



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

**Not reportable**

Case no: 1553/2024

In the matter between:

**CLOSE TRADE 200074 CC t/a ILCOR ENGINEERING SERVICES**                      **APPELLANT**

and

**CROSSMOOR TRANSPORT (PTY) LTD**                                              **RESPONDENT**

**Neutral Citation:**    *Close Trade 200074 CC t/a Ilcor Engineering Services v Crossmoor Transport (Pty) Ltd* (Case no 1553/2024) [2026] ZASCA 134 (5 October 2026)

**Coram:**                      SCHIPPERS, MBATHA, MEYER, MATOJANE and WINDELL JJA

**Heard:**                      27 August 2026

**Delivered:**                5 October 2026

**Summary:**                Contract – interpretation – payment and security provisions – deposit or guarantee required before commencement of manufacture – payment provisions did not render agreements unenforceable where manufacturer proceeded without first obtaining security – payment provisions not suspensive conditions – storage costs recoverable as contractual damages – failure to mitigate not established – appeal upheld.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Jordaan AJ with Twala J concurring and Vally J dissenting), sitting as court of appeal:

- 1 The appeal is upheld with costs.
- 2 The order of the Full Court is set aside and replaced with the following:  
'The appeal is dismissed with costs.'

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## JUDGMENT

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**Windell JA (Schippers, Mbatha, Meyer and Matojane JJA concurring):**

### Introduction

[1] This is an appeal against an order by the Full Court (Jordaan AJ and Twala J concurring, Vally J dissenting) of the Gauteng Division of the High Court, Johannesburg (the high court). The Full Court upheld the respondent's appeal against an order of the trial court (Modiba J), in terms of which the respondent was ordered to pay the appellant damages for breach of contract, interest and costs, relating to the manufacturing and storage of trailers. The appeal is with the special leave of this Court.

[2] The appellant, Close Trade 200074 CC t/a Ilcor Engineering Services (Ilcor), manufactures specialised trailers. For many years it had an established business relationship with the respondent, Crossmoor Transport (Pty) Ltd (Crossmoor). During June 2017, the parties concluded two written agreements in terms of which Crossmoor ordered three trailers from Ilcor: two four-axle trailers and one five-axle trailer.

[3] In April 2018, Ilcor instituted action against Crossmoor for damages arising from the alleged repudiation of the agreements. Ilcor had completed both four-axle trailers, but Crossmoor failed to pay for and take delivery of them. Ilcor had also commenced manufacturing the five-axle trailer but ceased production after Crossmoor failed to pay the 50 per cent deposit agreed between the parties. Ilcor treated Crossmoor's failure to

perform under the agreements as a repudiation, which it accepted. Before instituting the action, Ilcor sold one of the completed four-axle trailers in mitigation of its damages.

[4] The action comprised two claims. Claim A related to the remaining four-axle trailer. Ilcor claimed R997 500, its agreed purchase price of R875 000 plus VAT, together with storage costs of R22 500 per month from the date delivery was tendered. Claim B related to the five-axle trailer. Ilcor claimed the costs incurred up to the cessation of manufacture together with loss of profit, calculated at 35 per cent of the projected cost price of a completed trailer, amounting in total to R 4 447 037.36. It also claimed storage costs of R45 000 per month from the date manufacture ceased.

[5] Crossmoor disputed liability. Its primary contention was that, in terms of the agreements, Ilcor was not entitled to commence with manufacturing the trailer until the stipulated deposit had been paid or a bank guarantee furnished and that the agreements were therefore not enforceable by Ilcor. In the alternative, it pleaded that the deposit or guarantee requirements constituted suspensive conditions. As those conditions had not been fulfilled, the agreements had lapsed.

[6] By the time the matter came before the trial court as a certified commercial court matter, the remaining four-axle trailer had also been sold. Claim A was accordingly reduced to R45 000, being the shortfall between the agreed purchase price of R875 000, excluding VAT, and the R830 000 realised on the sale, together with the storage costs claimed. Claim B remained unchanged at R4 447 037.36, together with storage costs of R45 000 per month.

[7] In accordance with the Commercial Court Practice Directive, Ilcor delivered an expert witness statement by Mr Sanvir Ramkissoo (Mr Ramkissoo), an expert in the manufacture of specialised trailers and the commercial rates applicable to their storage; and a factual and expert witness statement from Mr Trevor Lex Flynn (Mr Flynn), a director of Ilcor. Both testified at the trial. Crossmoor did not deliver any witness statements and led no evidence. It merely cross-examined Ilcor's witnesses, excepted to

aspects of Ilcor's claims, and objected to evidence which it contended fell outside the pleadings.

