FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no: **192**

PARTIES: EASTERN CAPE DEVELOPMENT CORPORATION v MLUNGISI JULY

REFERENCE NUMBERS –

- Registrar: **A80/07**
- Magistrate:
- Supreme Court of appeal/Constitutional Court: **HIGH COURT, TRANSKEI DIVISION**

DATE OF HEARING: **31 August 2007**
DATE DELIVERED**:** **13 September 2007**

JUDGE(S): **Kroon J, Van Zyl J, Dawood AJ**

LEGAL REPRESENTATIVES –
Appearances:

- for the State/Applicant(s)Appellant(s): **B Pienaar**
- for the accused/respondent(s): **M R Madlunga SC and T M Ntsaluba**

Instructing attorneys:

- Applicant(s)/Appellant(s): **X M Petse Inc**
- Respondent(s): **S Z Jojo Attorneys**

CASE INFORMATION –

- *Topic:*
- *Keywords:*

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSKEI DIVISION)

CASE NO: A80/07

IN THE MATTER BETWEEN:

EASTERN CAPE DEVELOPMENT CORPORATION Appellant

and

MLUNGISI JULY
Respondent

JUDGMENT

KROON J:

[1] The appellant in this matter seeks the following:

a) an order condoning the late filing of

(i) the appellant's application for a date for the hearing of the appeal;

(ii) the record on appeal, and

(iii) the appellant's heads of argument;

b) reinstatement of the lapsed appeal;

c) an order that:

(i) the appeal be upheld;

(ii) the order of the court *a quo* be set aside; and

(iii) the costs of the appeal and of the application in the court *a quo* be paid by the respondent.

[2] The appeal is against an order made by *Miller* J consequent upon an application brought by the respondent. The order directed the appellant to take all steps necessary to effect transfer of certain immovable property situate in Mthatha ("the property") to the respondent, after the latter has paid to the former all the costs payable in respect of such transfer.

[3] Pursuant to the grant of leave to appeal by *Miller* J on 19 October 2006, the appellant duly delivered a notice of appeal to the respondent on 30 October 2006 and filed it with the registrar on 31 October 2006. Thereafter, however, the appellant failed timeously to comply with certain of the prescripts relating to the prosecution of appeals, one result of which was that the appeal lapsed. Hence, the application for condonation and for reinstatement of the appeal. The application is opposed by the respondent.

[4] The relevant steps which the appellant was required to take in the

prosecution of the appeal appear from the following provisions:

(a) Within 60 days after delivery of a notice of appeal the appellant shall make written application to the registrar for a date for the hearing of the appeal; if no such application is made the appeal shall be deemed to have lapsed (Rule 49 (6) (a) of the Uniform Rules of Court ("the URC"));

(b) The court to which the appeal is made may, on the application of the appellant, and upon good cause shown, reinstate an appeal which has lapsed (Rule 49 (6) (b) of the URC);

(c) A party seeking a date for the hearing of a Full Bench appeal shall, before lodging its request for a date:

(i) file heads of argument, and

(ii) paginate and index the record

(Transkei Division Rule of Court G9);

(d) When applying for a date for the hearing of an appeal in terms of subrule (6) (a) the appellant shall file with the registrar three copies of the record on appeal and furnish two copies to the respondent (Rule 49 (7) (a) of the URC).

[5] Initially, the relief sought by the appellant in its notice of motion was condonation of its late filing of the record on appeal and the appellant's heads of argument. A further supporting affidavit by the appellant's attorney filed at a later stage referred to the late filing of the appellant's application to the registrar for a date for the hearing of the appeal (he referred to an incorrect date by which this should have been done, as to which see below), and the consequent lapsing of the appeal, and he recorded a request that the late filing be condoned and the appeal reinstated (impliedly requesting an amendment of the notice of motion). (A stance subsequently adopted by the appellant in its papers that only condonation of the late filing of the heads of argument was necessary was correctly not persisted in). At the hearing the appellant sought, and was granted, leave to amend its notice of motion to reflect the relief set out in para [1] above.

