



Real Estate Law & Conveyancing

14 April 2026

SOUTH AFRICA

- No better, no worse - The true aim of restitution after contract cancellation

For more insight into our
expertise and services



No better, no worse - The true aim of restitution after contract cancellation

In the case of *Mosewicka v McLellan* (2015/17439) [2026] ZAGPJHC 61 (3 February 2026), the Gauteng Division of the High Court recently considered the issue of restitution following the cancellation of a property sale agreement. The case provides useful guidance on how courts approach restoring parties to their original positions when a contract fails, particularly where the property has been damaged and the cost of repairs must be determined.

The judgment clarifies that restitution is an equitable remedy aimed at fairness. Its purpose is to return both parties, as far as possible, to the positions they occupied before the agreement, without allowing either party to gain an unfair benefit. The court's application of this principle to the facts is set out below.

Facts

The dispute arose from a written agreement of sale concluded in November 2014, in terms of which the plaintiff sold immovable property, together with certain movable items, to the defendant for approximately R3,518,000. The defendant took occupation of the property in August 2014.

In December 2017, a fire caused damage to structures on the property. The sale agreement was later terminated, which gave rise to a dispute about what each party was required to restore or repay to the other.

In a previous judgment delivered in November 2023, the High Court declared the sale agreement terminated and determined that the defendant was entitled to restitution of the total amount of R2,154,000 paid by him under the agreement, less the fair and reasonable cost of repairing the fire damage. In terms of the November 2023 order, the adjudication of the quantum of the fair and reasonable cost to remedy the fire damage was separated from the remaining disputes between the parties and postponed indefinitely. However, the parties were unable to reach an agreement on this amount, and the matter accordingly returned to court for determination. This judgment deals with that outstanding issue.



Legal framework

The court reaffirmed the principle of restitution in integrum, which requires that parties be restored, as far as reasonably possible, to their pre-contractual positions. Importantly, restitution does not entitle a party to be placed in a better position than before the contract was concluded.

Key principles affirmed by the court included:

- **Restitution must reflect the actual condition of the property at the time the purchaser took occupation**, meaning costs are assessed by reference to what was factually built on the site, not what could now be built new.
- **The obligation to make restitution arises upon the date on which the underlying agreement is cancelled** and it is this date that determines both what restitution is required and the interest that runs on the obligation.
- **The value of the premises is to be assessed as they were at the date of occupation by the purchaser**, taking into account any pre-existing deterioration or poor workmanship and not as a newly built structure.

- **Courts must avoid overcompensating a party** and, where the poor condition of a property has already been reflected in the assessment of individual items, a further general deduction will not be permitted as it would amount to a double deduction.

Quantification of repair costs

The court conducted a detailed assessment of the disputed repair costs. The court reduced some claimed expenses, rejected others entirely, and partially allowed the remainder. The central question was whether the claimed repairs accurately reflected the cost of restoring the property to its pre-fire condition.

In reaching its decision, the court:

- Applied reductions where proposed repairs would effectively result in new or upgraded structures rather than simple restoration.
- Rejected claims where damage was not sufficiently proven or where items remained usable after the fire.
- Accepted value-added tax as a legitimate component of the restoration costs.
- Rejected a request for a further global deduction to account for the overall dilapidated and rundown state of the property at occupation. The court held that, having applied strict and conservative individual assessments at the line-item level, a further general deduction would amount to a double deduction that would unduly prejudice the plaintiff.



Real Estate Law & Conveyancing

The court ultimately determined the fair and reasonable cost of restoring the property to the condition it was in during August 2014, when the purchaser took occupation of the premises, to be R1,355,051.37.

Set-off and net result

The defendant had previously paid R2,154,000 under the sale agreement and was entitled to restitution of that amount. The restoration costs of R1,355,051.37 were set off against the defendant's entitlement.

