

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2021/58699

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES.

DATE: 13 January 2023 _____

In the matter between: -

M&J DA COSTA BROTHERS (PTY) LTD
(REGISTRATION NUMBER: 1985/003906/07)

First plaintiff

MANJOH RANCH (PTY) LTD
(REGISTRATION NUMBER: 1960/001756/07)

Second plaintiff

and

IVOR MICHAEL KARAN
(IDENTITY NUMBER: [...])

Defendant / Excipient

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 14h00 on 13 January 2023.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] The plaintiffs issued summons against the defendant for payment of various amounts of money. The defendant excepts to the claims on the ground that they lack averments necessary to sustain a cause of action.
- [2] The issues for determination as formulated by the parties in a joint practice note, are as follows: -
- 2.1 Whether the first plaintiff's claim, as well as the second and third plaintiffs' second and third claim, lack averments to sustain a cause of action against the defendant.
- 2.2 Whether on a proper interpretation of the agreement, the plaintiffs have a claim or whether they are excluded by the non-variation clause or parol evidence rule.
- [3] It is common cause between the parties that for purposes of determining the exception, the facts alleged in the particulars of claim, are deemed to be correct.

THE SALE OF BUSINESSES AGREEMENT

- [4] The parties concluded a written sale of businesses agreement (“*the agreement*”) on 29 August 2018. The agreement provides for the sale of the plaintiffs’ businesses, as defined in the agreement, to the defendant.
- [5] The terms of the agreement relevant for the determination of the exception, are the following: -
- [a] The aggregate purchase consideration payable on the transfer date by the defendant to the plaintiffs for the businesses, excluding the Manjoh Ranch’s *other assets* and the M&J Da Costa Brothers’ *other assets*, would be an amount of [...] (*vide clause 7.1*);
- [b] The *effective date* (*also referred to as the transfer date*) of the agreement would be the date of the simultaneous transfer of the properties into the name of the defendant after the fulfilment or waiver, as the case may be, of all the conditions (*vide definition clause 2.2.15*);
- [c] “*Other assets*” of both the Manjoh and the M&J Da Costa Brothers’ businesses are defined as the raw materials, seeds, standing crops, fertilisers, pesticides (whether in storage or worked into the properties in the 2018 crop cycle), packaging materials, feeds, fuel, silage and other finished goods on the properties as at the effective date and including all other assets¹ not otherwise included in the sale assets;
- [d] The purchase price payable for the Manjoh Ranch’s other assets and the M&J Da Costa Brothers’ other assets would be an amount equal to the

¹ Excluding the excluded assets.

aggregate of the costs reflected on annexure “W” and where the cost of any item specified on annexure “W” was not reflected, or was still to be calculated or finalised as indicated in the aforesaid annexure, the aggregate of such costs calculated in accordance with the principles set out in annexure “W” and where applicable as read with the relevant line item/s on pages 84, 96 and 172 of the mechanisation guide (*vide clauses 7.3.1 and 7.3.2*);

- [e] If no item of cost was specified on annexure “W”, then no amount would be payable by the defendant in respect thereof, such as depreciation and/or salaries and wages (*unnumbered clause following clause 7.3 and the sub-clauses thereto*) (“*the rider*”);
- [f] During the *interim period*, which is to be regarded as the period from the signature date to the transfer date,² the plaintiffs would in all respects carry on the businesses in the ordinary course, subject to the provisions of clause 12 (*vide clause 12.1*);
- [g] Physical delivery of the businesses and the respective sale assets will be given to and taken by the purchaser on the transfer date, against payment of the portion of that purchase consideration referred to in clause 8.1 as a result whereof the defendant shall become the owner of the businesses and the sale asset relating thereto (*vide clause 9.1*);
- [h] During the *interim period* the plaintiffs would: -
- [i] conduct and carry on their businesses in a normal and efficient manner (*vide clause 12.2.1*);

² Clause 2.2.25.

- [ii] continue best farming practice, including fertilising, spraying, planting, cultivating and harvesting and whatever else may be necessary to ensure the best crop possible (*vide clause 12.2.5*);
- [i] Within 30 days from the effective date or such extended date as the defendant may require, the defendant would prepare an adjustment account as at the effective date as a credit to the plaintiffs and a debit to the defendant, all expenses which may have been or which may be prepaid by the plaintiffs in respect of the businesses for any period *subsequent to the effective date*, provided that only items in respect of which the defendant enjoys the benefits would be included in the adjustment account and as a credit to the defendant and a debit to the plaintiffs, *all expenses payable by the defendant after the effective date relating to the businesses in respect of any period preceding the effective date (vide clause 22.1, 22.1.1 and 22.1.2)*;
- [j] The agreement would contain the entire agreement between the parties relating to the *subject matter* and none of them would be bound by any undertakings, representations, warranties, promises or the like *not recorded in the written agreement or in such other agreements (vide clause 31.1)*;
- [k] No alteration, variation, novation or cancellation by agreement of, addition or amendment to, or deletion from the agreement would be of any force or effect, unless in writing and signed by or on behalf of the parties thereto (*vide clause 31.2*).

