

SOUTH AFRICA / JUDGMENT

Greyvenstein and Others v Mbombela Golf Club (322/2021) [2021] ZAMPMBHC 62 (14 December 2021) [2021] ZAMPMBHC 62

COURT

Mbombela High Court, Mpumalanga

BEFORE

B A Mashile

CASE / FILE NUMBER

322/2021

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(MPUMALANGA DIVISION,

MBOMBELA)

CASE

NO: 322/2021

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: YES

REVISED: YES

14/12/2021

In

the matter between:

JOHANNES
HENDRIK GREYVENSTEIN
First Applicant
EXECUGOLF
(PTY)
LTD
Second Applicant
GAVIN
SPIES
Third Applicant
and
MBOMBELA
GOLF
CLUB
Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] Central to the controversy between the parties is whether or not the lease agreement (“the agreement”) concluded on 1 December 2015 between the First Applicant (“Greyvenstein”) and the Respondent (“the Golf Club”) has been validly renewed as intended in Clause 20(4) of the agreement. Resolution of all the other disputes, including the counterclaims, are dependent on the decision of this Court on the central question. Counsel for both parties have advised that the reliefs sought in the main application and counterclaim are mutually exclusive. As such, if the Court resolves in favour of the Applicants, for example on the main application, the counterclaim of the Golf Club must fail and vice versa.

[2] Greyvenstein seeks relief in the following terms:

“1.1 Declaring that the Lease Agreement between the First Applicant (“Greyvenstein”) and Respondent (“the Golf Club”) has been lawfully renewed for a further period of 5 years from 1 December 2020;

1.2 That the sale of the business of the Pro Shop between Greyvenstein and Third Applicant (“Spies”)[1] be declared to be lawful and binding on the Respondent;

1.3 That it be declared that the Golf Club must[2] consent to the cession of the lease to Spies pertaining to the Pro Shop lease premises at the Mbombela Golf Club; and

1.4 That the Golf Club pays the cost of the Application.”[3]

[3] Conversely, the Golf Club seeks the following relief in its counterclaim:

“2.1 That Spies and Greyvenstein be ordered to vacate the premises known as the Execugolf Pro Shop situated on the premises of the Mbombela Golf Club, failing which the Sheriff is authorised to evict Greyvenstein and/or Spies from the premises;

2.2 That a Declarator Order be issued wherein it is declared that the Golf Club lawfully invoked the provisions of clause 26.2 of the Lease Agreement;

2.3 That an independent auditor, Mr Pretorius, be appointed in terms of clause 26.2 of the Lease Agreement to give effect thereto and to ascertain the value of the business of the Execugolf Pro Shop as at 30 November 2020;

2.4 That the Golf Club be ordered to pay, against receipt of the report and a valuation of the business from the independent auditor the aforesaid amount to Greyvenstein, alternatively Spies.”

FACTUAL MATRIX

[4] The Golf Club is a voluntary association established in 1928. It is the owner of the Mbombela Golf Club situated in Matumi Golf Estate, Mbombela. It is common cause that a Pro Shop is an integral part of most successful golf clubs. In short a Pro Shop is very much a requirement for the successful operation of a golf club because:

4.1 Usually, it supplies golf carts for patrons who make use of the golf course;

4.2 It sells merchandise such as golf clothing, gloves, golf balls, golf pegs and the like.

[5] The Pro Shop is no exception to the above. Prior to the conclusion of the agreement between Greyvenstein and the Golf Club, the Pro Shop was owned and run by Mr Steve and Ms Heidi Lawrence. The Respondent alleges that since Greyvenstein took over as the lessee, standards have declined to insufferable heights. On 1 December 2015, Greyvenstein and the Golf Club concluded the Agreement in terms of which Greyvenstein took occupation of the Pro Shop at the Golf Club together with the right to run the business of the Pro Shop.

[6] The agreement commenced on 1 December 2015 and was to endure for a period of 5 years culminating on 30 November 2020 unless extended. The terms and conditions of the agreement are not contested but the parties part ways at the point of ascribing meaning to some of the contents. On 15 April 2019, the erstwhile attorneys of the Golf Club notified Greyvenstein that he was in breach of the Agreement for not making payment of the rental before the 7th day of every month. The attorneys also alerted him to his failure to comply with Clauses 9.1, 9.11 and 9.12 of the Agreement.