After deducting the repair costs, the net amount payable by the plaintiff to the defendant was R798,948.63. In addition, the court ordered the plaintiff to pay interest on this amount at 10% per annum from 31 May 2018 (being the agreed date of cancellation) to date of final payment and the plaintiff was also ordered to pay the defendant's costs in relation to the quantification proceedings.

Conclusion

Mosewicka is a practical illustration of the "no better, no worse" principle of restitution. A party is not entitled, on restoration, to receive a newly built structure in place of a dilapidated one; equally legitimate restoration costs should not be reduced by a double deduction.

The case also underscores the importance of recording a property's condition at the date of occupation by the purchaser and confirms that the date of cancellation (and not the date of litigation) governs the quantification of restitution obligations.

Natasha Fletcher and Danielle Goldschagg

SOUTH AFRICA



OUR TEAM

For more information about our Real Estate Law & Conveyancing practice and services in South Africa, Kenya and Namibia, please contact:



Muhammad Gattoo
Practice Head & Director:
Real Estate Law & Conveyancing
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com



Patrick Kauta
Managing Partner | Namibia
T +264 833 730 100
M +264 811 447 777
E patrick.kauta@cdhlegal.com



Bronwyn Brown
Director:
Real Estate Law & Conveyancing
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com



Simone Franks
Director:
Real Estate Law & Conveyancing
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com



Fatima Gattoo
Director:
Real Estate Law & Conveyancing
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com



Simone Immelman
Practice Management Director:
Real Estate Law & Conveyancing
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com



Sune Kruger
Director:
Real Estate Law & Conveyancing
T +27 (0)11 562 1540
E sune.kruger@cdhlegal.com



Lulama Lobola
Director:
Real Estate Law & Conveyancing
T +27 (0)21 481 6443
E lulama.lobola@cdhlegal.com



John Webber
Director:
Real Estate Law & Conveyancing
T +27 (0)11 562 1444
E john.webber@cdhlegal.com



Natasha Fletcher
Counsel:
Real Estate Law & Conveyancing
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com



Lutfiyya Kara
Counsel:
Real Estate Law & Conveyancing
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com



Samantha Kelly
Counsel:
Real Estate Law & Conveyancing
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com



Tania Pearson
Counsel | Namibia
M +264 833 730 100
E tania.pearson@cdhlegal.com



Muneerah Hercules
Senior Associate:
Real Estate Law & Conveyancing
T +27 (0)11 562 1579
E muneerah.hercules@cdhlegal.com



Hesekiel Ipinge
Senior Associate | Namibia
T +264 83 373 0100
E hesekiel.ipinge@cdhlegal.com



Asisipho Kozana
Senior Associate:
Real Estate Law & Conveyancing
T +27 (0)21 405 6168
E asisipho.kozana@cdhlegal.com



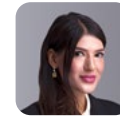
Ceciley Oates
Senior Associate:
Real Estate Law & Conveyancing
T +27 (0)11 562 1239
E ceciley.oates@cdhlegal.com



Ebum Taigbenu
Senior Associate:
Real Estate Law & Conveyancing
T +27 (0)11 562 1049
E ebum.taigbenu@cdhlegal.com



Muneerah Hercules
Senior Associate:
Real Estate Law & Conveyancing
T +27 (0)11 562 1579
E muneerah.hercules@cdhlegal.com



Zahra Karolia
Associate:
Real Estate Law & Conveyancing
T +27 (0)11 562 1701
E zahra.karolia@cdhlegal.com



Saraphina Paulus
Associate: | Namibia
T +264 83 373 0100
E saraphina.paulus@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

ONGWEDIVA

Shop No A7, Oshana Regional Mall, Ongwediva, Namibia.
T +264 (0) 81 287 8330 E cdhnamibia@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

WINDHOEK

2nd Floor, 4@Steps - East Tower, Hilltop Estate, Kleine Kuppe, Windhoek.
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020
T +264 833 730 100 E cdhnamibia@cdhlegal.com

©2026 15712/APR

