

SOUTH AFRICA / JUDGMENT

Rudolf Schoeman Landgoed BK v Valco Boerdery (Pty) Ltd (31/2022 and 32/2022) [2024] ZAMPMHC 39 (8 August 2024)

[2024] ZAMPMHC 39

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa

CASE / FILE NUMBER

31/2022 and 32/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION (MIDDELBURG LOCAL SEAT)

Case

No: 31/2022

Case

No: 32/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

08/08/2024

SIGNATURE:

In

the Matter between: RUDOLF SCHOEMAN LANDGOED BK
PLAINTIFF
(Christo
Schoeman (Pty) Ltd and - Case
No: 31/2022)
(Rudolph
Schoeman Landgoed BK - Case
No: 32/2022)
And
VALCO
BOERDERY (PTY)
LTD
DEFENDANT

JUDGMENT

Coram: Langa J

Introduction

- [1] In these two consolidated actions, the Plaintiffs, Christo Schoeman (Pty) Ltd and Rudolph Schoeman Landgoed BK, are each claiming from the Defendant, Valco Boerdery R1 000 000.00 together with interest and costs. These are amounts outstanding on the purchase price in terms of the sale agreements entered into between the Plaintiffs and the Defendant in respect of their two separate farms. Additional relief for a declaration of executability of the two immovable properties is also sought in both actions. As the two cases are similar, both actions in cases no 31/2022 and 32/2022 have by agreement been consolidated and the trial proceeded on both simultaneously. For ease of reference the tow Plaintiffs will together be referred to as Schoeman Boerdery and the Defendant as Valco unless specified otherwise.
- [2] It is common cause that Rudolph Schoeman is the director of both Plaintiffs and also signed the deeds of sale in respect of both sale agreements in respect of the immovable properties belonging to the Plaintiffs which formed part of a larger business known as Schoeman Boerdery.
- [3] The farms which form the subject matter of this litigation Both farms are located in the Mpumalanga Province and have been identified as follows:
1. Portion 44 of the Farm Goede Hoop 315, Registration Division JS. Mpumalanga which was sold by Christo Schoeman (Pty) Ltd.
 2. Portion 9 of the Farm Rietfontein 314, Registration Division JS Mpumalanga and Portion 10 of the Farm Rietfontein 314, Registration

Division JS, Mpumalanga.

- [4] When Schoeman Boerdery closed its farming operations it decided to sell all its properties including immovable properties. The farms referred to in paragraph 2 above were the last to be sold. They were initially sold at an auction where the highest bid for both was an amount of R14 million which was made by Valco. Immediately after auction and the rejection of Valco's R14 million bid, the parties started there and there negotiating the sale of the properties. The negotiations were conducted by Rudolph Schoeman

assisted by Hendré Greybe on behalf of the Plaintiffs, while Valecia and Jaco Van Dyk represented the Defendant. The auctioneer Mr Verster acted as the middleman. Schoeman Boerdery's asking price for the two properties was R22 million while Valco offered a sum of R20 million for both farms. These negotiations eventually led to the conclusion of the two sale agreements in respect of each farm.

- [5] In terms of the said sale agreements, Schoeman Boerdery sold the two farms to Valco on 11 May 2020 for R20 million. It is common cause that R18 million of the total purchase price of R20 million was paid and the transfer was effected on 13 January 2021. An Addendum was also concluded in respect of the Rudolph Schoeman sale on 22 July 2020.
- [6] The essence of the dispute in this case is around the amount of R2 million which is the unpaid remainder of the purchase price. In terms of the agreement between the parties, the first instalment in respect of the remainder of the purchase price was to be paid on 1 September 2021 in a total sum of R1 million (R500 000 for each sale). The Plaintiffs are claiming the payment of this amount from the Defendant.
- [7] It is common cause that both sale agreements contain a what I will at this point just refer to as a clause. In the Rudolph Schoeman sale agreement, it is Clause 14.1 whereas it is Clause 14 in the Christo Schoeman agreement . Translated from Afrikaans these identical clauses read as follows:

"The agreement is subject to the suspensive condition that the existing lease which the SELLER has with South 32 be ceded to the PURCHASER within a reasonable time, under the same terms and conditions." ("the suspensive condition")

Schoeman Boerdery's contentions

- [8] In instituting the action Schoeman Boerdery contended that because the outstanding amount of R2 million remain unpaid by Valco, the acceleration clause, (Clause 11), contained in the agreements was triggered and Schoeman Boerdery is therefore entitled to claim the full outstanding amount of R2 million together with interest and costs. The applicable interest rate was agreed at the commencement of the trial as 7% per annum.
- [9] Concerning the interpretation of the sale agreements, Schoeman Boerdery maintained that the two sale agreements contain an explicit

suspensive condition in favour of Valco, the effect of which is that one cannot enforce any rights of the agreements until the condition has been fulfilled.

[10] Schoeman Boerdery contended that since Valco's representatives were aware of the suspensive condition, their decision to allow transfer of the farms to proceed on 13 January 2021 amounted to a waiver of the suspensive condition since once the sale is executed, it is no longer suspended on the basis of a suspensive condition. It further that it was only when Valco realised that it had waived the suspensive condition that it attempted to correct this by pleading that "... clause 14 is not a condition in the true sense, but a normal term of the "sale" obliging the plaintiff to effect cession within a reasonable period and attaching thereto a monetary value of R1 million to be paid whether it is effected or not.

[11] Schoeman Boerdery contended that Valco's proposed interpretation is problematic especially as Valco did not seek the

rectification of the wording of the suspensive clause in both agreements of sale. Counsel for Schoeman Boerdery Advocate Erasmus SC argued that for as long as the phrase "the agreement is subject to" remains in the two sale agreements, the interpretation proposed by Valco that it is a normal term of the agreement cannot be sustained.