[6] (a) Annexed to the appellant's founding papers was a letter dated 22 February 2007 addressed by the appellant's attorneys to the respondent's attorneys. Therein it was recorded that at a meeting between them on that day the attorneys had been in agreement that the following day, 23 February 2007, was the last day for the appellant's attorneys "to file our records". It would appear that that view proceeded on the basis that the closed period, 16 December to 15 January, referred to in Rule 19 of the URC, fell to be excluded when the 60 day period referred to in para [4] (a) above was calculated.

(b) That view was wrong. Rule 19 is concerned with the period within which a notice of intention to defend action proceedings (defined in Rule 1 as proceedings commenced by summons) is to be filed and delivered by the defendant, and it is in that regard that the closed period is to be excluded in the computation of the *dies induciae*. The exclusion of the closed period is not applicable to the time periods fixed in Rule 47.

(c) Accordingly, the 60 day period in question in fact expired on 24 January 2007, and it was by that date that the appellant was required to apply for a date for the hearing of the appeal (para [4] (a) above), and file and deliver the copies of the appeal record (para [4] (d) above) and its heads of argument (para (4) (c) above).

[7] (a) On 29 January 2007 the appellant's East London attorneys sent an index to the appeal record to the respondent's attorneys and requested that they "agree to its contents".

(b) The response, dated 31 January 2007, advised the appellant's attorneys that no indulgence in respect of compliance with the prescribed time periods would be granted.

(c) In reply, dated 6 February 2007, the said East London attorneys

noted that attitude, but recorded that they were unable to finalise the record on appeal without the respondent's attorneys agreeing to its contents, and the latter's instructions thereanent were sought as a matter of urgency.

d) The rejoinder, dated 19 February 2007, queried the request that the respondent's attorneys should agree to the record, but nevertheless intimated the understanding of those attorneys of what should be contained in the record.

e) The letter of 22 February 2007 (para [5] (a) above) further recorded, *inter alia*:

(i) that it had been conveyed to the respondent's attorneys that the appellant's counsel was engaged in a lengthy criminal trial in Cape Town and that the appellant's attorneys were accordingly not in a position to file heads of argument together with the application for an appeal date, that a request for an extension of time for the filing of the heads had been refused and that an application for condonation in respect of the late filing of the heads would be launched.

(ii) That the respective attorneys had considered "the indexed, paginated and bundle of record" and had agreed that same was in

order.

[8] (a) On 22 February 2007 the appellant's attorneys filed a written application with the registrar for a date for the hearing of the appeal and a copy thereof was delivered to the respondent's attorneys on 23 February 2007.

(b) The appellant's heads of argument and the application for condonation were filed on 3 May 2007 and delivered on 4 May 2007.

(c) The appellant's papers reflect that for some considerable period its attorneys (both the East London as well as the Mthatha attorneys) laboured under the inexplicable impression that copies of the indexed and paginated record on appeal had not been filed *pari passu* with the application for a date for the hearing of the appeal and that that had occurred only when the heads of argument were filed; indeed, the appellant's papers sought to proffer an explanation therefor (part of which was that it had been necessary to consult with counsel for the purposes of settling the appeal record) and condonation thereof was sought. Further, in a late supplementary affidavit by Mr Junju, the appellant's Mthatha attorney, it was recorded that, because the appeal record and the appellant's heads of argument had not been ready, he had not been able timeously to file an application for a date for hearing of the appeal (he had in mind that the cut-off date was 23 February 2007) and he had only done so on

receipt of the appellant's heads of argument. On the premise that the appeal had accordingly lapsed (i.e. on 23 February 2007) he sought condonation of the appellant's infraction of the applicable time prescript and reinstatement of the appeal (impliedly requesting that the notice of motion be amended accordingly). In fact, as recorded earlier, the application for a date for the hearing of the appeal had been made on 22 February 2007, and, further, it subsequently transpired that in fact the copies of the indexed and paginated record on appeal (albeit with certain defects) had accompanied that application. The final papers of the appellant accordingly adopted the stance that no application for reinstatement of the appeal was necessary and that the only condonation that was required was for the late filing of the heads of argument. As recorded earlier, that stance was not persisted in.