- [6] Annexure “W” to the agreement bears these two respective heading: “2018/2019 Crop cost to be recovered” and “SCHEDULE OF COSTS IN RESPECT OF OTHER ASSETS”. It lists the costs of certain seeds, fertiliser, chemicals, the transport of fertiliser and the cost relating to the application of the fertiliser and chemicals, fuel and planting. The annexure specifically provides that the calculation of the hectares covered and tonnages purchased and transported, would be confirmed.

THE PLAINTIFFS’ CAUSE OF ACTION

- [7] It is the plaintiffs’ case that during October 2018 the parties concluded an oral agreement in respect of the interim period from the signature date to the effective date. The express, alternatively tacit, further alternatively implied terms of the oral agreement were that: -

- [a] It would be in respect of: -

- [i] the purchase of raw material, seed, fertiliser, pesticides, herbicides, chemicals, fuel and packaging material *not* identified or recorded in annexure “W” and which was *not* on or worked into the properties of the plaintiffs;
- [ii] the planting, cultivation, harvesting, fertilisation, spraying and management of all farming-related activities;
- [iii] the management of new and standing crops;
- [iv] the management of the businesses in general, the personnel and the payment of salaries and bonuses in the ordinary

course to preserve the businesses of the plaintiffs for the benefit of the defendant;

[v] the expenses incurred in respect of the purchase of *inter alia* raw material, the planting, fertilisation, spraying and management of all farming-related activities, the management of new and standing crops and the management of the businesses in general, the personnel and the payment of salaries and bonuses *would be included in, alternatively compounded separately, for payment when the adjustment account in respect of annexure "W" was prepared.*³

[8] The first plaintiff instituted one claim against the defendant for costs and expenses incurred in the purchase of fertiliser, the transport and delivery of hay, diesel, the lending of money, repairs conducted on an asbestos house, the payment of defendant's attorneys' invoice and the purchase of chicken litter, during the period September/October 2018 to the effective date.

[9] The second plaintiff instituted three claims against the defendant from the September/October 2018 period to the effective date for expenses incurred in planting raw material and seeds, fertilisation and the spraying of chemicals.

THE DEFENDANT'S EXCEPTION

[10] The defendant's exception essentially takes issues with the plaintiffs'

³ Plaintiff's particulars of claim: paragraph 8, including sub-paragraphs 8.1 to 8.3.

reliance on an oral agreement. The defendant complains that the oral agreement: -

- [a] pertains to the purchase price payable for the other assets already dealt with in clause 7.3 of the written agreement;
- [b] provides for amounts payable by the defendant to the plaintiffs in respect of items of costs not specified on annexure "W";
- [c] contradicts the express terms of the written agreement, specifically clause 7.3 which provides that if no item of cost is specified on annexure "W", then no amount shall be payable by the purchaser in respect thereof, such as depreciation and/or salaries and wages;
- [d] cannot exist in law by virtue of the provisions of clauses 33.1 and 33.2 of the written agreement, read with the principles pertaining to the parol evidence rule.⁴

THE PLAINTIFFS' CASE

[11] The plaintiffs on the other hand, contend that from a reading of the agreement it is apparent that a long time would have elapsed between the signing of the agreement on 29 August 2018 and the effective date, which latter date would entitle the defendant to gain physical possession and control of the businesses and the sale assets.

[12] It is common cause that the effective date occurred on the 10th of June 2019 when the immovable properties of the plaintiffs were

⁴ Notice of exception: paragraph 5, including sub-paragraphs 5.3 to 5.4 and paragraphs 6, 6.1 and 6.2.

transferred to the defendant and the defendant paid the purchase price.

[13] Because of the anticipated time lapse, provision was made for an interim period whereby the plaintiffs would retain physical and effective control and management of their businesses and sale assets and conduct such businesses as in the past. During the interim period the defendant was not to have physical control and management of the businesses and sale assets.

[14] However, the plaintiffs submit that what was anticipated and provided for in the agreement did not occur.