[7] Following various persistent contraventions of the agreement by Greyvenstein over a protracted period, the Golf Club resolved that Greyvenstein could no longer be the preferred tenant for the leased premises. On 5 October 2020, the attorneys of the Golf Club addressed an e-mail message to Greyvenstein, which was also delivered by hand

at the leased premises, informing him of the decision of the Golf Club. Even before the letter of 5 October 2020, on 4 May, 23 May and 6 December 2018, Greyvenstein was made aware of his violations of the agreement. The notices notwithstanding the breaches of the agreement continued unabated.

- [8] On 31 May 2019, the Golf Club wrote an e-mail message to Greyvenstein wherein it complained about opening at 7:50 instead of 6:00 and other several matters relating to faulty golf carts. Furthermore, Greyvenstein had advertised online that the Pro Shop business was for sale. In that very advertisement he also stated that the Agreement would expire on 30 November 2025. On 8 July 2020 responding to the advertisement, the attorneys of the Golf Club wrote to Greyvenstein conveying their concern that he advertised the business for sale online.
- [9] In a follow up letter also dated 8 July 2020, the attorneys of the Golf Club notified Greyvenstein that at the time when he advertised the business, he was indebted to the Golf Club for arrear rentals. On 9 July 2020, Greyvenstein replied apologising for the non-payment of the rental, which he stated was caused by him falling behind by 2 and a half months at many other places for which he was then trying to make up.
- [10] Upon Greyvenstein's failure to liquidate his entire arrear rentals, the Golf Club, through its attorneys, wrote a further letter to him dated 5 August 2020 advising him that he was in arrears to the extent of an amount of R70 910.00 and that unless payment was received, the Golf Club would exercise its rights in terms of the Agreement against him. The Golf Club alleges that this non-payment or short or late payment recurred and became habitual despite numerous warnings. The situation deteriorated with other parties owed by Greyvenstein asking if the Golf Club could not assist in impressing upon Greyvenstein to settle their bills.
- [11] The history of non-payment of rentals and the failure to pay his creditors was enough, states the Golf Club, to conclude that Greyvenstein was no longer the preferred tenant for the lease premises as contemplated in clause 26.2 of the Agreement.
- [12] The Golf Club alleges further that quite apart from non or short or late payments of rentals, Greyvenstein has over a sustained period breached his obligations in terms of Clause 9 of the Lease Agreement by:

12.1 Failing to keep the lease premises clean and tidy;

12.2 Failing to ensure that the premises were kept open for business when golf could be played every day of the week and if the day is a public holiday for the hours described in Clause 9.11.1;

12.3 Failing to ascertain that the lease premises were adequately stocked with merchandise and properly staffed with personnel at all relevant times;

12.4 Failing to guarantee that the décor of the premises was maintained at a level which is in keeping with the standards of the building of the Golf Club;

12.5 Failing to have a suitable qualified person nominated by Mr Greyvenstein and approved by the management of the Mbombela Golf Club to be in attendance at the premises during golf playing hours;

12.6 Hiring out golf carts which were mechanically not fit in that they broke down too often and/or could not be used by patrons visiting the Golf Club and wishing to make use thereof.

[13] The Golf Club has provided confirmatory affidavits of illnesses referred to above by some of its various patrons. Other than the confirmatory affidavits, the Golf Club has attached letters, e-mail messages and WhatsApp's setting out complaints by other patrons. On 1 October 2020, Greyvenstein's attorney wrote to the Golf Club advising it that he has exercised his right to renew the Lease Agreement in terms of Clause 20.4, for a further period of 5 years immediately upon the date of expiry of the initial period of lease, being 30 November 2020.

[14] On 5 October 2020, the attorneys of the Golf Club responded to Greyvenstein's exercise of his right to renew the agreement in terms of Clause 20.4. The letter draws Greyvenstein's attention to the provisions of Clause 26.2 and that the right of renewal is dependent on the provisions of clause 26.2. The letter went further to provide the following:

14.1 Greyvenstein is informed that the Golf Club would exercise its right in terms of Clause 26.2 as at 30 November 2020 and not conclude a new Lease Agreement because he was not regarded as the preferred tenant for the lease premises anymore;

14.2 Paragraph 4 of the letter elaborates on reasons why Greyvenstein has been discarded as the preferred tenant for the premises;

14.3 The letter further invites Greyvenstein to agree to the appointment of an independent auditor in Mbombela to determine the value of his business to enable payment of the amount so established prior to his evacuation of the premises on 30 November 2020;

14.4 Additionally, the letter advises Greyvenstein that should he refuse to agree on the appointment of an independent auditor, he would be in breach of the provisions of clause 26.2 of the Lease Agreement;

14.5 Paragraph 7 of the letter informs Greyvenstein that he continues to be in breach of his obligations arising from the agreement. In consequence, he was not entitled to renew the Agreement due to the provisions of Clause 20.6.