[8] (a) On 17 March 2007 the respondent launched application proceedings in which, in effect, he sought an order directing the appellant and its Chief Executive Officer to implement the order of *Miller* J that the property be transferred to him.

(b) The cause of action relied upon was a failure on the part of the appellant properly to prosecute the appeal it had noted, the consequent lapsing of the appeal and the absence of any application for reinstatement thereof.

(c) That application did not specify what omission on the part of the appellant in respect of the prosecution of the appeal had resulted in same lapsing, other than an unelucidated reference to the period of 60 days from the date of the filing of the notice of appeal having elapsed.

(d) However, in the respondent's answering affidavit in the present proceedings (in which the papers in the application referred to above were incorporated) the stance was adopted that the appeal had lapsed on 23 February 2007, apparently by reason thereof that the record on appeal had not been filed and delivered.

[9] (a) At the hearing of the appeal it was accepted that in fact the appeal had lapsed on 24 January 2007 by reason of the failure on the part of the appellant to apply by that date for a date for the hearing of the appeal and that the other steps referred to in para [4] had also been required to be taken by that date.

(b) Mr *Pienaar*, for the appellant, was accordingly obliged to seek an amendment of the notice of motion to reflect the relief set out in para [1] above (such relief relating to the appellant's failure to take the required steps by 24 January 2007). He stated that in support of the grant of the relief he would still be relying on what was alleged in the appellant's papers as being the explanation

for the appellant's non-compliance with the Rules, but that in addition he would request the court to accept that it was to be inferred from the papers that the earlier reliance by the appellant's attorneys on the date of 23 February 2007, instead of 24 January 2007 (their mistaken view having also been shared by the respondent's camp), was to be attributed to a misreading of the provisions of Rule 19.

Mr *Madlanga* (with Mr *Ntsaluba*, for the respondent) did not offer any objection and the amendment to the notice of motion was granted.

[10] (a) The grant of condonation rests in the judicial discretion of the court, to be exercised with regard to all the circumstances of the case. In *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720 E-G the following passage appears:

> ''It is well settled that, in considering applications for condonation, the court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."

b) Condonation of non-observance of the Rules is by no means a mere formality: it is for the applicant to satisfy the court that there is sufficient cause for excusing him from non-compliance. Erasmus, *Superior Court Practice*, at B-360 and the authorities there cited.

c) Although the court is loath to penalise a blameless litigant on account of his attorney's negligence, it has been pointed out that:

"There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be an invitation to laxity……..The attorney, after all, is the representative whom the litigant has chosen for himself".

(*Saloojee & Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141 C

Erasmus, at B1-362, adds the following comment:

‘‘It is undesirable to attempt to frame a comprehensive test as to the effect of an attorney’s negligence on his client’s prospects of obtaining relief or to lay down that a certain degree of negligence will debar the client and another degree will not. Since negligence on the part of the attorney is not an individually decisive factor but must be weighed against all the other factors operative in a particular case, it is preferable to say that the court will consider all the circumstances of the particular case.

By way of broad generalisation it can be said that relief will be granted where the attorney’s default was due to a *bona fide* error or misunderstanding. Ignorance of the rules of court and of procedure is generally not a sufficient ground for relief, and in those cases on appeal in which condonation was granted by reason of the applicant’s sound prospects of success, practitioners have been warned that they are not entitled to proceed on the assumption that the court will in all cases condone failure to have proper regard to the rules…….. Obviously no relief will be granted where the default was not satisfactorily explained, or not explained at all”.

d) Other considerations discussed by Erasmus, at B1-362 *et seq*, are the prospects of success on the merits, the importance of the case, absence of prejudice, the respondent’s interest in the finality of his judgment and a variety of other factors. I do not consider it necessary to deal with these further considerations in any detail in this judgment.

[11] In my judgment, the explanation offered in the appellant's papers for the non-compliance with the Rules is lamentably lacking in cogency, both as regards the various factors relied upon viewed individually and, more important, in their cumulative effect.