[15] What in fact occurred was that the defendant took over effective control and management of the businesses of both the plaintiffs one day after the conclusion of the agreement and he started giving directions and instructions that were not contemplated by the provisions of the agreement.

[16] The defendant therefore took over effective control and management of the businesses on the 30th of August 2018, one day after the conclusion of the agreement. The factual reality was therefore that the plaintiffs no longer had any control over their businesses and had to purchase other products and the like on the instructions of the defendant after the defendant took possession.

[17] The changed circumstances necessitated the conclusion of an oral agreement, so the plaintiffs argue, and such oral agreement goes beyond the scope and ambit of the non-variation clause contained in the written agreement.

- [18] Accordingly, the plaintiffs contend that the proper interpretation of clause 7.3 of the written agreement and also the non-variation clause is that they are limited to instances where the plaintiffs operated their businesses in the usual course and/or in the usual manner and would be limited to those items specifically listed in annexure "W".
- [19] Consequently, it is the plaintiffs' case that their claims founded on the oral agreement do not add to, alter or contradict or vary clause 7.3 of the written agreement or the non-variation clause therein contained. The oral agreement is beyond the scope and ambit of the provisions of the written agreement.
- [20] Furthermore, the proper interpretation to be placed on clause 7.3, the non-variation clause, reveals that the oral agreement relied on by the plaintiffs is truly extrinsic to the written agreements and therefore not in conflict with such agreement.
- [21] Accordingly, so the plaintiffs argue, they would be able to prove its terms and therefore the entire function and/or purpose of an exception, which is to ensure the elimination of unnecessary evidence, has not been achieved.

THE LAW

Exceptions

- [22] This court has previously⁵ crystalised the principles applicable to exceptions. A refresher of these principles is always useful and instructive: -

⁵ *Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) par [15].

- 22.1 In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
- 22.2 The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.⁶
- 22.3 The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.⁷
- 22.4 An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.⁸
- 22.5 An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.⁹

⁶ *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (2)* 1976 (1) SA 100 (W).

⁷ *Van der Westhuizen v Le Roux and Le Roux* 1947 (3) SA 385 (C) at 390.

⁸ *Fairoaks Investment Holdings (Pty) Ltd and Another v Oliver and Others* 2008 (4) SA 302 (SCA) par 12.

⁹ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) par 3.

22.6 Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.¹⁰

22.7 Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.¹¹

[23] An important principle to be added to this list is that as a rule, courts are reluctant to decide upon exception questions concerning the interpretation of a contract, with the critical caveat that this is only the case where its meaning is uncertain.¹²

Parol evidence

[24] It is trite that the integration (or parol evidence) rule ("*the rule*") remains part of our law.

[25] The rule consists of two subrules. This duality was outlined by Corbett JA in *Johnston*:

*'As has been indicated, the parol evidence rule is not a single rule. It in fact branches into two independent rules or sets of rules: (1) the integration rule . . . which defines the limits of the contract, and (2) the [interpretation] rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract.'*¹³

¹⁰ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902].

¹¹ *Jowell (supra)* at 900].

¹² *Dettmann v Goldfain and Another* 1975 (3) SA 385 (A) at 400A.

¹³ *Johnston v Leal* 1980 (3) SA 927 (A) at 942H - 943A.

[26] It is the interpretation facet that was relied on by the Supreme Court of Appeal (“SCA”) and explained by Corbett JA as follows: -

*“In many instances recourse to evidence of **an earlier or contemporaneous** oral agreement would, in any event, be precluded by . . . that branch of the rule which prescribes that, subject to certain qualifications, when a contract has been reduced to writing, **the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract.** The extrinsic evidence is excluded because it relates to matters which, by reason of the reduction of the contract to writing and its integration in a single memorial, have become legally immaterial or irrelevant.”¹⁴ (Emphasis added)*

[27] He continued to say: -

*“(I)t is clear to me that the aim and effect of [the integration] rule is to **prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract.** The object of the party seeking to adduce such extrinsic evidence is usually to enforce the contract as redefined or, at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence.”¹⁵ (Emphasis added)*

[28] The SCA has also recently re-affirmed its position that where a document that was *“intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning”*,¹⁶ but

¹⁴ Id at 938C – F.

¹⁵ Id at 943B – C.

