



**IN THE HIGH COURT OF SOUTH AFRICA**  
**(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

2024-01-26

DATE

SIGNATURE

Case Number: 35560/2019

In the matter between:

**LAMBERT PETRUS VAN SITTERT**

First Plaintiff

**RENA JOHANNA VAN SITTERT**

Second Plaintiff

and

**ALBERTUS SAUNDERS**

First Defendant

**SALOME SAUNDERS**

Second Defendant

*This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 26 January 2024.*

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## **JUDGMENT**

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### **POTTERILL J**

#### Introduction

[1] The plaintiffs, Mr and Mrs Van Sittert, owned Erf 1210 Valhalla [the property] from where they ran Kraaines Kleuterskool [Kraaines] from 1985 for approximately 30 years. Mr Van Sittert was the principal and Mrs Van Sittert took care of all the administration. They wanted to retire and had told Mr Van der Merwe, the head of SA Childcare, to achieve this they wanted to sell the immovable property and Kraaines for an amount of R4 million. Mr Van der Merwe managed SA Childcare as an independent service provider to nursery schools assisting with registration and the like. He then introduced Mr and Mrs Saunders to the Van Sitterts as possible buyers. This much is common cause, thereafter the versions digress.

#### The pleadings

[2] In the amended particulars of claim the Van Sitters claimed that an oral agreement was reached that Mr and Mrs Saunders would buy the property for R3 million and Kraaines for R1 million. The Saunders needed to obtain a loan from a financial agreement to facilitate the sale. The parties agreed to reduce this oral agreement to writing. While this was being done the Saunders would rent the property to run the business as a going concern. The Van Sitterts complied with the oral agreement by handing over the business together with a certificate of

registration by the Department of Social Development to the Saunders to operate the business from 1 June 2016. The Saunders took occupation of the property. The Saunders breached the oral agreement by refusing to sign the written agreement forwarded by the Van Sitterts. The Saunders repudiated the oral agreement by not buying the property and the business and the Van Sitterts accepted the repudiation. The Saunders abandoned the property after they had appropriated Kraaines, as it was, for themselves to such an extent that there was no business for the Van Sitterts to run when they returned to the property. Claim 1 is for past loss of income and claim 2 for future loss of income with each claim in the amount of R3 420 000.00

[3] The particulars of claim have a myriad of further claims but in the plaintiffs' heads of argument judgment is sought on only claims 1 and 2 and I need not address these further claims.

[4] The defendants pleaded that they entered into a verbal agreement with the Plaintiffs with the following material express and/or tacit and/or implied terms:

“5.2.1 The Plaintiff and the Defendants would enter into a lease agreement for the premises known as 21 Vindela Road also known as Erf 1210 Valhalla (hereinafter referred to as the “Premises”) at an escalated rental price compared to the market related rental price;

5.2.2 The escalated rental price would include the price for the sale of the business which the Defendants would pay off over a period of three years being the lease period;

5.2.3 Upon expiry of the lease agreement the Defendants have the option to purchase the Premises subject to qualifying for a bond on condition that they are provided by the Plaintiffs with the necessary documentation to apply to the financial institution for a bond;

- 5.2.4 The Defendants would take over the Premises and introduce their own business being Kiddi Care Academy (hereinafter referred to as “KCA”);
- 5.2.5 The Plaintiffs’ duly appointed agent would ensure that the certificates of compliance also accorded with the requirements to enable KCA to operate from the Premises and to operate as KCA;
- 5.2.6 The Defendants would revamp the entire Premises to suit its business model which included, but was not limited to the following:
  - 5.2.6.1 change of name, including the nameboard outside;
  - 5.2.6.2 repainting and cosmetically renewing the entire space;
  - 5.2.6.3 creating a new educational space for the children;
  - 5.2.6.4 introducing a new educational system and program; and
  - 5.2.6.5 handing and entering into new educational contracts with both the children and parents and the new and current teachers who stayed behind.
- 6. It was further pleaded that the defendants did not qualify for the bond amount to purchase the Premises. The Plaintiffs had also failed to provide the Defendants with the necessary information to apply to more financial instructions.”