[15] On 7 October 2020, the attorneys of Greyvenstein wrote back advising the Golf Club that in consequence of its failure to exercise its right of first refusal, Greyvenstein concluded an Agreement of Sale with Spies in respect of the first part of the business. The Golf Club was further told that Spies would take occupation of the lease premises on 12 October

2020. Replying to the above letter on 14 October 2020, the attorneys of the Golf Club wrote and requested the following:

15.1 A copy of the alleged agreement of Sale of Business between Greyvenstein and Spies;

15.2 Proof of payment of the purchase price by Spies to Greyvenstein.

[16] Greyvenstein is yet to provide the proof of payment by Spies. That said, the Golf Club states that it would appear that Spies has caused a guarantee for the payment to be issued. However, the guarantee has not been called upon for payment. On 14 October 2020 and as a result of the sale of their Shop business to Spies, the attorneys of the Golf Club wrote to Spies' attorneys to which they responded by their letter of 16 October 2020. The Golf Club maintains that against

the background of the above facts, it is entitled to an order evicting Greyvenstein and/or Spies from the leased premises for the

various reasons already canvassed above.

ASSERTIONS

[17] The Golf Club contends that the professed exercise of the right of renewal is illegitimate firstly, because when Greyvenstein purported to renew the agreement, the Golf Club had previously decided that he would not be the preferred tenant for the leased premises anymore. Secondly, at the time of the exercise of the right of renewal Greyvenstein was constantly in contravention of his obligations. As such, he could not exercise the right of renewal being prohibited by the provisions of clause 20.6.

[18] Regarding the observance of the agreement concluded between Greyvenstein and Spies by the Golf Club, the argument is that the latter cannot entertain it because Greyvenstein cannot and could not have transmitted to Spies a right that he himself did not have in the first place. Against that background, the Golf Club impressed upon the Court to dismiss the application and to grant relief as per its counterclaim.

[19] Greyvenstein on the other hand contends that his exercise of the right of renewal of the agreement on 1 October 2020 precluded the Golf Club from declaring that he was no longer the preferred tenant. In any event, such a decision could only be made by the Golf Club on 30 November 2020, not before. While Greyvenstein acknowledges that he has not been a model tenant especially insofar as payment of rentals is concerned, he urged this Court not to have regard to his historical contraventions of the agreement because they are immaterial. In any event, concludes Greyvenstein, such infringements were ultimately complied with as demanded by the Golf Club.

ISSUES

[20] The first key issue for decision is the validity of the exercise of the right of renewal of the agreement by Greyvenstein. The second is whether or not the Golf Club is legally obliged to observe the agreement entered into on 7 October 2020 between Greyvenstein and Spies. Needless to state that should this Court find the renewal to have been invalid, the second

issue as described aforesaid will become superfluous. The resolution of these issues depend on the interpretation of the agreement and case law. For that reason, I deem the provisions of the agreement to be the starting point followed by case law.

LEGAL FRAMEWORK

RELEVANT PROVISIONS OF THE AGREEMENT

[21] Clause 4 deals with duration of the agreement and it provides that:

“This lease shall come into operation on 1 December 2015 and shall endure until 30 November 2020.”

[22] Clause 6 is concerned with payments. Sub-clause 6.1 lays down that:

“All payments due by the lessee to the lessor under this lease shall be made to the lessor on or before the 7th day of each and every month at the Club or to such other person, if any, at such other place, if any, as the lessor has designated for the time being by written notice to the lessee.”

[23] Clause 9 dealing with sundry obligations of the lessee states that the lessee shall:

“9.1 Keep the premises clean and tidy;

9.11 Procure that the premises are kept open for business when golf can be played every day of the week, if the day is a public holiday of which the hours will be as follows:

9.11.1 opening at least 30 minutes before the first Tee-off on all relevant days; and

Closing hours: Wednesday and Saturday 18:00

Sunday and all others days 17:00.