¹⁶ *KPMG Chartered Accountants (SA) v Securefin supra* par [39]; see also *Johnson v Leal* 1980 (3) SA 927 (A) at 943B.

has, in no uncertain terms, expressed its dismay at this “*rule being frequently ignored by practitioners and seldom enforced by trial courts*”.¹⁷

[29] The approach to interpretation as enunciated in *Endumeni* requires that “*from the outset one considers the context and the language together, with neither predominating over the other*”.¹⁸ In *Chisuse*, although speaking in the context of statutory interpretation, the Constitutional Court held that this ‘*now settled*’ approach to interpretation, is a ‘unitary’ exercise.¹⁹ This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

[30] 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.²⁰ 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 who negotiated and produced the contract.²¹

[31] This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. This does, however, not mean that extrinsic evidence is *always* admissible. A court's recourse to extrinsic evidence is not limitless because ‘*interpretation is a matter of law and not fact. Interpretation is a matter for*

¹⁷ *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) par [39].

¹⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par 18.

¹⁹ *Chisuse v Director-General, Department of Home Affairs* 2020 (6) SA 14 (CC) par 52.

²⁰ *Novartis* above n38 par 28; *Unica Iron & Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA) par 21; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) ([2013] ZASCA 76) par 24.

²¹ *Endumeni (supra)* n14 par 18 and *KPMG (supra)* n11 at par 3.

the court and not for witnesses'.²²

[32] The rules on admissibility of extrinsic evidence do not depend on the nature of the document.²³ The position held by the SCA is that the extent that evidence may be admissible to contextualise the document to establish its factual matrix or purpose or for purposes of identification, must be used as conservatively as possible.²⁴

[33] The Constitutional Court favours an expansive approach to interpretation.²⁵ -

“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.”

[34] Having said that, the Constitutional Court in *University of Johannesburg* also recognised the parol evidence rule in our law. *“It sought to reconcile the generous admissibility of extrinsic evidence of context and purpose with the strictures of the parol evidence rule in the following way”*.²⁶

²² *KPMG (supra)* n11 par 39.

²³ *Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)).

²⁴ *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B - C).

²⁵ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) par 68.

²⁶ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) par [41].

'The integration facet of the parol evidence rule relied on by the Supreme Court of Appeal is relevant when a court is concerned with **an attempted amendment of a contract**. It does not prevent contextual evidence from being adduced. **The rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement.** . . .'²⁷ (Emphasis added)

[35] In *Capitec*, the SCA summarised the interplay between the leading of evidence and the governing of the parol evidence rule with reference to *University of Johannesburg* as follows:²⁸ -

"... since the text of an agreement enjoys no interpretational primacy, and the meaning of the text must be determined before a court can decide whether evidence seeks to alter the terms of that contract, the parol evidence rule does not govern admissibility. **Rather, the question is whether the evidence is relevant to context so as to ascertain the meaning of the contract.**" (Emphasis added)

NON-VARIATION CLAUSES

[36] It is a trite principle of our law that the privity and sanctity of a contract should prevail and should be enforced by the courts.²⁹

[37] The principle laid down in *Shifren*³⁰ that a term (an entrenchment clause) in a written contract providing that all amendments to the contract have to comply with specified formalities is binding still remains in force.³¹

²⁷ Id par 92.

²⁸ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) par 53.

²⁹ *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others* 2020 (5) SA 247 (CC).

³⁰ *SA Sentrale Ko-opGraanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A).

³¹ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) par [6] to [10].

[38] In *Media 24 Ltd*³² at paragraph 35 Brand JA said: -

*"As explained in *Brisley v Drotzky 2002 (4) SA 1 (SCA) (para 8)*, when this court has taken a policy decision, we cannot change it just because we would have decided the matter differently. We must live with that policy decision, bearing in mind that litigants and legal practitioners have arranged their affairs in accordance with that decision. Unless we are therefore satisfied that there are good reasons for change, we should confirm the status quo."*

DELIBERATION

[39] It is not the plaintiffs' case, as I understand it, that clause 7.3 or the rider, is uncertain or ambiguous.

[40] They also do not deny that the agreement contains a non-variation clause, although it was submitted on their behalf that the clause self-destructs by the addition of the words "*or any such other agreements*".

[41] The plaintiffs' case is rather that the oral agreement relied on, goes beyond the agreement and its non-variation clause. The high-water mark of their argument is that the defendant took control and possession of the businesses before the effective date - a scenario which had not been catered for in the agreement. The plaintiffs are therefore not relying on evidence relating to circumstances that prevailed before the agreement was signed or during the negotiations of its terms. The evidence, in my view, is therefore not relevant to context so as to ascertain the meaning of the contract. The evidence seeks to achieve something more.

³² *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd and Others as Amici Curiae) 2011 (5) SA 329 (SCA)*.