[12] Furthermore, Schoeman Boerdery submitted that Ms Van Dyk's evidence does not support this interpretation as she testified that that the inclusion of the suspensive in the final sale was in accordance with what had been agreed in the draft agreement and further that she understood the legal implications of the phrase "hierdie koop is onderhewig aan..." to that until that event happens, there is no contract. She understood it to be a suspensive condition.

[13] Schoeman Boerdery contended further that even if the court were to accept Valco's interpretation of the clauses, the evidence still does not support Valco's argument, particularly if regard is had to inter alia the fact that the suspensive condition needed to be fulfilled within a reasonable time. Further, on Valco's own version, the fulfilment of the condition would amount to a written lease agreement between Valco and South 32 or its successor in respect of Rietfontein.

[14] Concerning Valco's version that the R2 million was a quid pro quo for the cession,

Schoeman Boerdery argued this contention cannot be accepted because the two sale agreements do not contain any provision to that effect. It contended further that Valco did not seek to rectify the clauses in order to link the payment of R1 million to compliance with the cession. Not even in the handwritten portion of the draft agreement is it stated that the R2 million is a quid pro quo for the cession.

[15] It was argued in this respect that it would have been easy for the parties or Valco for that matter, to have included an express

provision that the purchaser undertakes to pay a further sum of R2 million in exchange for the cession of the lease. In addition, it was submitted that the fact that payment of the R2 million is staggered over more than two years also does not tally with the alleged cession, which would be a once off-event as conceded by Ms Van Dyk. Schoeman Boerdery also contended that the attempt

by Valco to attach any significance to the presence of the arrow at the bottom of B444 next to the word “huurgroond” attempting to link the two terms is farfetched and fanciful especially as Valco could have formulated the two clauses by stating explicitly that the one is a quid pro quo for the other but failed to do so.

- [16] Additionally, Schoeman Boerdery argued that Valco’s subsequent offer to Schoeman Boerdery on 8 October 2021 to the effect that due to Schoeman’s failure to procure a cession of lease a reduced sum of R1, 650 00 is tendered is not reconcilable with Valco’s interpretation of the suspensive clause. Schoeman Boerdery contended that in line with the principles laid out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) SA 593 (SCA) the clauses constitute suspensive clauses.
- [17] Lastly, concerning Valco’s claim for damages, Schoeman Boerdery insisted that there is no evidence that Schoeman Boerdery had misrepresented that it was entitled to cede the lease. It merely made an undertaking to assist its procurement. Furthermore, the R2 million claimed was never paid by Valco and it therefore has not suffered any damages. Schoeman Boerdery submitted further that even if there was a misrepresentation which induced Valco into concluding the sales, Valco waived reliance on the cession obligation. Furthermore, no evidence was put forward as to how the damages were quantified.

Valco’s contentions

- [18] Also relying on the *Endumeni Municipality* case, *supra*, Valco submitted that the interpretation of the written agreement must be done in context to give it a sensible and businesslike meaning. It contended that the interpretation of the so-called suspensive condition as set out in clause 14 and 14.1 in both written agreements respectively is that it is mere term of the agreement which was never intended to be a suspensive condition to the sale but was a condition relevant to the payment of the balance of R2 million.
- [19] Valco argued further that considering that all the parties intended the transfer of the properties to be finalised as soon as possible, if the suspensive condition had to be done prior to transfer that would have delayed the process. The respective clauses therefore have nothing to do with suspending the operation of the written agreements, but rather affect the obligation to pay the balance of R2 million. Valco contended therefore that as Schoeman Boerdery did not cede the lease and cannot tender same, Valco’s obligation to pay is negated.
- [20] Valco further labelled Mr Schoeman was an unimpressive, unreliable and uncreditworthy witness whose his evidence, insofar as it contradicts the version of Valco, should be rejected. It was argued that he could not explain why Schoeman Boerdery would request South 32 to transfer the lease to Valco if the cession of the lease was never discussed nor entered the fray at the auction as stated by Mr Schoeman in his evidence. It was submitted that Mr Schoeman’s evidence that the lease of farmlands was never discussed at the auction was never put to Mrs Van Dyk or Mr Van Dyk so that they could respond thereto.

- [21] In its counterclaim filed in respect of each claim, Valco contended inter alia that there was a reciprocity of obligations as it was an express, implied or tacit term of the written agreement that Schoeman Boerdery would cede to Valco its rights to the farmlands it has leased with South 32 on the same terms and conditions within reasonable time. Valco argued further that it is only upon compliance with this condition by Schoeman Boerdery that Valco would be obligated to pay the balance of the purchase price of R1 million in respect of each sale.
- [22] Valco further averred that Schoeman Boerdery made a representation to it that it was entitled to effect the cession. It was as a result of that fraudulent, negligent or innocent misinterpretations made by Schoeman Boerdery that, Valco was induced to sign the sale agreements with the increased higher purchase price of R20 million. In short Valco asserted that Schoeman Boerdery misrepresented to Valco that it was entitled to cede the rights and obligations it had in terms of lease of farmlands from South 32 in order to increase the purchase price by R2 million.
- [23] Consequently, Valco pleaded that it was with these representation in mind that the parties inserted the clause pertaining to the leased farmlands into the agreements reflecting their understanding that the extra R2 million will only be payable upon compliance with this proviso. It therefore argued that as the term was never fulfilled because Schoeman Boerdery did not have the rights it declared, Valco suffered damages to the same amount and is therefore entitled to hold back the remaining R2 million until such time as Schoeman has effected the cession. Valco further pleaded that apart from a condition stipulating for a certain subdivision to be effected, the rectification of the Addendum was also sought to revoke the whole suspensive condition.
- [24] In its plea to the counterclaim, Schoeman Boerdery, however, asserted that the bond of R2 million was extended to Valco as the latter was unable to obtain a mortgage bond of R10 million. Secondly, Schoeman Boerdery pleaded that Valco had in any event waived any right it may have had to insist on compliance with the cession, irrespective of whether its obligation

is interpreted as a suspensive condition or a normal term of the agreement.