[12] The first aspect invoked, already referred to above, was the misreading of the provisions of Rule 19 by the appellant's attorneys. While this factor is not in itself as serious as the other criticisms to be levelled at the conduct of the attorneys, it remains a cogent criticism. It behoves attorneys who practise in the High Court to ensure that they are *au fait* with the provisions of the Rules bearing upon the matter in hand. It requires to be mentioned, too, that the failure of the attorneys in this regard contributed to the other infractions which are at issue.

[13] (a) The second aspect relates to the preparation of the record on appeal.

(b) The record consists of only 75 pages comprising the judgment of *Miller* J, the application for leave to appeal, the judgment of *Miller* J granting leave to appeal, the appellant's notice of appeal, and the papers filed in the application before *Miller* J. What is to be emphasised is that there was no oral evidence that required to be transcribed. The preparation of the record was a

simple matter.

(c) I fail to understand why it was necessary for the appellant's attorneys either to seek the views of the respondent's attorneys as to what should be included in the record or to consult with counsel for the purpose of settling the record.

(d) A further explanation apparently relied upon by the appellant's East London attorney (who assumed the responsibility of preparing the record) was that he was "extremely busy during this period", an averment he saw fit not to elucidate at all. Suffice it to say that this averment offers scant excuse, if at all, for his failure to cause the record to be prepared timeously.

[14] (a) The final aspect is the failure to file the heads of argument timeously. As recorded earlier, this was attended to only on 3 May 2007.

(b) The appellant's East London attorney, who also undertook to attend to briefing counsel in this regard, records that he only approached counsel on 16 February 2007, i.e. one week before, as he then thought, the date by which the heads of argument were required to be filed. Leaving aside the effect of the attorney's misreading of the provisions of Rule 19 (read with the definition of "action" in Rule 1), the only explanation proffered why counsel was approached, at

the eleventh hour as it were, was again the unelucidated one that he had been extremely busy. It need hardly be stated that the attorney's lackadaisical conduct in attending to what was in essence an easy step, is deserving of severe censure.

(c) Upon his briefing counsel he learnt that the latter was already engaged in a lengthy criminal case in the Cape Town High Court, which was anticipated to continue for a considerable period. (As it is, counsel remained engaged in that matter for approximately a month thereafter). The obvious course dictated in the circumstances was to have engaged the services of other counsel. The fact that Mr *Pienaar* had been the counsel who appeared for the appellant in the proceedings before *Miller* J (and even if, as the attorney averred, he is a specialist in matters such as the present) is again scant excuse, if any, for the failure to engage other counsel to ensure the expeditious filing of the heads.

(d) The already existing non-compliance with the Rules was then compounded by the delay thereafter in the drafting of the heads. The attorney records that after counsel had ceased his commitment in Cape Town he, too, was extremely busy in attending to other work that had accumulated in his chambers in the interim and, secondly, the preparation of the heads required counsel to undertake a great deal of time consuming research. Suffice it to say that it is unacceptable that the already late preparation of the heads was the

subject of a still further substantial delay until 3 May 2007.

(e) Even accepting, as was contended, that the respondent was not prejudiced by the delays referred to above, that factor does not serve to ameliorate the seriousness of the non-compliance of which the appellant's camp was guilty.

[15] Mr *Pienaar*'s final counter was that whatever the seriousness of the degree of non-compliance with the provisions of the Rules and of the inadequacy of the explanation therefor, same was outweighed by what he contended were the good prospects of success on the merits of the appeal. I now address that issue.

[16] The salient facts may be stated as follows:

(a) During 1995 the respondent and the Transkei Development Corporation ("the TDC", the predecessor in law of the appellant) concluded a written agreement of sale which provided for the transfer of the property to the respondent;

(b) Transfer was, in terms of clause 4, to be effected by the TDC's conveyancers within a reasonable time after the respondent had effected

payment of the purchase price and the costs of transfer;

(c) At the time the agreement was concluded the respondent was already in possession of the property, and since then has remained so;

(d) In terms of clause 7, read with clause 1.7, the respondent was liable to pay to the TDC occupational rental in a stated monthly sum up to the date of registration of transfer;