9.12 Procure that the premises are adequately stocked with merchandise and properly staffed with personnel at all times;

9.13 Procure that the décor of the premises is maintained at all level which is in keeping with the standards of the building;

9.16.2 Appoint a suitable qualified person, nominated by the lessee, and approved by management of the lessee, to be in attendance at the premises during playing hours, also ex officio to serve on the Club Committee and attend all meetings, if and when required, including the Jock Tournament Committee.; [SIC]

9.17 Responsible (not exclusively to market the golf course, the facilities and the general upliftment of the aforementioned, and without derogating from the generality thereof assisting with the following:

9.17.1 The Greens Superintendent with course setup, where necessary;

9.17.2 Promoting the game of golf through an operational structure that

provides the first class environment for members and their guests;

9.17.3 Actively promote the Club to companies, visiting groups and visitors;

9.17.4 Management and Golf Committee to organise the playing of the game on non-club days, club days are currently Wednesday and Saturday afternoons and the occasional Sundays;

9.17.5 The Golf Committee during large tournament in marshalling on the course;

9.17.6 Management and Golf Committee from time to time in other duties as agreed between the parties to disagreement from time to time hereto.”

[24] Clause 20 is headed: Option of Renewal and the following sub clauses are pertinent:

“20.1 The lessee shall have the right to renew this lease upon die terms and subject to the conditions set out below; [SIC]

20.2 The period for which this lease may be so renewed is 5 years commencing on the date immediately following the date of expiry of the initial period of this lease, being 30 November 2020.

20.3 All the terms of this lease shall continue to apply during die renewal period save that:

20.3.1 upon expiry of the renewal period, set out in Clause 20.2, the Club may elect to re-advertise the letting of the premises. And

20.3.2 Should the letting of the premises be re-advertised, the lessee shall not be precluded from re-applying.

20.4 The right of renewal shall be exercised by notice in writing from the lessee to the lessor given and received not later than 1 November 2020, and shall lapse if not so exercised.

20.5 If the right of renewal is duly exercised, this lease shall be renewed automatically and without the need for any further act of the parties.

20.6 The lessee shall not, however, have the right of renewal while in breach or default of any of the terms of this lease.

20.7 ...”

[25] Clause 23 is headed: Whole agreement. The following sub clauses are relevant:

23.1 “This is the entire agreement between the parties.

23.2 Neither party relies in entering into this agreement on any warranties, representations, disclosures or expressions of opinion which have not been incorporated into this agreement as warranties or undertakings.

23.3 No variation or consensual cancellation of this agreement shall be of any force or effect unless reduced to writing and signed by both parties.

[26] Clause 24 is a Non-Waiver and it prescribes that:

“24.1 Neither party shall be regarded as having waived, or be precluded in any way from exercising, any right under or arising from this lease by reason of such party having at any time granted any extension of time for, or having shown any indulgence to, the other party with reference to any payment or performance hereunder, or having failed to enforce, or delayed in the enforcement of, any right of action against the other party.

24.2 The failure of either party to comply with any non-material provision of this lease shall not excuse the other party from performing the latter’s obligations hereunder fully and timeously.”

[27] Clause 26 deals with special conditions and it stipulates as follows:

“26.1 Should the lessee during the currency of the agreement wish to sell its business in whole or in part, the lessee shall first, by means of a written offer, offer it to the lessor:

26.1.1 The said offer shall be irrevocable for a period of 30 days after it has been received by the lessor and shall state the price required for the business and the terms of payment;

26.1.2 The said offer shall not contain any other terms and conditions save for the normal restraints and warranties required by the lessor as well as the releasing of the lessee or its representative/members as surety from any financial institution;

26.1.3 Should the said offer be accepted, it shall be communicated to the lessee, in writing, without any counter and/or new conditions and/or proposals, together with the payment of the price required,

alternatively submit security for payment, acceptable to the lessee;

26.1.4 If at the expiration of the period stated in Clause 26.1.1 above, or if it is not accepted by the lessor, the lessee will be entitled to offer the said business to any bona fide third party at a price not less and terms not more favourable than the price and terms set forth in the written offer to the lessor, with the exception, if the business is sold the lessor shall consent to the cession of this agreement of lease to the purchaser.