The Issues in dispute

[25] The crisp issues for determination in this matter are therefore the following:

[25.1] whether the cession of certain rights allegedly held by Schoeman Boerdery in terms of a written lease agreement was a suspensive condition.

[25.2] Whether Schoeman Boerdery misrepresented to Valco that it would be entitled to cede those rights.

[25.3] Whether a portion of R1 million of the purchase price in each instance specifically represented compensation for the promised cession.

[25.4] Whether the sale agreements ought to be rectified by deleting the suspensive condition referring to the lease agreement with South 32.

[25.5] Whether all the suspensive conditions in the sale agreements were either fulfilled by Schoeman Boerdery or waived by Valco.

The onus and the duty to begin

[26] Concerning the onus, based on the contentions by the parties, Schoeman Boerdery carries the onus to prove compliance with its

contractual obligations in order to claim payment of the purchase price in respect of the sales.

Valco, on the other hand, has the onus to prove that it was induced to conclude the contract by the alleged misrepresentation made by Schoeman Boerdery. Valco further has to prove any damages it may have suffered as well as the need for the addendum needs to be rectified.

Concerning the duty to begin, since Valco's case is based on a misrepresentation and a term not appearing from the written sale, Valco accepted the duty to begin.

The Evidence

[27] The evidence centred around amongst other things, the background circumstances leading up to the signing of the written agreements of sale as well as the discussions which led to the said sales and what happened thereafter. Valco called three witnesses namely, Ms Valecia Van Dyk, Mr Jacobus "Frik" Verster and Mr Jaco Barend Van Dyk while Schoeman Boerdery called Mr Rudolph Schoeman and Mr Hendré Greybe. I will now turn to the summary of each witness's testimony.

Ms Valecia van Dyk

[28] Ms Van Dyk testified that she together with her husband Mr Jaco Van Dyk are directors of Valco. She stated that Schoeman Boerdery placed all their farms in the market for sale when they stopped all their farming activities, and these included two farms adjacent to their farm. Valco became interested in purchasing the two farms which form the subject matter of this litigation. Valco subsequently obtained bank pre-approval for the loans and through a firm of attorneys presented Schoeman Boerdery with offers of R9 million for each farm. However, Schoeman Boerdery did not accept the offers and the farms were eventually placed on auction on 21 April

2020. At the auction Valco tendered the highest bid of R14 million for both properties and this was also not accepted as confirmed by the Mr Jacobus Verster, the auctioneer.

[29] Immediately after the auction failed further negotiations took place between the parties and Mr Verster acted as the middleman during the negotiations running in between the parties to communicate the position of each. Mr Verster informed Valco that the asking price by

Schoeman Boerdery for the two farms was R22 million. Ms Van Dyk stated that she was shocked by the new price as they only had a bank guarantee of R18 million. Mr Rudolph Schoeman then said they were prepared to settle for R20 million. She said Schoeman Boerdery then added that the R20 million will include adjacent farmlands belonging to South 32 which Schoeman Boerdery had been leasing from South 32 for the past fifteen years or so. These leases were renewable over periods of 1, 3 and 5 years between the same parties. She testified that Valco was also interested in the lease L1-5 Portion 4 of the Farm Rietfontein 314 JS Middelburg, which were adjacent to their farm.

- [30] Ms Van Dyk testified further that during the negotiations, Schoeman Boerdery undertook to cede over to Valco the lease which was valued at R2 million for the same period and on the same terms and conditions. She asserted that this is how the purchase price came to R20 million for both properties at R10 million each. She said that it was agreed that the payment of the R2 million would reflect as a term of the sale and would be payable if the lease is ceded to Valco. The understanding was that the additional R2 million would be payable from proceeds of the farming activities on this leased farmland and would therefore make economic sense for Valco.
- [31] She further stated that after the agreement on 21 April 2020, she filled out the “Koopvooreenkoms” by adding in her handwriting the additional manuscript with the help of Mr Verster who according to her dictated the wording which would reflect the parties’ agreement as follows: That the “AANBOD/KOOPPRYS” reflect the purchase price as R18 000 000.00. The ‘Special Condition’ was inserted referencing the additional R2-million payment over a period of two years with a mortgage in favour of Schoeman Boerdery. Underneath same handwritten condition was an arrow which she said pointed to the clause pertaining to the “Huurgrond” that sets out the cession of the lease of the farmlands from South 32 to Valco for the same term and price/ha.
- [32] Ms Van Dyk averred that this term referred to the payment of the additional R2 million against the cession and in its absence, no payment would become due. She further confirmed that all the relevant parties signed the initial agreement which was thereafter sent to Mr Verster’s attorney who drew the final agreement. The final agreement was eventually signed on 11 May
2020. She testified that as the suspensive condition in the agreement misstated the parties’ intentions, an addendum was later signed which also was aimed at removing the subdivision clause and not the part that dealt with the cession.
- [33] Valco then took occupation of the farmlands at the beginning August 2020, through a handover from Schoeman Boerdery and not formal cession of the lease. She testified further that unbeknown to Valco, Schoeman Boerdery received a 5-year lease from South 32 on 20 July 2020, as Valco anticipated, but that also unbeknown to Valco, Schoeman Boerdery cancelled this lease on 7 September