(e) Because of certain difficulties encountered by the appellant it was, for a considerable period, unable to pass transfer to the respondent, and only became so able when it itself had obtained registration of the property in its name during May 2003;

(f) In March 2005 the respondent learnt that such registration had taken place and he made, and the appellant accepted, payment of the full purchase price payable for the property;

(g) The appellant, however, refused to transfer the property into the name of the respondent, on the grounds that the respondent was in arrears with his payment of occupational rental, he having failed to effect same for a considerable period. The extent of the arrears, and the circumstances under

which they arose, are in dispute, but that the respondent is in fact in arrears, and that he thereby is in material breach of the contract, is not in dispute. (The appellant has not, however, cancelled the contract by reason of that breach).

(h) In his papers the respondent records his willingness and ability to pay the transfer costs; in effect, a tender to pay same.

[17] In this Court, as in the Court *a quo*, the appellant invoked the *exceptio non adimpleti contractus* and the principle reflected by the maxim *pacta sunt servanda*, reliance being placed on the fact that the respondent was in arrears with his payment of occupational rental and had made no tender in respect thereof.

[18] In *Anastasopoulos v Gelderblom* 1970 (2) SA 631 (N) at 636 the Full Bench, sitting on appeal against a judgment of *Fannin* J, approved, *inter alia*, of the following passage in the latter's judgment:

> "It seems well-established, too, that this defence is not available where the obligation, said by the party raising the defence not to have been performed, is not yet due to be performed by the other party. *De Wet & Yeats*, *op. cit.* at p. 139, say –
>
> "Die sogenaamde *exceptio non adimpleti contractus* help die verweerder slegs waar die prestasies van weerskante gelyktydig moet plaasvind

of die eiser voor die verweerder moet presteer",

that is to say, the obligations of the parties, the subject of the litigation, must be not merely mutual, but must be such that, when the defence is raised, both are due to be performed. (Cf. *S.A. Crushers (Pty) Ltd. V. Ramdass,* 1951 (2) S.A. 543 (N) at p. 546; *Kamaludin v. Gihwala,* 1956 (2) S.A. 323 (C) at p. 326; *Kameel Tin Co. (Pty.) Ltd. V. Brollomar Tin Exploration Ltd.,* 1928 T.P.D. 726). There is a further limitation upon the availability of this defence. There must be a relationship ('n verband) between the performances due from each of the two parties that is where

"…..partye onderneem om te presteer in ruil vir betrokke teenprestasies". See *Myburgh v. Central Motor Works,* 1968 (4) S.A. 864 (T); *de Wet and Yeats, op. cit.,* p. 138; *Arnold v. Viljoen,* 1954 (3) S.A. 322 (C) at pp. 331-2."

[19] In *Valasek v Consolidated Frame Cotton Corporation Ltd* 1983 (1) SA 694 (N) *Didcott* J (with whom *Kriek* J agreed) is reported as follows:

at 697C-F:

''None of this (i.e. the particular breach committed by the plaintiff) has any bearing, however, on the issue whether the plaintiff's claim was hit by the *exceptio non adimpleti contractus*. The defence depends not on the dimensions or materiality of the obligation the claimant is said to have shirked, but solely on its reciprocity with the right he seeks to enforce. The rule was put thus by MILNE J in *U-Drive*

Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd and Another 1976 (1) SA 137 (D) (at 149D):

"Where a plaintiff sues to enforce performance of an obligation which is conditional upon performance by himself of a reciprocal obligation owed to the defendant, then the performance by him of this latter obligation is a necessary prerequisite to his right to sue, and the defendant may in such a case raise the defence known as the *exceptio non adimpleti contractus*."

