dispute is settled and becomes res judicata. Second, what litigation there may be after the settlement order will relate to non-compliance with this order, and not the original underlying dispute. Third, matters that culminate in litigation that precedes enforcement are fewer than those that don't."[10]

[68] In the view I take of this matter, there was a litigious *lis* between the parties albeit before an Expert and not this court. It is so that the Arbitration Act expressly provides for arbitral awards to be made an order of court. In this case in the absence of a statutory directive relating to Experts there is in fact a litigious *lis* pending between the applicant and the first respondent. The parties themselves envisaged possible disputes and agreed in advance to any award being made an order of Court. Even though the Expert was not sitting as a court in the strict sense of the word, she was in fact sitting in a quasi-judicial capacity if regard be had to her powers as provided for in clause 7 of the Process Agreement. These were not parties such as merchants wanting to secure their position in advance as described in *Eke vs Parsons*.

Can a final and binding award be set aside?

[69] A further way to view the award is within the context of when an expert award can be set aside. In *Transnet National Ports Authority v Reit Investments (Pty) Ltd* the following is instructive"

"This distinction serves an important purpose in review proceedings because, as Ponnan JA put it in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA) para 22:

'. . . A finding that Andrews was a valuer would not assist Lufuno and does not require a decision. Unlike an arbitrator, a valuer does not perform a *quasi-judicial* function but reaches his decision based on his own knowledge, independently or supplemented if he thinks fit by material (which need not conform to the rules of evidence) placed before him by either party.

[9] Id para 25
[10] Id para 36

> Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. . . .'
>
> Accordingly, the power of the courts to interfere with an expert's decision in review proceedings is severely circumscribed. The juridical ambit of this power was described by this Court in *Wright v Wright* [2014] ZASCA 126; 2015 (1) SA 262 (SCA) para 10 as follows:
>
> 'The position of a referee under s 19b is, as the high court correctly found, similar to that of an expert valuator who only makes factual findings but dissimilar to that of an arbitrator who fulfils a quasi-judicial function within the parameters of the Arbitration Act 42 of 1965. In this regard, the dictum of Boruchowitz J in *Perdikis v Jamieson* is apposite:[11]

[70] The first respondent in essence is asking this court to overturn a ruling of an expert. This is really in the form of an "appeal" against the decision of the Expert. It is for these reasons; the award can be made an order of court.

Conclusion

[71] The case of the first respondent fails on the interpretation of the Process Agreement and the attack on the List. As matters stand no defences were placed before the Expert. New defences were raised for the first time in this application.

[72] In this case the award was made within the context of a *lis* between the parties and the parties agreed in the Process agreement that the award could be made an order of court. In this case, the payment claim was in accordance with the Process Agreement entered into between the parties.

[73] No authority has been presented that where an agreement is properly concluded on a litigious issue that it cannot be made an order of court. Therefore, the submission that this expert award cannot be made an order of court is unsustainable. In fact, the Constitutional Court went on to describe the advantages

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[11] *Transnet National Ports Authority v Reit Investments (Pty) Ltd* [2020] ZASCA 129 (2020 JDR 2104): dictum in paras [32] – [34] applied

of settlement agreements, provided of course they comport with the law and that it does in fact reduce costs and of course saves important judicial resources.

[74] In the result I find that the counterclaim must be dismissed for the reasons that I have already referred to in detail.

[75] The order that I made is found in Prayer 1 of the notice of motion.

ORDER

1. The Counterclaim is dismissed.
2. The expert award by Ms Tootla, annexure X hereto is made an order of court.
3. The first respondent shall pay the costs of the application.

M Victor
Judge of the High Court
of South Africa

Counsel for Applicant	Adv C Eloff SC
Attorney for applicant	Meiring &Partners Inc
Counsel for First Respondent	Adv S Hassim SC Adv B Rowjee
Attorney for First Respondent	Office of the State Attorney

IN THE DISPUTE RESOLUTION ROCESS

BETWEEN

HLANO FINANCIAL SERVICES (PTY) LIMITED ("Hlano")

and

GAUTENG DEPARTMENT OF HUMAN SETTLEMENTS ("GDHS")

EXPERTS AWARD

In the above dispute resolution process (ADR), the following order is made on 29 October 2020:

1. **GDHS** is ordered to pay Hlano as follows-
   (a) the sum of R116, 729,249.90;
   (b). interest on the aforementioned sum at the mora rate of 8.75% calculated from 30 April 2020 until date of full and final payment;
   (c) All costs incidental to the ADR hearing (from date of agreed appointment of the Expert) on a party and party scale in favour of Hlano.
2. GDHS is further ordered to pay the agreed costs of the Expert in the sum of R 45 000 (fourty five thousand rand).

DATED AT MIDRAND ON THIS 29 DAY OF OCTOBER 2020

Ktootla

Khatija Tootla
(Electronically signed)
Cnr Riverside and 14 th Road,
Noordwyk, Midrand