2020. She said this lease was as a result never ceded to Valco and consequently Schoeman Boerdery failed to fulfil its obligation to cede the lease in order to become entitled to the further payment of R2 million. She stated further that Valco was therefore induced to sign the sale agreement through this fraudulent misrepresentation that the leased farmlands from South 32 would be ceded to Valco whereas Schoeman Boerdery knew that the lease prohibited any cession to a third party.
- [34] Ms Van Dyk further testified that although the purchased lands were ultimately transferred to Valco, Valco only realised during October 2021 that the cession will never be effected and that South 32 had already leased the farmlands to a third-party and Valco therefore had to vacate the farmlands. On 28 October 2021 she was informed that the cession is unattainable and that Schoeman Boerdery's position was that it had done everything it could to transfer the lease. Ms Van Dyk's position was that because of Schoeman Boerdery's failure to cede the lease, Valco had no obligation to pay and consequently did not owe any of the Plaintiffs any money.
- [35] During cross-examination Ms Van Dyk conceded that she was copied in various emails during August 2020 from which it was evident that South 32 had formal objections to the cession. She stated that it was, however, not her or Valco's place to interfere as she believed Schoeman Boerdery would get the cession signed. She was not personally told by Schoeman Boerdery regarding the difficulties experienced with South 32. She further maintained that Valco did not waive any rights it may have or had prior to registration and transfer of the properties. She confirmed that Valco did have a written lease with South 32 for the period August 2020 to August 2021 although it was in her husband's name.
- [36] She confirmed that although the cession was not yet in place when Valco signed the Addendum on 20 July 2020, Valco did not raise any queries with this issue at that stage. She confirmed that Valco never made any formal demand for the cession to be effected by Schoeman Boerdery.
- [37] She further confirmed that Valco also paid VAT on the full sum of R20 million and not on R18 million, together with transfer costs. Furthermore, by the time the transfer of the two farms was effected on 13 January 2021, no written complaints were made by Valco even though the cession was still not in place. Ms Van Dyk confirmed that she was informed of both the request by Schoeman Boerdery for transfer of the relevant lease agreement on 12 August 2020 as well as Ms Booï's reply thereto to the effect that Schoeman Boerdery was in breach of the lease by subletting or ceding the lease to Valco.
- [38] Although she said these mails caused her concern, Ms Van Dyk however also stated that she found no need to follow-up the cession issue with Schoeman at the time. In addition, she confirmed the email from Ms Booï to her on 17 December 2020 informing her of the illegality of Valco's occupation of Rietfontein. Further, although she still had regular contact with the conveyancers during December 2020, she however did not see the need to raise the

absence of the cession and Valco also had no objection to second bonds being registered in respect of each sale. In an email dated 26 October 2021 she stated that South 32 had repeatedly stated that Valco's occupation of Rietfontein was illegal.

- [39] She further confirmed that Schoeman Boerdery's bookkeeper Hendré Greybe reminded her of Valco's payment of R2 million being due, more or less on 1 September 2020. She confirmed further that Ms Ruthven conveyed Valco's offer of payment to Schoeman Boerdery on or about 8 October 2021 with which Valco attempted to obtain a discount on the full sum of R2 million plus interest. She also did not mention Schoeman Boerdery's failure to procure the cession when conveying Valco's offer.
- [40] When she was confronted with the fact that Valco only raised non-compliance with the cession for the first time in writing on 18 October 2021 after having been pushed for payment, she responded that she did not want to push Schoeman Boerdery and still believed "in her heart" that Schoeman would procure cession of the lease. This was one year and five months after conclusion of the formal sales.
- [41] She further confirmed during cross examination that Valco through Mr Jaco van Dyk had previously, prior to 21 April 2020, had leases with South 32 and other mines in the vicinity. She and her husband were therefore familiar with South 32's requirements and that South 32 has a say in whether a new tenant was acceptable to them upon a transfer of a lease or subletting. Ms Van Dyk further confirmed that she knew the legal implication of a suspensive condition which she interpreted to mean that until the event happens there is no contract. She conceded that the clause in question constitutes a suspensive condition.
- [42] She further stated that in her understanding if Schoeman Boerdery had complied with the cession obligation a written lease agreement should have been concluded between Valco and South 32 for the same term on which Schoeman Boerdery leased the land. Ms Van Dyk further confirmed that Valco had through her husband Mr Jaco van Dyk been in direct contact with South 32 prior to October 2021 and that Valco did have a written lease with South 32 for the period August 2020 to August 2021 even though it was in her husband's name. When asked why Valco was not awarded the lease of Rietfontein by South 32, she said that it had been "predetermined" that a certain "Div de Villiers" would obtain it.

Mr Frederick Jacobus Verster

- [43] Mr Verster, the auctioneer and the middleman in the negotiations, was initially Schoeman Boerdery's witness but was made available to Valco. Although he confirmed the testimony Mrs and Mr Van Dyk regarding how the initial "Kooppooreenkoms" was drawn, he however denied that he dictated the terms thereof as stated by Ms Van Dyk. Upon questioned whether he provided the wording of the manuscript with the caption "Huurgrond," he confirmed that it was inserted in his presence but denied having dictated the wording thereof. He further stated that both the Schoemans and the Van Dyks were consulted on the wording. He did not dictate it, but simply stated what the parties had agreed upon. He however stated that he did not provide the wording of the "special condition" in manuscript.

He was adamant that the manuscript portions in the draft agreement reflected what the parties had agreed upon verbally and wording thereof had been debated and Ms Van Dyk participated in the debate. He indicated that in his view the arrow at the bottom of the document B444 next to the word “Huurgrond” was irrelevant.

- [44] He further testified that his involvement in the discussions was in connection with the purchase price and that the subject of the leased lands was discussed between the parties themselves. He was not involved in the negotiation in respect of the condition of the cession which was done by the parties on their own without his involvement.
- [45] He confirmed that after the auction did not yield the results expected by Mr Schoeman, he facilitated the negotiations between the parties. When he informed the Van Dyks of the price of R22 million, they told him they could only afford R18 million. He informed the Schoeman's of the Van Dyks' offer Mr Schoeman informed him that he was prepared to accept R20 million even though the original asking price was R22 million. He further told him that he was prepared to give the buyers an extended time to pay off the R2 million over time. He took the Schoeman's counteroffer to the Van Dyks who negotiated further with Schoeman junior and eventually agreed on a price and a lease condition.