And FAGAN J stressed the element of reciprocity in *National Screenprint (Pty) Ltd v The Campbell-Scott Company (Pty)) Ltd* 1979 (4) SA 393 (C) by saying (at 396H):

> "A basic requirement of the exception is that the obligations are reciprocal in the sense that the performance of the one is conditional upon performance of the other."

at 698G-H:

> ‘‘The point had to do with the meaning of reciprocity, for the purposes of the *exceptio non adimpleti contractus* at all events. It was simply this. The obligation which the claimant has to perform is not reciprocal to the one he seeks to enforce unless his obligation falls due for performance prior to or simultaneously with the other. De Wet and Yeats put this succinctly in their *Kontraktereg en Handelsreg* 4th ed when they wrote (at 178):
>
> ‘‘Die sogenaamde *exceptio non adimpleti contractus* help die verweerder slegs waar die prestasies van weerskante gelyktydig moet plaasvind of die eiser voor die verweerder moet presteer."

> The previous edition of the work contained the identical passage, which FANNIN J quoted with approval a dozen or more years ago. His agreement with it was endorsed in turn by the Full Bench of this Division when it dismissed an appeal against his judgment. The case was *Anastasopoulos v Gelderblom* 1970 (2) SA 631 (N) (at 636C and G-H).

[20] In *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 809 D-E *Corbett* J (as he then was) stated the following:

> "For reciprocity to exist there must be such a relationship between the obligation to be performed by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other and, in cases where the obligations are not consecutive, *vice versa* (see de Wet and Yeats, *Kontraktereg*, p. 138; *Myburgh v Central Motor Works*, 1968 (4) SA 864 (T) at p. 865; *Anastasopoulos v Gelderblom*, 1970 (2) SA 631 (N) at p. 636)."

See, too, *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (C) at 322.

[21] The issue was the subject of a further Full Bench decision (which dealt specifically with the question whether the obligation to pay occupational rental was reciprocal to the obligation to give transfer), viz., *Dawnford Investments CC and Another v Schuurman* 1994 (2) SA 412 (N). At 418A-G the following

passage appears:

> "The *exceptio* can only be invoked when one party breaches an obligation which is reciprocal to the obligation from the performance of which the innocent party claims to be excused. (*Anastasopoulos v Gelderblom* 1970 (2) SA 631 (N) at 635 in fine - 636G and *Valasek v Consolidated Frame Cotton Corporation Ltd* 1983 (1) SA 694 (N) at 698G-H.)

Obligations can only be described as being reciprocal if one was undertaken in exchange for the other. (*Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 809C-E.) De Wet and Yeats (*op cit* at 186) put it as follows when referring to the requirement of reciprocity:

> 'Die verweerder sal hom dus nie op hierdie verweer kan beroep nie waar hierdie verband nie tussen sy verpligting en dié van die eiser bestaan nie, selfs al bestaan daar 'n ander noue verband tussen die twee verpligtings.'

In his heads of argument Mr Singh made the following points:
'The obligation to pay occupational interest was inextricably related to the obligation to effect transfer in at least the following respects:
(a) the amount of occupational interest depended upon the period before transfer was effected;
(b) the date on which the remaining half of the occupational interest would be paid depended upon the date of transfer;

> (c) the provision for interest should the purchaser be in *mora* also depended on the date on which transfer could be effected.'

> At the hearing of the appeal Mr Singh, however, was hard put to argue that the facts set out in his heads of argument render the obligation to pay occupational interest reciprocal to the obligation to give transfer of the immovable properties. In my view they are not reciprocal, despite the fact that there is a close link ('noue verband') between them. To me it seems clear that the obligation to pay occupational interest is reciprocal to the obligation to give 'vacant occupation and possession' of the properties which were sold."

[22] Finally, reference may be had to the judgment in *Thompson v Scholtz* 1999 (1) SA 232 (SCA) where the following two passages appear:

at 238C-D:

> ‘‘The defendant's defence was the so-called *exceptio non adimpleti contractus* ('the *exceptio*'). It is a defence entitling a party from whom performance is demanded to withhold it until the party demanding performance has rendered or tendered his own performance; it arises where performance and counter-performance are contractually dovetailed and the party demanding performance is to render his own performance either in advance of or in conjunction with performance from the other side.”

at 238G:

> ‘‘Occupational interest is the return which the seller of immovable property earns by permitting his purchaser, pending payment, to occupy the property sold (cf *Sidali v Mpolongwana* 1990 (4) SA 212 (C) at 216E; Dawnford *Investments CC and Another v Schuurman* 1994 (2) SA 412 (N) at 418F--G). Clearly there is, in such a case, reciprocity between the seller's obligation to give occupation and the purchaser's obligation to pay occupational interest.”