[8] The trial court dismissed the exception and objections and found for Ilcor. It held that both agreements were enforceable and that Crossmoor's failure to perform amounted to a repudiation which Ilcor was entitled to accept. In relation to the five-axle agreement, it held that payment of the deposit constituted a suspensive condition, but that Ilcor had waived it. The trial court granted judgment in favour of Ilcor in the amount of R45 000 under Claim A, together with storage costs of R22 500 per month from 20 November 2017 until the remaining four-axle trailer was sold. Under Claim B, it awarded R4 447 037.36, together with storage costs of R45 000 per month from 12 April 2018 until the date of judgment. It refused leave to appeal. This Court granted leave to appeal to a Full Court of the high court, on petition.

[9] The Full Court held that payment of the stipulated deposit or furnishing a guarantee before the manufacture of the trailers constituted suspensive conditions. As neither had occurred and there had been no waiver, the agreements never came into effect. The appeal was accordingly upheld and Ilcor's claims dismissed.

### **Interpretation of the agreements**

[10] The principal issue is the proper interpretation of the payment provisions in the two agreements. The question is whether, as Crossmoor contends, those provisions precluded Ilcor from commencing manufacture until the stipulated deposit had been paid or a bank guarantee furnished and, alternatively, whether they constituted suspensive conditions upon which the operation of the agreements depended.

[11] The payment provisions in the two agreements are materially the same, save that the deposit specified in the four-axle agreement was 30 per cent of the purchase price and that specified in the five-axle agreement was 50 per cent. They provide:

'PAYMENT

PAYMENT TERMS ARE TO BE DISCUSSED & ACCEPTED BY BOTH PARTIES PRIOR TO COMMENCEMENT OF MANUFACTURE.

A DEPOSIT OF 30% OF THE PURCHASE PRICE IS PAYABLE PRIOR TO COMMENCEMENT OF MANUFACTURE IN THE EVENT OF THE UNIT NOT BEING FINANCED BY A SOUTH AFRICAN FINANCIAL INSTITUTION.

IN THE EVENT OF THE UNIT BEING FINANCED BY A FINANCIAL INSTITUTION, WE WILL REQUIRE GUARANTEES FROM THE INSTITUTE IN QUESTION.

Method of payment: Cash on Delivery'

[12] Interpretation is a unitary exercise.<sup>1</sup> The starting point is the language of the agreements, read in context and having regard to the purpose of the provisions. The words used must be considered in the light of all relevant and admissible context, including the circumstances in which the agreement came into existence.<sup>2</sup>

[13] The subsequent conduct of the parties in implementing an agreement may also be relevant to its interpretation. In *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited*,<sup>3</sup> this Court held that where the parties have adopted the same approach to the implementation of their agreement, their conduct may provide evidence of how reasonable business people in their position would have construed the disputed provision. Such conduct cannot, however, be used to give the language of the agreement a meaning which it cannot reasonably bear.<sup>4</sup>

[14] The payment provisions, read together, contemplate two methods of financing the purchase of a trailer. Where the purchase price was not financed by a South African financial institution, a deposit of 30 per cent or 50 per cent, as the case may be, was

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<sup>1</sup> *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 12.

<sup>2</sup> *Capitec Bank Holdings Ltd 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) (*Capitec Bank*) para 25; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

<sup>3</sup> *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited* (759/2011) [2012] ZASCA 126 (21 September 2012) (*Comwezi*); see also *Capitec Bank* paras 35, 48 and 54 and *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC). In addressing these principles, counsel for Ilcor relied in his heads of argument on a passage attributed to *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA) para 39. The passage does not appear in that judgment in the form quoted. Counsel must ensure that quotations attributed to judgments are accurate and properly sourced.

<sup>4</sup> *Comwezi* para 15.

payable before manufacture commenced. Where a financial institution financed the purchase, Ilcor required a guarantee from that institution. In either case, the purpose was to provide Ilcor with security before it commenced manufacturing the trailers.

[15] Seen in that context, the requirement that security be provided before manufacture commenced was for Ilcor's protection. It entitled Ilcor not to commence manufacture until the required deposit had been paid or a guarantee furnished. It did not, however, preclude Ilcor from proceeding with manufacture without first insisting upon that security. Nothing in the agreements provides that, if Ilcor did so, the agreements would become unenforceable. Crossmoor's primary contention cannot be sustained.