Mr Barend Jacobus Van Dyk

- [46] In his evidence Mr Barend Jacobus Van Dyk by and large confirmed the testimony of his wife and business partner Ms Van Dyk concerning what transpired at the auction and how the initial “Kooppooreenkoms” was drawn. He testified that had Valco procured a lease of Rietfontein, it would have assisted in paying off the R2 million from the proceeds of the harvest. Contrary to what was stated by Mr Verster, according to him the latter suggested the wording of the handwritten clauses in the draft agreement. He confirmed Ms Van Dyk's version that Valco increased their offer to R20 million as compensation for the receipt of the cession. According to him, Mr Verster knew what the agreement was regarding the further R2 million.
- [47] During cross examination, Mr Van Dyk confirmed inter alia that Valco previously had concluded written lease agreements with South 32 and that South 32 makes the ultimate decisions on the acceptance of a new tenant once the relevant land is sold. When questioned what more Schoeman ought to have done to procure the cession, he stated that Christo Schoeman had to personally visit the mine. He believed the cession faltered due to the arrogant attitude of Mr Greybe in dealing with the mine. Mr Van Dyk however conceded that he and Mr Kitching had discussions on the cession to Valco and that insofar as any fault can be attributed for such cession not materialising, the “fault” was on the mine. He furthermore corroborated her version on the purpose of concluding the Addendum.

Mr Rudolf Schoeman

- [48] Mr Rudolf Schoeman confirmed in his testimony that Schoeman Boerdery stopped all farming activities and sold off about nine immovable properties and the two properties under discussion were the last to be sold. Although he confirmed that they had leased farmlands with South 32, he however said that they played no role in the selling price of the lands as no discussions took place during the auction about the leased farmlands and at no time did it enter the fray. He said that the sale price was negotiated on price alone and that Ms Van Dyk drafted the initial agreement which he later went to sign without reading.
- [49] Mr Schoeman testified further that the R2 million did not represent a separate value for the cession as alleged by the Van Dyks. It was however treated separately because it was subject to an instalment arrangement as the Van Dyks could only obtain a bank guarantee for only R18 million. He further stated that Schoeman had merely undertaken to use its best endeavours to procure the cession but never guaranteed or misrepresented that it was legally entitled to cede the lease. He further stated that during negotiations that the relevant land (Rietfontein) was not the property of Schoeman, but that of South 32. He said Rudolph Schoeman Landgoed never had a lease agreement with South 32, it was Christo Schoeman (Pty) Ltd which had. His evidence was that the reference to a cession in the sale agreement relevant to Rudolph Schoeman Landgoed was therefore a mistake.
- [50] Further, Mr Schoeman testified that Christo Schoeman (Pty) Ltd paid the rent on Rietfontein to South 32 until the end of November 2020. He said that the fact that Christo Schoeman gave three months' notice of termination of the lease was in accordance with what Schoeman had been advised, as the best possible means to place Valco in a position to procure its own lease agreement. Effectively it bought Valco time. According to him the parties never agreed that payment of the remaining R2 million would be held back until the cession was effected and Schoeman Boerdery had no further obligation in this regard.
- [51] He further confirmed that Schoeman Boerdery had afforded Valco occupation of both the farms purchased, as well as Rietfontein, free of charge and that at the time of conclusion of the draft agreement and the formal sale agreements, Christo Schoeman and South 32 had no written lease in place. There was only a verbal agreement which was valid until the end of the current planting season, around end July 2021.
- [52] During cross examination Mr Schoeman stated that, although he did not object to the wording of the draft agreement relating specifically to Rudolph Schoeman agreement, that draft agreement is objectively false insofar as it portrays that Rudolph Schoeman had a lease with South
32. He said that he had not read the final sales before he signed them and conceded that Valco could cancel the whole of the sale agreements if the cession did not materialise.
- [53] He further stated that Christo Schoeman was awaiting a new lease agreement and knew beforehand what lease term it would be granted as the understanding was that the oral lease agreement would be converted to a written one. Mr Schoeman conceded that the suspensive conditions place a heavier obligation on Schoeman than merely attempting to procure the

lease. According to him the arrow in the draft agreement (at B444) merely meant that one should turn over the page and does not point to a connection between the two relevant clauses. He further conceded that the purpose of the Addendum was only to scrap the condition pertaining to subdivision of a portion of Rudolph Schoeman's land. Lastly, he also conceded that the request on the part of Christo Schoeman to South 32 for the transfer of the lease on 12 August 2020 was consistent with the suspensive condition.

Mr Hendré Greybe

[54] In his testimony Mr Greybe confirmed the contents of the emails between him and Ms Van Dyk and that he went with Mr Rudolf Schoeman to the attorney's firm in Standerton and that Mr Schoeman read the agreements. This constitutes the sum total of the evidence adduced in this matter.

Principles of interpretation

[55] The principles of the interpretation of agreements or legal instruments are trite. In the seminal case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) SA 593 (SCA) the SCA in the often-quoted paragraph [18] stated the following regarding the process of interpretation:

"Interpretation is the process of attributing meaning to the words used in a ... 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 a contractual context 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".

[56] In *Minister of Police and Others v Samuel Molokwane*, (Case number 730/2021) [2022] ZASCA 111 915 July 2022) at paragraph

[17] the court stated that "where a provision is reasonably capable of two interpretations, the one that better promotes the spirit, purport and objects of the Bill of Rights should be adopted." The purpose of a section, rather than merely its text should be considered and a "purposive approach is far more consistent with our constitutional values, than reading the section narrowly and strictly".

[57] In *University of Johannesburg v Auckland Park Theological Seminary and Another* (CCT 70/20) [2021] ZACC 13; 2021 980 BCLR 807; 2021 (6) 1 (CC) 11 (11 June 2021) the Constitutional Court stated the following in respect of the question of interpretation of contracts:

“[66] The approach in Endumeni “updated” the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to Endumeni that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances

leading up to its conclusion, and the knowledge at the time of those whose negotiated and produced the contract.

[67] This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract was concluded. As the Supreme Court of Appeal held in *Novartis*:

“This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the

parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without. Context mean nothing.”

[68] Let me clarify that what I say here does not mean that extrinsic evidence is always admissible. It is true that a court’s recourse to extrinsic evidence is not limitless because “interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses”. It is also true that “to the extent that evidence may be admissible to contextualise the document (since ‘context is everything’) to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible”. I must, however, make it clear

that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable

people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation

enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.