[23] *Miller* J had regard to all the above authorities, considered that they were decisive as to the legal approach to be adopted, and, applying same to the facts

before him, concluded that the appellant's reliance on the *exceptio* was ill-conceived.

[24] It was counsel's submission that *Dawnford* was distinguishable from the present matter in that *Dawnford* concerned an application by the seller of property for the eviction of the purchaser therefrom by reason of the latter's failure to pay occupational rental and, *inter alia,* the defence that transfer of the property had not been tendered, and it was in that context that it was held that the obligations to effect transfer and to pay rental were not reciprocal. The different context of the present matter (if in fact there is any cognizable distinction) does not, however, affect the applicability of the legal principle involved, which is in fact operative in both contexts.

[25] Counsel further referred to the decisions in *Motor Racing Enterprises (Pty) Ltd (In Liquidation) v NPS (Electronics) Ltd* 1996 (4) SA 950 (A) (and specifically the passage at 961E - 962A) and *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 (3) SA 60 (TkSC). Suffice it to say that neither decision is authority for the proposition that payment of occupational rental is a reciprocal obligation to the obligation to pass transfer.

[26] In my judgment, the conclusion reached by *Miller* J and the reasoning supporting it are unassailable.

[27] His further comment that the grant of the order sought by the respondent (the effect of which is set out in para [1] above) would not deprive the appellant of its remedy to claim payment of the arrears which it alleged the respondent owed, with which I agree, disposes of the reliance on the *pacta sunt servanda* principle.

[28] As before *Miller* J, Mr *Pienaar* added a further string to his bow. It was to the effect that what the respondent had sought before *Miller* J was an order for specific performance; the grant thereof was in the discretion of the court; in the circumstances obtaining, specifically the non-payment by the respondent of the arrear rental and the absence of a tender thereof, that discretion should not have been exercised by *Miller* J in favour of the respondent.

[29] In the view of *Miller* J, however, in the light of the fact, already adverted to, that the grant of the order sought would not deprive the appellant of its remedy to claim payment of the arrears from the respondent (a remedy, *Miller* J further commented, the appellant had inexplicably not previously sought to enforce) the grant of the order would not be inequitable or work an injustice.

[30] Had this court been called upon to decide this issue I would have been inclined to the view that the contention that *Miller* J had not exercised his

discretion judicially, fell to be rejected. I am satisfied, however, that the issue was not properly raised during the argument on the appeal. While both the application for leave to appeal and the notice of appeal reflected that the appeal related to the "whole of the judgment and order" of *Miller* J, and both the application for leave to appeal and the notice of appeal raised as a ground of appeal the contention that the learned judge erred "in not finding that the applicant's conduct was in conflict with the *pacta sunt servanda* principle" (one of the bases invoked during argument for the contention that specific performance ought not to have been granted), neither document raised as a ground of appeal the contention that *Miller* J, in granting the order sought, had not exercised a judicial discretion in according the respondent relief in the form of specific performance, nor did *Miller* J deal with any such contention in his judgment granting leave to appeal.

[31] The appellant's prospects of success on the merits accordingly do not assist it in the application for condonation and reinstatement of the appeal; on the contrary, they are decisive in favour of the respondent.

[32] The following order will accordingly issue:

a) The application for condonation and reinstatement of the appeal is dismissed with costs;

b) The appellant is ordered to pay the respondent's costs of appeal;

c) The costs referred to in (a) and (b) will include the costs of two counsel.

_____
F. KROON

JUDGE OF THE HIGH COURT

D VAN ZYL

I agree

_____
VAN ZYL, J

JUDGE OF THE HIGH COURT

F. DAWOOD

I agree

_____

DAWOOD, AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 31 August 2007

Date of judgment: 13 September 2007

For Applicant / Appellant: B Pienaar instructed by X M Petse Inc

For Respondent: M R Madlunga SC and T M Ntsaluba instructed by S Z Jojo Attorneys