[16] That leaves Crossmoor's alternative contention that payment of the deposit or the furnishing of a guarantee constituted suspensive conditions upon which the operation of the agreements depended. *Southern Era Resources Ltd v Farndell NO*<sup>5</sup> illustrates the distinction between such a condition and a contractual obligation. In that case, this Court rejected the proposition that an obligation to furnish a guarantee, without more, constituted a suspensive condition. Once the relevant condition in that agreement had been fulfilled, the purchaser became bound to furnish the guarantee within the stipulated period. The obligation to furnish the guarantee was an enforceable term of the agreement. The fact that the agreement also protected the seller from parting with its rights until the guarantee had been furnished did not alter the character of that obligation.<sup>6</sup>

[17] Similarly, the language of the agreements in the present matter does not make payment of the deposit or the furnishing of a guarantee a condition upon which the agreements would come into effect. Rather, the provisions regulate the parties' obligations concerning payment and the provision of security under agreements already concluded. The final provision, that the method of payment was '[c]ash on [d]elivery', supports this interpretation.

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<sup>5</sup> *Southern Era Resources Ltd v Farndell NO* [2009] ZASCA 150; [2010] 2 All SA 350 (SCA); 2010 (4) SA 200 (SCA).

<sup>6</sup> *Ibid* paras 14 and 16.

[18] That construction is also supported by the absence of language ordinarily associated with a suspensive condition. Neither agreement states that it is 'subject to' payment of the deposit or the furnishing of a guarantee. In *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd*,<sup>7</sup> this Court observed that, in a contractual setting, the phrase 'subject to' usually creates a suspensive condition. The absence of that phrase is not decisive. It is, however, significant in the present agreements because no language indicates that their operation was to be suspended pending payment of the deposit or the furnishing of a guarantee.

[19] The parties had an established business relationship. Mr Flynn's uncontested evidence was that on previous occasions, Crossmoor had not paid the required deposit before manufacture commenced. Ilcor had nevertheless proceeded with manufacture, and Crossmoor had paid for the trailers in full upon completion.

[20] The present agreements were implemented on the same basis. In respect of the four-axle trailers, Crossmoor had indicated that the purchase would be financed through Standard Bank of South Africa Ltd. The deposit requirement did not apply; instead, Crossmoor was required to furnish a guarantee. No guarantee was furnished, yet Ilcor proceeded with manufacture with Crossmoor's knowledge. Crossmoor did not object to the commencement of manufacture on that basis or suggest that the agreements were not yet operative.

[21] In respect of the five-axle trailer, the parties ultimately agreed that the applicable security would be the 50 per cent deposit. Mr Flynn and Mr Ashton Naicker (Mr Naicker), who represented Crossmoor in its dealings with Ilcor, reached that agreement in October 2017, and Mr Flynn confirmed it in an email to Mr Naicker on 17 October 2017. Ilcor nevertheless proceeded with manufacture without receiving the deposit. Again, Crossmoor knew that manufacture had commenced but did not object nor require Ilcor to cease manufacture. On Mr Flynn's uncontested evidence, Crossmoor instead urged him to complete the trailers.

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<sup>7</sup> *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA); [2005] ZASCA 95 para 5, with reference to *Badenhorst v Van Rensburg* 1986 (3) SA 769 (A) at 777H-778A.

[22] Crossmoor's subsequent conduct also indicates that it regarded the agreements as operative. After the two four-axle trailers had been completed, Mr Flynn delivered the invoices and registration documents to Crossmoor. At a meeting with Crossmoor's representatives, it was agreed that the two completed four-axle trailers would be paid for in full and that a deposit would be paid for the five-axle trailer.

[23] This is confirmed in Crossmoor's later communications with Mr Flynn. In June 2018, Mr Naicker enquired about the two trailers remaining at Ilcor's premises and the storage charges. When Mr Flynn asked whether Crossmoor wished to settle the entire matter, Mr Naicker confirmed that Crossmoor wanted the trailers, apologised and explained that it had experienced cash-flow difficulties. There is nothing in these communications to suggest that Crossmoor regarded the agreements as having lapsed because the required security had not been provided before manufacture commenced.