The test for mutually destructive versions

[58] When resolving two mutually destructive versions, the decision of the Supreme Court of Appeal in *SFW Group Ltd & Another v Martell et Cie & Others*, 2003 (1) SA 11 (SCA) is instructive. In order to come to a conclusion on the disputed issues, a court must make findings on inter alia the credibility of the factual witnesses, their reliability and the probabilities of the case. The credibility of a particular witness will depend on its impression about its veracity based inter alia on factors such as the witness's candour and demeanour, his bias, latent and blatant, contradictions and the probability or improbability of particular aspects of his or her version.

Discussion

[59] In the light of the above, this matter turns inter alia on whether the cession of certain rights allegedly held by Schoeman Boerdery in terms of a written lease agreement was a suspensive

condition. It is common cause that the two sale agreements contain a condition couched in the following explicit terms:

‘The agreement is subject to the suspensive condition that the existing lease which the SELLER has with South32 be ceded to the PURCHASER within a reasonable time, under the same terms and conditions’. (my emphasis).

[60] I must pause here to mention that to the extent that the agreement relating to Rudolph Schoeman suggests that a lease was involved this is incorrect as Rudolph Schoeman had no existing lease with South 32 at the time of the conclusion of the agreement. It is common cause that only Christo Schoeman had an existing lease that could form the subject matter of the impugned Clause 14 of the agreement.

[61] Reverting to the interpretation of the relevant clause, it is clear from the mere reading of the text that this clause purports to be a suspensive condition as it explicitly states that “The agreement is subject to the suspensive condition...”. It is further evident that the condition consists of a stipulation in favour of Valco as the purchaser. In terms of this condition the agreement can only come into being after Schoeman Boerdery has ceded the South 32 lease to Valco within a reasonable time.

[62] Considering how the agreements were negotiated and that the impugned clauses were meant to protect Valco, the interpretation of this clause, which would result in sensible meaning that would not lead to unbusinesslike results or undermine the purpose of the condition, is that it is a suspensive condition. From the purposive interpretation of the clause, it is clear that in terms thereof, Schoeman Boerdery cannot enforce any rights in respect of the agreement until the cession has been effected or unless the condition has been waived by Valco. If the condition is not fulfilled by Schoeman Boerdery and not waived by Valco, then the intended contractual consequences of the agreement(s) have to fall away and no claim for damages can flow therefrom.

[63] I find that Valco's interpretation that the condition is a mere contractual term establishing reciprocity is not sustainable. This argument, which suggests that this condition or term of the agreement applies to only the outstanding R2 million, is not consistent with the evidence of Ms Van Dyk. As she correctly conceded, from the contextual interpretation the clause it is clearly a suspensive condition in respect of the whole agreement and not just the R2 million balance as contended by Valco. Thus, considering inter alia the facts, the context and the language used, the parties clearly intended this condition to be a suspensive condition in favour of Valco. Bearing in mind that interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses, it must nevertheless be noted that Ms Van Dyk stated that she understood the sale to be subject to cession of the lease and that she understood it to be a suspensive condition.

[64] In my view the interpretation that the clause is a suspensive condition should be preferred as it makes business sense especially

considering that it provides protection for Valco in case Schoeman Boerdery fails to comply therewith and/or cannot tender to comply. In that event Valco is absolved from paying the purchase price.

[65] Consequently, I make a finding that the impugned clause is a suspensive condition. Consequently, the condition that it was an ordinary term of the agreement as contended by Valco must be dismissed. However, applied to the facts of this case this means that Schoeman Boerdery must show that the suspensive condition was either fulfilled or waived as it is common cause that the transfer and registration of the properties have taken place.

[66] Having determined that the condition is a suspensive condition, I now turn to the question whether Schoeman Boerdery fulfilled the condition, and if not, whether Valco waived it. It is trite that a waiver may be express or implied. A party relying on a waiver must plead and prove that when the alleged waiver took place, the other party had full knowledge of the right that was abandoned. There is furthermore a strong presumption in our law against a waiver. It must therefore be borne in mind that while the normal civil standard of proof on a balance of probabilities is applicable in this matter, the onus is however a stringent one. Clear proof of waiver is required particularly where the waiver is of a tacit nature. Clear proof must demonstrate that the person alleged to have waived his or her rights fully knew what those rights were and decided to abandon same.

[67] The test is therefore an objective one. It is whether the one party could fairly have inferred a waiver from the other. Whether or not a waiver has taken place is to be judged by the outward manifestations thereof which are to be judged from the perspective of a reasonable person in the position of the other party. *Road Accident Fund v Mothupi* 2000