[5] Also pleaded was that the plaintiffs had not disclosed that the property was sold for R2.3 million and this amount was to be included in any damages amount. The plaintiffs filed a consequential reply wherein it was admitted that the plaintiffs had sold the property on 10 March 2020 to mitigate their damages, but would have had to rent another property at R35 000 per month rendering their claim 2 correct as pleaded.

The question to be answered

[6] Is the written rental agreement in fact a sale agreement for the business Kraaines? Was the oral agreement to buy the business repudiated and must damages be awarded, and in what amount.

The evidence

[7] Mr Van Sittert testified that they wanted to retire and therefore wanted to sell their nursery school and the property from which it was operated. The purchase price was to be R4 million as a package deal. Mr Van der Merwe introduced the Saunders to them and they concluded a verbal agreement.

[8] The verbal agreement was that the Saunders would pay R4 million for the business and for the nursery school and that Mr Van der Merwe would see to the drafting of the agreement.

[9] Mrs Saunders then informed them that it would be easier to obtain financing for R3 million and therefore they wanted to split the transaction. They would pay R1 million for the business and R3 million for the property. As they did not have financing to purchase the property a lease agreement was drawn up. Attached to the lease agreement was a deed of sale for the property, signed by the Van Sitterts the same day as the lease agreement was signed. The Saunders did not sign the sale agreement but signed the lease agreement. He vehemently denied that the rent was paid as instalments for the purchase of the business. He testified the rental period was for three years because it accommodated the constant to and fro with the contract for the purchase of the property and it would give the Saunders time to build up financial credibility to obtain financing. He denied that the rent was linked to the amount of children in KCE indicative thereof that they were buying Kraaines and not renting. The R35 000 rent a month was easily affordable with the amount of children they had. The Saunders would continuously add terms and conditions, or delete

terms and conditions on the contracts. He denied that the escalating monthly leasing price was indicative thereof that the rental paid constituted the payment for the business. This version of the agreement came to light for the first time before they vacated the premises. In 2019 the Saunders changed tact again and wrote a letter to say that the nursery school did not belong to the Van Sitterts which he branded as a blatant lie. They then realised that the Saunders were playing cat and mouse with them.

[10] He testified that when the negotiations started there were 75 children in the school. When the premise was handed over to the Saunders there were more or less 60 children in the nurse school. They had informed the parents that the school was being taken over by Ms Saunders. She was known because she also has a nursery school in Raslow and some parents then took their children out of the school. Similarly, after she took over some children left the school because some of the parents did not like the attitude of Ms Saunders pursuant to a meeting she had with the parents. With 60 children in the school one could easily make a profit. He denied that when the Saunders took over the school there were only 40 children in the school and therefore KCE was running at a loss for three years.

[11] The premises where handed over with the buildings painted and in great shape. Ms Saunders wanted to change the interior and exterior to fit with her taste and to conform with Kiddi Care Education [KCE]. He denied that the premises were handed over in a bad shape. They had no objection that the name changed and starting under that name would also help with building financial credibility to obtain a mortgage bond.

[12] When the Saunders vacated the premises there was no business left, no children, the building was vandalised and hardly any equipment was left. Where the Saunders had removed an air-conditioner the wall was ripped and vandalised. The Saunders had started a new nursery school 4 or 5 houses down from where Kraaines was. He handed up to Court an inventory that was compiled when Kraaines

was handed over to the Saunders and another document reflecting the assets that were left when the Saunders vacated the premises. He agreed that no notice was sent out for a post inspection, but Mr Saunders and his father-in-law or father was present when the second document was drafted. They also took photographs of how Kraaines looked when the post inspection was done.

[13] He denied that the Saunders did not receive any financials for Kraaines. They received the bank statements for "Mr L P van Sittert handeldrywend as Kraaines Kleutersentrum." They received the financial statements drawn up by Lemique Consultants. He had handed the documents to Mr Van der Merwe who had to hand them to the Saunders.

[14] He was referred to an article wherein it was reported that a teacher in Kraaines had taped 4 four-year olds mouths with tape to keep them quiet. A disciplinary action was instituted against the teacher. He said the teacher had put tape in a cross sign on the floor indicating where the children had to stand while practising for a concert. One of the children picked this up from the floor and put it over his mouth. Three other followed suit and the class was laughing. The teacher sent the child who started this to sit outside.