[24] The majority of the Full Court took a different view. It regarded the provisions concerning the deposit and guarantee as forming a unitary payment mechanism and held that whichever method of financing was adopted, the relevant security had to be furnished before manufacture could commence. It accordingly concluded that payment of the deposit or furnishing of a guarantee constituted suspensive conditions and that because neither occurred, the agreements never came into effect.

[25] The majority's conclusion conflates the requirement that security be furnished before manufacture commenced with a condition upon which the operation of the agreements depended. A requirement as to when security had to be furnished did not, without more, make the furnishing of that security a condition for the agreements to come into effect. As explained above, the payment provisions entitled Ilcor to insist upon security before commencing manufacture. They did not provide that the agreements would not come into effect, or would lapse, if Ilcor proceeded without first receiving that security.

[26] The payment and security provisions were therefore not suspensive conditions. Nor did Ilcor's decision to proceed without first obtaining security render the agreements unenforceable. It is consequently unnecessary to consider whether any suspensive condition was waived. The Full Court erred in holding that the agreements never came into effect and in dismissing Ilcor's claims on that basis.

### **Storage costs**

[27] The remaining issue concerns the storage costs awarded by the trial court. Ilcor claimed R22 500 per month for the four-axle trailer from the date delivery was tendered until the trailer was sold, and R45 000 per month in respect of the five-axle trailer from the date manufacture ceased until the date of the trial court's judgment. Having concluded that the agreements had not come into effect, the majority of the Full Court did not determine these claims.

[28] Crossmoor challenges the storage awards on three grounds. First, it contends that the storage claims as pleaded disclosed no cause of action and that the evidence led in support of them was inconsistent with Ilcor's pleaded case. Secondly, it submits that the storage costs were too remote to constitute recoverable contractual damages. Thirdly, it contends that Ilcor failed to mitigate its loss by retaining the trailers at its premises rather than disposing of them or their components.

[29] Crossmoor's first contention arises from Ilcor's allegation in each claim that it 'incurs storage costs'. It excepted to those claims on the basis that they disclosed no cause of action. It contended that Ilcor had not pleaded the nature of the storage costs or the basis upon which they were incurred as a consequence of Crossmoor's conduct. Crossmoor further contended that the evidence did not cure the deficiency but disclosed a different case. Ilcor had not paid, or become liable to pay, storage charges to a third party. Mr Flynn's evidence was instead that the trailers occupied space on Ilcor's own premises for which Ilcor charged a rate of R150 per square metre. Crossmoor objected to that evidence on the basis that it was inconsistent with the pleaded allegation that Ilcor 'incurs storage costs'.

[30] Neither contention can be sustained. The storage claims must be read as a whole. Ilcor pleaded that it incurred storage costs because the four-axle trailer had not been collected and because Crossmoor repudiated the five-axle agreement. It identified the area occupied by each trailer and expressly pleaded that the storage costs were calculated at R150 per square metre per month. The use of the word 'incurs' did not mean that Ilcor was required to prove that it had paid, or become liable to pay, storage charges to a third party. The loss claimed was the loss of use of the space occupied by the trailers. Mr Flynn's evidence as to the space occupied and the applicable rate served to quantify that loss and did not depart from the case pleaded.

[31] Mr Flynn testified that Ilcor's premises were used for manufacturing and were not intended as a storage facility. The four-axle trailer occupied approximately 150 square metres of the spray-painting area and the incomplete five-axle trailer approximately 300 square metres of the manufacturing workshop. The continued presence of the trailers deprived Ilcor of the use of that space for its manufacturing operations. The amounts claimed as storage costs were intended to compensate Ilcor for that loss of use. Mr Flynn calculated the loss at R150 per square metre per month. In support of that rate, Mr Flynn referred to an invoice issued by Ilcor in 2016 for the rental of 130 square metres in the same facility for R32 490 per month. Mr Ramkissoo, whose expertise included the commercial rates applicable to the storage of trailers, considered the rate of R150 per square metre fair and reasonable.

[32] Crossmoor knew precisely what case it had to meet. Ilcor's witness statements, which set out the evidence in support of the storage claims, had been delivered approximately a year before the trial commenced. Crossmoor nevertheless led no evidence to contradict Ilcor's evidence as to the space occupied by the trailers or the reasonableness of the rate claimed. It cannot be said to have been taken by surprise or prejudiced in the conduct of its defence. The trial court was entitled to admit and rely upon the evidence.