- [42] If their reliance were on contextual evidence, parol evidence would not have been precluded as, at exception stage at the very least, it would not appear to be seeking to add to, vary, modify or contradict the terms of the contract.
- [43] However, the plaintiffs' evidence relates to a factual scenario following the conclusion of the agreement. In *Capitec* the SCA was faced with a similar factual scenario. The court was called upon to determine the admissibility of evidence relating to the conduct of the parties in implementing the written contract. The conduct was at odds with the terms of the written contract, as is the case in the matter at hand.
- [44] The SCA referred to its earlier judgment in *Comwezi*³³ where it explained that in the past, where there was perceived ambiguity in a contract, the courts held that the subsequent conduct of the parties in implementing their agreement was a factor that could be taken into account in preferring one interpretation to another.³⁴ In *Comwezi* the court went further to state that now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity,³⁵ there is no reason not to look at the conduct of the parties in implementing the agreement. The court concluded as follows:³⁶ -

*"It is therefore relevant to an objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties. **This does not mean that,***

³³ *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited* 2012 JDR 1734 (SCA).

³⁴ *Shill v Milner* 1937 AD 101 at 110-111; *Shacklock v Shacklock* 1949 (1) SA 91 (A) at 101; *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A) at 12F-H.

³⁵ *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) par 39.

³⁶ *Comwezi supra* at par [15].

if the parties have implemented their agreement in a manner that is inconsistent with any possible meaning of the language used, the court can use their conduct to give that language an otherwise impermissible meaning. In that situation their conduct may be relevant to a claim for rectification of the agreement or may found an estoppel, but it does not affect the proper construction of the provision under consideration.” (Emphasis added)

[45] In *Capitec* the SCA ultimately concluded as follows:³⁷ -

“That a party has an understanding of its rights under a contract and then changes its stance may be cynical or it may be based on its better appreciation of the contract. This ultimately matters little because the weight of the evidence of its understanding of clause 8.3 does not displace the outcome of the interpretative exercise, set out above, which shows that the meaning of clause 8.3 imports no requirement that Capitec Holdings' consent is necessary for Coral to conclude a demarcated sale.”

[46] In my view, the plaintiffs’ case as currently formulated in the particulars of claim cannot arise from evidence of context or surrounding circumstances. It would be evidence which would be at odds with the written contract, with the clear intention of varying the agreement, and would be in a manner inconsistent with any possible meaning of the plain and unambiguous language used, which is that: -

45.1 The parties had already provided for an interim period in writing.

45.2 If no item of cost was specified on annexure “W”, then no amount would be payable by the defendant in respect thereof.

45.3 Any variation is to be reduced to writing and signed by both parties.

³⁷ Par [56].

[47] To me it is of no moment that the defendant took control of the businesses earlier than agreed to in writing. It does not detract from the fact that the plaintiffs on their own version as pleaded in the particulars of claim at paragraph 6.2, carried on and conducted the businesses and farming enterprises in the ordinary course, which is what was specifically provided for in the agreement.

[48] Consequently, the only way in which evidence contrary to the terms of the agreement could be led, is in support of a claim for rectification of the written contract.³⁸ Rectification is a well-established common-law right that provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It thereby enables effect to be given to the parties' actual agreement.³⁹ However, the plaintiffs did not invoke rectification.

[49] In the premises, I do find that the particulars of claim lacks the necessary averments to sustain a cause of action.

[50] I now turn to deal with the issue of the non-variation clause. In light of my earlier finding that the particulars of claim lacks averments to sustain a cause of action, it must follow, in my view, that the non-variation clause stands and applies. I am not persuaded by the argument that the non-variation clause self-destructs by the addition of the wording "*or any such other agreements*". This clause cannot be considered in isolation. It has to be read with clause 31.2 which provides that no amendments, additions or variations shall be of any force or effect unless reduced to writing and signed by both parties. On a plain reading I cannot find that "*any such*

³⁸ *Beijers v Harlequin Duck Properties 231 (Pty) Ltd* 2019 JDR 0986 (SCA) par [10].

³⁹ *Intercontinental Exports (Pty) Limited v Fowles* [1999] ZASCA 15.

other agreements” includes oral agreements. Moreover, the plaintiffs have not advanced any reason for the relaxation of the Shifren principle either.

ORDER

[51] In the circumstances I make the following order: -

- “1. *The exception is upheld.*
2. *The plaintiffs are afforded a period of 15 (fifteen) days from date of this order to deliver amended particulars of claim.*
3. *The plaintiffs are to pay the defendant’s costs, including the costs of two counsel where employed.”*



**F BEZUIDENHOUT
ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 15 November 2022

DATE OF JUDGMENT: 13 January 2023

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