- (4) SA 38 (SCA) at 49 – 50. It is therefore clear that the conduct from which waiver is inferred must be so unequivocal that it cannot be consistent with any other hypothesis. Further, the decision to waive a contractual right need not be communicated explicitly as long as there is an “ineluctable event act by the “creditor”. Traub v Barclays National Bank Ltd 1983
- (3) SA 619 (A).
- [68] Leaving aside the question whether or not Schoeman Boerdery made the undertaking to cede the lease, it is common cause in this matter that the condition forms part of the agreement. So even though Mr Schoeman testified that the discussion if the lease did not feature in the negotiations, the facts prove otherwise. The condition was inserted by the parties in both agreements albeit erroneously in so far as it relates to the Rudolph Schoeman agreement as stated in the preceding paragraphs.
- [69] However most significantly, it is not in dispute that Schoeman Boerdery has not complied with the suspensive condition as it has not ceded the lease. It is further common cause that notwithstanding the fact that the suspensive condition has not been complied with, the agreements were executed, and the properties transferred to Valco.
- [70] In the instant matter, based on the facts, Valco’s conduct unequivocally supports the inference and conclusion that it waived its rights to enforce the suspensive condition particularly if the following are considered. For instance, Valco allowed the transfer of the properties to proceed before the cession was effected. This inference
- is further reinforced by the fact that Valco never raised this issue all along until Schoeman Boerdery rejected Valco’s offer to pay a discounted amount on 12 October 2021. This strongly implies a waiver of the suspensive condition by Valco.
- [71] In addition, Valco’s offer to pay the reduced outstanding amount is consistent with the waiver. Even if it is accepted that Valco believed that Schoeman Boerdery had an obligation to cede only in respect of the outstanding R2 million, it would not have made any sense for Valco to offer to pay the outstanding amount before the cession is done. Furthermore, it is significant that in the email of the offer dated 18 October 2021, no mention is made at all by Valco of Schoeman Boerdery’s failure to procure the cession. All that is communicated by Valco’s lawyers to Schoeman Boerdery is that Ms Van Dyk would like to know if Schoeman Boerdery will accept the offer of the full and final payment of R1 650 000. 00 on the outstanding amount of R2 million. The issue of the cession is not mentioned at all, and this also suggests waiver of the part of Valco.
- [72] It is further significant to note that Valco only raised the issue of the cession for the first time on 18 October 2021 in response the rejection of its offer to pay a reduced amount. This was one year and five months after the conclusion of the sale agreements and one year and two months after a reasonable time for procuring the cession had elapsed. Further, it was further nine months after the transfer of the farms had been effected and VAT paid on the full price of R20 million. Despite Ms Van Dyk having stated that a reasonable time for the

cession be effected was one year, it however took more than 1 year and six months for Valco to place Schoeman Boerdery in mora for non-compliance with the clause or “term of the agreement”.

[73] When asked why no complaint was raised about the cession up until 18 October 2021, Ms Van Dyk stated that she believed in her heart that the cession would still materialise. She stated further that Valco did not object to the transfer of the two farms in the absence of the cession, because she and her husband did not think that Schoeman Boerdery would not honour its obligation to cede the lease.

[74] In my view this explanation does not make sense especially coming from a person who appeared to be not only eloquent but also an impressively knowledgeable and shrewd businesswoman when she testified. It is consequently incomprehensible that she would have

approached such an important issue with such a lethargic attitude particularly in circumstances where she was au fait with the procedures of South 32 regarding leases. In addition, it is common cause that Ms Van Dyk was copied in the relevant emails concerning the leases as early as 12 August 2021 and must have known that South 32 had a problem with the cession. However, despite this knowledge, Valco never raised the issue of the cession or non-compliance therewith from 11 May 2020 until 17 October 2021.

[75] However, even if it was accepted that she was unaware that South 32 was not supporting any sublease without its consent, Ms Van Dyk was however not only aware of the cancellation of the lease by Schoeman Boerdery (during early September 2020), but she was also aware of the email from Ms Booï dated 17 December 2020. In this email Ms Booï in no uncertain terms informed Ms Van Dyk that the occupation and farming activities on South 32's properties by Valco were illegal. As a result of this email, Ms Van Dyk attempted to resolve the matter on her own with Ms Booï but was unsuccessful. Regardless of this Valco still did not raise the issue of the cession until the offer was rejected by Schoeman Boerdery.

[76] Additionally, the fact that Valco agreed to the payment of VAT on the amount of R20 million and allowed the transfer of the farms and registration of the two bonds on 13 January 2021 to go through is inconsistent with Valco's quid pro quo contention. It further cannot be inferred from the two sale agreements that the R2 million was a quid pro quo for the cession as contended by Valco. There is no provision anywhere in the agreements. This is not even mentioned in the handwritten part of the draft agreement which was inserted in Ms Van Dyk's own handwriting. If the parties had intended the R2 million to be a quid pro quo for the cession, it would have been easy for them to include this in the agreement or addendum thereto.

- [77] Furthermore, the argument by Valco that the arrow at the bottom of B444 next to the word “huurgrond” was inserted to show that the two conditions are linked is astonishing, particularly in circumstances where the parties, or Valco in particular, could have easily articulated in the two clauses by stating explicitly that the one is a quid pro quo for the other.
- [78] What is even more surprising is that even when it made the offer of 8 October 2021, Valco did not make any suggestion that the reduced sum of R1,650 000 was tendered because of Schoeman Boerdery’s non-compliance with the cession clause. In the circumstances this court is not entitled to read such a provision into the agreement where it is obviously not part thereof whether expressly, tacitly or by implication.
- [79] In the premise I find that Valco has failed to prove that the parties agreed that payment of the remaining R2 million would be held back until the cession was effected and consequently, the alleged reciprocity claimed by Valco in this regard stands to be rejected as irrelevant. Conversely, I find it is clear from Clause 1 of the sale agreement that the amount of R2 million was the agreed balance on the purchase amount of R20 million which was to be paid in 2 equal instalments of R500 000. This supports Mr Schoeman’s assertion that the R2 million did not represent a separate value for the cession as averred by Valco but the reason it was treated separately was because it was subject to an instalment arrangement as the Van Dyks only has a bank guarantee for R18 million. The facts of this matter clearly support the conclusion that the purchase price of R20 million was a split down the middle after Schoeman Boerdery asked for R22 million and Valco initially offered R18 million.
- [80] Concerning the purported rectification alleged by Valco, the latter clearly did not seek rectification of the suspensive condition part of the impugned clause. The rectification of the Addendum was aimed at doing away with the subdivision clause in order to expedite the transfer of the properties. It did not seek the rectification of the wording of the impugned clause.
- [81] In the light of the above I find that Schoeman Boerdery has demonstrated that the clause 4 and 4.1 in the two agreements respectively is a suspensive condition. The contention by Valco that the condition is a mere term of the agreement must accordingly be rejected. Further, upon a proper consideration of the evidence and the facts; and on a consideration of the balance of probabilities, Schoeman Boerdery has demonstrated that the impugned suspensive condition was waived by Valco. As stated in the preceding paragraphs, there is more than sufficient facts to support the conclusion that Valco’s conduct amounted to a waiver of any benefit or protection flowing from the suspensive condition. The version by Valco that there was no waiver accordingly stands to be rejected as is not only implausible, but it is also highly improbable.