[33] The contention that the storage costs were too remote must also fail. Contractual damages include those that flow naturally and generally from the kind of breach in question and which the law presumes the parties contemplated as a probable result of the breach.<sup>8</sup> These were agreements to manufacture large, customised trailers at Ilcor's premises. Once completed, Crossmoor had to collect the four-axle trailer. Its failure to do so left the trailer occupying Ilcor's premises. Similarly, the repudiation of the five-axle agreement after manufacture had commenced left the incomplete trailer occupying Ilcor's workshop. The resulting loss of use of Ilcor's premises was a direct consequence of Crossmoor's breach and was not remote.

[34] The remaining question is mitigation. A plaintiff is required to take reasonable steps to mitigate its loss, but the onus of proving a failure to do so rests on the defendant.<sup>9</sup> Crossmoor was therefore required to establish that Ilcor could reasonably have taken steps to reduce its loss and the extent to which its loss would thereby have been reduced.

[35] The evidence does not establish such a failure. Ilcor sold the first of the two four-axle trailers in early 2018 to mitigate its loss. As to the remaining four-axle trailer, Mr Flynn testified that it was offered to Mass Logistics and other customers and advertised for sale. A purchaser was eventually found, and the trailer was sold in February 2020 for R830 000, R45 000 less than the agreed price of R875 000, excluding VAT.

[36] Crossmoor relies on Mr Flynn's concession in cross-examination that the trailer could instead have been dismantled and its components and scrap sold. But that was not the end of his evidence. Mr Flynn explained that only the tyres and axles had any appreciable value and that the remainder would have been scrap. He considered that dismantling the trailer would have resulted in a substantial loss. That evidence must be considered against what actually occurred: Ilcor retained the completed trailer while attempting to find a purchaser and ultimately sold it intact for R830 000.

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<sup>8</sup> *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687D-688A ('*Holmdene*').

<sup>9</sup> *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372 at 388-389; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines* 1915 AD 1; *Holmdene* at 689D-F.

[37] A reasonable person in Ilcor's position was not required to dismantle a completed customised trailer and sell its components and the remainder as scrap at a substantial loss merely to avoid storage costs. The question is whether Ilcor acted reasonably in mitigating its loss. Crossmoor bore the onus of establishing that there was a less costly course which Ilcor ought reasonably to have adopted.<sup>10</sup> It led no evidence to establish that dismantling the four-axle trailer was a reasonable and less costly course than the one adopted by Ilcor.

[38] The position concerning the five-axle trailer is similar. Mr Flynn accepted that the partly completed trailer could physically have been dismantled and sold for scrap. He was equally clear, however, that dismantling it made no economic sense. He estimated that the recoverable value would have been in the region of R100 000, compared with approximately R4 million already incurred in its manufacture. He also explained that dismantling the trailer would itself have involved labour costs.

[39] Crossmoor led no evidence as to the costs of dismantling the trailer, the value of the components of the five-axle trailer that could have been sold separately, or the time and expense involved in doing so. Mr Flynn's concession that dismantling the trailer would have brought the storage costs to an end was insufficient to establish that this was a reasonable and less costly course for Ilcor to have adopted.

[40] The June 2018 correspondence referred to above is also relevant to the question of mitigation. When Mr Naicker enquired about the trailers and the storage charges, Mr Flynn proposed halving the storage costs if Crossmoor took the trailers. The following day, Mr Flynn confirmed that Ilcor would halve the storage costs and charge no interest. Mr Naicker then asked whether Crossmoor would be charged for 'legal and storage' costs. Mr Flynn replied affirmatively, and Mr Naicker did not object. In those circumstances, Ilcor could hardly have been expected to dismantle the trailers while Crossmoor continued to represent that it intended to take them.

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<sup>10</sup> *Everett & Another v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) at 201H-202A.

[41] The challenges to the storage claims must therefore fail. The claims disclosed a cause of action and were established in evidence. The loss was not too remote, and Crossmoor failed to establish that Ilcor acted unreasonably in retaining the trailers rather than dismantling them. The trial court was accordingly correct to award storage costs in respect of the four-axle trailer until it was sold, and the five-axle trailer until the date of judgment.

[42] In the result, the following order is made:

- 1 The appeal is upheld with costs.
- 2 The order of the Full Court is set aside and replaced with the following:  
'The appeal is dismissed with costs.'

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L WINDELL  
JUDGE OF APPEAL

Appearances:

For the appellant:

N Alli

Instructed by:

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Webbers Attorneys, Bloemfontein

For the respondent:

L Hollander

Instructed by:

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