26.2 It is hereby agreed that should the lessee at the expiry of any of the lease periods not be the preferred tenant for the premises, the parties shall instruct a firm of auditors, who shall not be the auditors of the Club nor of the lessee, to value the business of the lessee. The said auditors shall act as an expert and not as an arbitrator, whose valuation shall be final and binding on all parties. It is agreed that the said valuation shall be the purchase price of the business and shall be paid, in cash, to the lessee before the vacation of the premises by him or it as the case may be.”

- [28] To the extent that this matter involves interpretation of the agreement between the parties, it could be instructive to refer to the famous and often quoted paragraph of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA):

“[18] The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

- [29] There is a dispute on the pertinence of historical breaches by Greyvenstein. Greyvenstein asserts that they are irrelevant because while it is true that he contravened the agreement on several occasions, he subsequently fully complied rendering reference thereto untenable. The Golf Club maintains that Greyvenstein’s conduct of non or short or late payment of rentals throughout the currency of the agreement is material and requires to be taken into account when it exercises its discretion whether or not to declare him a preferred tenant.

- [30] The Appellate Division, as it was then, in *OK Bazaars (1929) Ltd v Cash-In CC* 1994

- (2) SA 342 (A) was concerned with a similar clause as 20.6 that provided that the lessee could not renew while he is in contravention of the agreement. The Court stated the following:

“The clause reflects, upon the part of the lessor, an understandable version to be saddled, after the ordinary expiry of the lease and for a further period of 9 years and 11 months, with a lessee whose performance of its obligations during the ordinary currency of the lease had been unsatisfactory. The language of the clause means no less, so it seems to me, than that in considering the prerequisite for the renewal has been established, the lessee’s whole track records up to the date of the expiry of the lease is relevant.”

ANALYSIS

VALIDITY OF THE RENEWAL OF THE AGREEMENT

[31] It is manifest that the validity of the renewal is governed by Clause 20.6 to which I have referred above. The essence of the clause is that Greyvenstein is at liberty to renew the agreement save in those instances where he is in breach of any of the terms of the agreement. The obvious question then becomes, was Greyvenstein in contravention of the provisions of the agreement at the time when he renewed it? Greyvenstein purportedly renewed the agreement on 1 October 2020 for another 5-year period.

[32] In support of its allegation that Greyvenstein was in contravention of the agreement at the time when he purportedly exercised his right of renewal, the Golf Club has furnished the evidence of Robert Bruce Henderson (“Henderson”) in the form of an affidavit. He confirms that he was at the Golf Club from 1 to 3 October 2020. Below are some of the complaints that he describes in his affidavit:

32.1 He found the level or absence of service received at the Pro Shop during the period 1 October 2020 to 3 October 2020 objectionable;

32.2 There were no golf balls that could be purchased as there were none in stock and the general stock level was very poor with very little golf and other clothing items for sale;

32.3 Some of the members of Henderson’s group, as visiting golfers, wanted to purchase clothing and other souvenirs from the club but could not find anything of relevance to buy;

32.4 The personnel displayed lack of proper training as they exhibited no welcoming or enthusiastic attitude towards the patrons;

32.5 The interior of the Pro Shop was parsed and barren;

32.6 He describes the aforesaid as having been a contrast to the rest of the golfing experience, which he refers to as fantastic, exemplary, efficient and professional; and

32.7 Henderson concluded his Affidavit by stating that it was disappointing that their experience as described aforesaid was diminished by the extreme poor quality of the Pro Shop.

[33] The in depth experiences of Henderson described in his affidavit are confirmed in the affidavit of Mr Gert Drederik Johannes Erasmus (“Erasmus”). As such, Greyvenstein was in breach of Clause 20.6 of the agreement if I have regard to the affidavits of Henderson and Erasmus. Accordingly, Greyvenstein could not have renewed the agreement because he was proscribed from doing so as a result of the provisions of Clause 20.6.

[34] Greyvenstein has argued that the Golf Club has always been at liberty to cancel the agreement utilising the provisions of the breach clause if it felt aggrieved by his contraventions. In any event, added Greyvenstein, he subsequently rectified them making reliance on the fact that he was not a preferred tenant invalid. The OK Bazaars case supra is unequivocal on the argument advanced by Greyvenstein in that regard. The position is that the Golf Club was entitled to have regard to the history of Greyvenstein’s breaches of the agreement it being beside the point that he subsequently complied. In any event, Clause 24.1 of the agreement, the non-waiver clause, militates against Greyvenstein’s assertion.