[15] He agreed that Kraaines was conditionally registered with the Department of Social Development when the Saunders took over and that KCA was not yet registered with them.

[16] Mrs Van Sittert in essence confirmed the version of Mr Van Sittert. She agreed that the Saunders were entitled to take the possessions that were theirs, but they had left barely any of the moveables that had belonged to Kraaines. She testified to the photographs taken reflecting very little of the movables were left compared to the inventory list when the Saunders took over Kraaines. The prices of the items that were not left on the premises she obtained from shops like Makro and

Westpack to claim damages for the items that were missing. She denied that all the moveables were left, the list reflected the items that were missing and she did not claim for anything that was not missing.

[17] It was put to her that an account with number 011740809 was not taken into account when the auditors compiled their financial statements. She could not answer to how the auditors compiled the statements.

[18] Mr Van der Merwe testified that SA Childcare is an independent service provider for nursery schools that assists with all required legal procedures for registration, HR and training; all services related to running a nursery school. He assisted the Van Sitterts with their registration. The document that forms part of the registration process showed that at that time there were 73 children in Kraaines. His office ladies complete the forms and this application was sent in in August 2015 but they only received the registration certificate in 2017.

[19] SA Childcare also assists in advertising nursery schools that are for sale. The Van Sitterts told him that they wanted to retire and sell. He knew Ms Saunders because he had also assisted her with the registration of another nursery school and knew she wanted to expand so he informed her that the Van Sitterts wanted to sell. The first proposal was to buy the property and the business as a package deal for R4 million, but because the Saunders had bought the property of the other nursery school they could not obtain finance. He then suggested that they lease the property until they could obtain finance and this will also assist in them obtaining finance. So he suggested a split. One million for Kraaines and R3 million for the property.

[20] He instructed the attorneys to draw up the contracts. The lease agreement had this specific term; if more children attended the nursery school, more rental to be paid, because it was a going concern and it was what the Van Sitterts had to live on monthly. There was also a sale agreement for the property. The Van Sitterts signed



both but the Saunders only signed the lease agreement. He did not know why. He knew it as a rent to buy; after the expiry of the lease agreement the sale agreement would kick in.

[21] He testified there was a valuation before the Van Sitterts took occupation of Kraaines. He knew of the valuation in 2018 when the Van Sitterts had been in the property for 2 years and said that it would be easy for the Saunders to subtract from the 2018 valuation any improvements they had made on the property to attach a value to the property as a sale price.

[22] He had received the financial statements and bank statements from the Van Sitterts and saw an email that it was sent to the Saunders, but he did not know who in his office had sent it. He could not comment as to why Ms Saunders avers she did not receive it. He knew Ms Saunders had overreached and could not buy another property without a loan, that is why the contract was redefined to first lease and then buy. He said it was not factually correct that the lease amounts paid would be for payment of the purchase price of Kraaines. He was part of the discussions and knew exactly why that clause was formulated as it was; it was to protect the tenant if the nursery school did not grow because the rent would not increase. That is why a 10% yearly increase was not inserted in the contract. He was adamant that he knew exactly what that clause was for.

[23] He testified that the property was zoned for a nursery school, but that the municipality had lost the documents. The municipality found a minute [the email was produced], that it was correctly zoned and that is why the building plans were approved. He also testified that the Department of Social Development is supposed to register a nursery school within 90 days, but it is nothing strange to wait for two years before they do so. Kraaines was conditionally registered and if a nursery school had a name change or change of ownership one had to register again.

[24] He acknowledged that the sale agreement provided that he receive commission to which he was not entitled.

[25] Ms Saunders testified that Mr Van der Merwe told her about Kraaines and he did mention the price of R4 million. She told him that they had just bought a property and they will not be able to buy another property. She went to see Kraaines and the Van Sitterts and Mr Van der Merwe. were present. Mr Van der Merwe later called her and said that a three-year lease was an option “to make it easier to buy the property in three years’ time.”

[26] She testified that Mr Van der Merwe when he handed her the lease agreement explained that the three years will be payment for Kraaines because then it will be easier to obtain financing for just the property. The rent would increase if more children attended because they were generating more income and the Van Sitterts needed to be paid for it. The rental amount was split, R20 000 towards the business and R15 000 for the rent.