Counterclaim and Misrepresentation

- [82] I now turn to Valco’s counterclaim which is essentially based on the alleged fraudulent, negligent or innocent misrepresentation by Schoeman Boerdery that it represented that it was entitled to cede certain leased farmlands from South 32 to Valco whereas it knew or

should have known that it was not entitled to do so. Valco asserts that it is this misrepresentation which induced it to enter into the written agreement for a purchase price of R10 million for each of the properties in circumstances where the parties valued the cessions in an amount of R2 million. Valco asserted that as it did not receive a cession of the lease, it suffered damages in the sum of R2 million in respect of both sales. As Valco is relying on fraud and negligent misrepresentation it accordingly bears the onus to prove same.

- [83] Valco referred to and put reliance on the evidence and version of Schoeman Boerdery that the discussion of the leases never entered the fray at the auction. Valco contended that although Mr Schoeman denied the cession was discussed, the only inference to be drawn from the testimonies of all witnesses is that the leases were discussed and the obligation to cede was incorporated in the draft agreement and the value attached thereto was R2 million. It argued therefore that the only basis upon which the lease could be discussed at the auction with reference to a price increase was on the representation that it exists and could be ceded. No other inference is consistent with the

facts.

- [84] Valco argued therefore that considering the denial of the cession by Mr Schoeman, the inference of fraud or negligent misrepresentation is consistent with the facts and that the representation could only have been made to induce Valco to sign the draft agreement.
- [85] It is correct that Mr Schoeman contradicted himself in his testimony. While he denied that discussion of the lease at the negotiations, he also stated that he did not properly read the agreement. Notwithstanding his ambivalence as a witness, it is however common

cause that the clauses were part of the agreements, and he did not deny it. The dispute concerning the clause was not whether it was part of the agreement. The issue was whether it was a suspensive clause. Consequently, Mr Schoeman's vacillation on the issue of whether the lease was discussed is of no moment.

- [86] I am not persuaded that the damages claim should succeed inter alia because Valco, which bore the onus in this instance, failed to produce definite evidence that Schoeman Boerdery had misrepresented to it that it was entitled to cede the lease as opposed to only making an undertaking to assist the procurement of a lease.
- [87] It is not in dispute that having farmed in the area for many years, Mr Van Dyk had previously concluded written agreements specifically with South 32 and was therefore familiar with South 32's procedures when tenants were substituted. He and Ms Van Dyk knew that South 32 had to be satisfied with the new tenant before leasing any property. It is inconceivable that the alleged misrepresentation could have in these circumstances induced Valco to sign the sales agreement.

- [88] It is further recorded that Christo Schoeman made a request to South 32 for the transfer of the lease on 12 August 2020. This appears to have been done in an attempt to comply with the suspensive condition. Furthermore, the evidence that Schoeman Boerdery tried to facilitate the lease was not seriously challenged. When this was put to Ms Van Dyk her response was no comment. In her testimony Ms Van Dyk also confirmed that Valco in fact occupied the leased land and farmed thereon until it was given three months' notice to vacate apparently because South 32 did not approve of the proposed cession. In the light of the above facts, it cannot be concluded that Valco has proved that Schoeman Boerdery is guilty of any misrepresentation as alleged by Valco.
- [89] However, even if it is accepted that there was a misrepresentation which induced Valco into concluding the sale, the issue of the waiver discussed in the preceding paragraphs presents an insurmountable challenge for Valco. As I have already found, Valco waived reliance on the cession obligation and cannot therefore rely thereon for the claim based on misrepresentation. A further challenge with the damages claim is the fact that the R2 million on which the counter claim is anchored was never paid by Valco. Valco has failed to prove that it suffered any damages. This is more so if one again considers the fact that Valco actually occupied and used the leased farmlands and benefited therefrom, the quantification of the damages is questionable. It is not clear how the R2 million was arrived at. In the premise the counter claim by Valco for damages cannot be sustained and ought to be dismissed.

Conclusion

- [90] In concluding, I make a finding that based on the contextual and purposive interpretation thereof, Clauses 14 and 14.1 are suspensive conditions. I further find that notwithstanding the Addendum, Valco waived fulfilment of those conditions when it inter alia consented to payment of VAT on the R20 million and went ahead with the transfer of the farms and the registration of the two bonds on 13 January 2021 notwithstanding that the cession had not been effected.

- [91] Furthermore, I find that irrespective of whether the clause is regarded as a suspensive condition or normal term of the contract,

Valco waived the condition or term whatever the case may be. I further conclude that the facts and evidence do not support the

contention that the R2 million was a quid pro quo for the cession as contended by Valco.

- [92] Based on the foregoing, I am satisfied that Schoeman Boerdery's has complied with its obligations in terms of the agreements and is accordingly entitled to judgment. Valco's counterclaim is consequently dismissed.

Order

[93] In the result I make the following order:

Judgment

is granted in favour of the Plaintiffs against the Defendant for:

1. Payment of the sum of R1 million rand in respect of each claim.
2. Interest on the sum of R1 million on each claim at 7% per annum from 1 August 2020 until the date of payment.
3. The following properties are declared executable:
 - 3.1. The Remaining Portion of Portion 9 (a portion of Portion 1) of the Farm Rietfontein 314, Registration Division JS Mpumalanga Province Held under deed of Transfer T156/2021.
 - 3.2. Portion 10 (a Portion of Portion 1) of the Farm Rietfontein 314, Registration Division JS Mpumalanga Province Held Under Deed of Transfer T156/2021.
4. Cost of suit on Scale C.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances: For the Plaintiff Advocate FJ Erasmus SC Instructed by: Van Heerden & Brummer Inc. Witbank For the Defendants: Advocate BJ Greyling Instructed by: Dreyer and Dreyer Attorneys, Pretoria Date heard: 26 April 2024 Date delivered: 08 August 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 08 August 2024 at 14h00.

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