- [35] Having declared that Greyvenstein was no longer a preferred tenant, the Golf Club proceeded to invoke Clause 26.2. In short, the clause provides that if at the expiry of any of the lease periods Greyvenstein is no longer the preferred tenant for the leased premises, the parties shall instruct independent auditors to value the business. The resultant valuation shall be the purchase price of the business, which the Golf Club must pay to Greyvenstein in cash prior to his vacation of the leased premises. If the invocation of Clause 26.2 by the Golf Club was lawful, as I believe it was, Greyvenstein could not have exercised his right of renewal.
- [36] The assertion by Greyvenstein that the Golf Club could not have declared that he was no longer the preferred tenant because at the time when it did so, he had already renewed the agreement on 1 October 2020 and that such decision could only be made on 30 November 2020 and not prior, will produce aberrant corollaries. I find myself in agreement with the Golf Club that such interpretation renders Clause 26.2 completely gratuitous as to ensure that the Golf Club does not invoke it, Greyvenstein could basically notify the Golf Club before the end of October 2020 of his objective to renew the agreement.
- [37] If that were to be the interpretation to assign to the clause, the Golf Club could be guaranteed that any decision taken by it on 30 November 2020 and beyond would be ineffectual. It is understandable why Greyvenstein would prefer that meaning because it protects him against the natural consequences of the principle that flows from the OK Bazaars case *supra*. What could happen is that had Greyvenstein chosen to exercise his right to renew the agreement between inception of the agreement and 1 October 2020, the Golf Club would find itself without any remedy for Greyvenstein's transgressions throughout the period of the agreement.
- [38] The above would bring about preposterous and unintended results. The position is that the Golf Club could exercise its discretion to declare him no longer preferred tenant at any time including invoking the provisions of the breach clause. Such a move by the Golf Club would undermine any attempts of renewal of the agreement by Greyvenstein. Over and above all this, Greyvenstein has failed to state why the Golf Club was not entitled to make its declaration that he was no longer the preferred tenant earlier than 30 November 2020.

THE AGREEMENT BETWEEN GREYVENSTEIN AND SPIES

- [39] Turning to the agreement concluded between Greyvenstein and Spies on 7 October 2020. The decision of this Court that the Golf Club was within its rights to invoke the provisions of Clause 26.2 ousts any possible entitlement of declaration of the agreement between Greyvenstein and Spies as lawful. Accordingly, even if their agreement was valid, the mere fact that it was concluded subsequent to the Golf Club exercising its rights in terms of Clause 26.2 means that the procedure laid down in Clause 26.2 takes precedence over Clause 26.1. As such I find it unnecessary to traverse the subject whether or not Greyvenstein and Spies followed the procedure described in Clause 26.1. In the result, the application must fail and the counterclaim succeeds.

ORDER

[40] I make the following order:

1. The main application is dismissed with costs;
2. Spies and/or Greyvenstein and/or Execugolf (Pty) Ltd are directed to vacate the premises known as the Execugolf Pro Shop, situated on the premises of the Mbombela Golf Club failing which the Sheriff is authorised to evict Spies and/or Greyvenstein from the premises;
3. It is declared that the Golf Club lawfully invoked the provisions of Clause 26.2 of the Agreement;
4. Mr Pieter Pretorius of PBS Chartered Accounts Incorporated, an independent auditor, is appointed in terms of clause 26.2 of the Lease Agreement, to give effect to the provisions of clause 26.2 and to ascertain the value of the business of the Execugolf Pro Shop as at 30 November 2020;
5. The Golf Club is ordered to pay, against receipt of the report and the valuation of the business from the independent auditor the amount that he shall have determined to Spies alternatively, Greyvenstein and/or Execugolf (Pty) Ltd;
6. Greyvenstein, Execugolf (Pty) Ltd and Spies are directed, jointly and severally, the one paying the other to be absolved, to pay the cost of the Application.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 14 December 2021 at 10:00.

APPEARANCES:

Counsel for the Applicant: Adv J Brand SC

Instructed by:

Christo Smith Attorneys Inc

Counsel for the Respondent: Adv C Erasmus SC

Instructed by:

Swanepoel & Partners Inc

Date of

Judgment:

14 December 2021

- [1] Incorrectly set out in prayer 2 of the Notice of Motion to be the “Respondent”
 - [2] Sic! shall
 - [3] Prayers 1, 2, 3 and 4 of the Notice of Motion, pp 1 and 2
-

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Prepared on 12 October 2026 · Esheria