[27] She had made it very clear that she would not trade under Kraaines because it did not have a good reputation, was old, and she wanted to bring it up to standard and in line with the nursery school she had in Raslouw.

[28] She refused to sign the sale agreement because she was not provided with the zoning for the property, the financials and the registration of Kraaines and could not do due diligence. She kept on asking for the documents but never received anything. She accordingly refused to sign any further agreements.

[29] She proceeded with the lease despite not receiving any of these documents because she had put everything in place and had signed the agreement. When she took over there were 41 paying children but there were between 45 and 46 children

in the school. She did receive the bank statements but from that she could not see an income for 60 children.

[30] When she took over the premises it was functional, but she had to replace the cutlery and the mattresses. The cots were also not up to standard. They did a lot of maintenance to bring it all up to standard. She denied that they removed the items as testified to and she would not have agreed to the photos of the items been taken. They were running at a loss.

[31] Her evidence on what was left on the premises when they vacated left much to be desired. She admitted there were no mattresses, not the cots of Kraaines, no crockery no cutlery. She had removed the musical instruments and a piano stool. She could not remember whether the urn was left behind and would not acknowledge the photographs because she did not give permission for the photographs to be taken and there should have been a post inspection.

[32] She could not point to a clause in the rental agreement that supported her version that she bought the business and it was not only a rental agreement. She insisted that the rental constituted the purchase price but did not know what the purchase price was. She could not explain how the increased rent would alter the purchase price. She could not answer why after she signed the lease agreement she did not object to the sale of business agreement forwarded to her on the basis that she has signed such agreement; the lease agreement. She affirmed that she did not sign the sale of business agreement because on her version she had not received the financials from the Van Sitterts, not because she had signed the lease agreement. She was referred to an email she sent pursuant to taking occupation of the property and having signed the lease agreements which read as follows:

“Subject to the information required above we wil apply for a loan at the bank for 4 Million and buy the property and business (subject to bond approval).”

She testified she wrote that because she wanted to verify the prices of the property and the business.

[33] She was confronted with the fact that on every contract she received she made many alterations, yet on the rental agreement not reflecting it as payment for the sale of the business she made no alterations. She testified she was happy with the rental agreement because she understood it as being 36 months of paying off the sale of the business. She was young and it was misrepresented to her. She had not told her attorney that the Van Sitterts and Mr Van der Merwe had misled her.

[34] Mr Saunders testified but his evidence did not take the matter any further. He signed the rental agreement but did not read it. He said there was never any mention of R4 million. He was present when the Van Sitterts wanted entry into the premises. He removed the goods from the premises and it was mostly packed in boxes.

Reasons for decision.

[35] The plaintiffs' claim is for damages suffered as a result of the repudiation of the sale of the business. It has two components; past loss of income for the three-year period of the lease and future loss of income because when the premise was handed back them to them there was no business to continue with.

[36] It is common cause that there was an oral agreement for the sale of Kraaines. The Van Sitterts have to on a preponderance of possibilities prove that the rental agreement did not constitute the sale of business agreement and that the oral agreement was repudiated.

[37] To determine whether the rental agreement is in fact a sale of business agreement the Court has to interpret the agreement. As neither of the counsel referred to the *locus classicus* on this subject I quote as follows:

“The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”<sup>1</sup> [Footnotes omitted]

[38] Whether this written agreement is to be interpreted as a lease agreement requires very little pondering. It has the heading “lease agreement”, it identifies the property to be leased, the rental period and the amount rent to be paid. The lease agreement sets out all the essentials required by law for a valid lease agreement. There is no ambiguity in the wording of the contract. Clause 17 provides that this agreement grants the lessee the option to purchase the immovable property with the immovable property on the terms set out in the sale agreements attached to the lease agreement and the lessee upon signing accepts the option. There is nothing unbusinesslike in the terms and conditions of the lease agreement

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<sup>1</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) par [18]

[39] Ms Saunders placed much reliance on clause 5 and that this should be interpreted as being the sale price for the business from which it must be inferred that the lease agreement is in fact a sale of business agreement. Clause 5 reads as follows:

“5.1 Rental

5.1.1 The rental shall be

R35 000.00 (Thirty Five Thousand Rand) as from 1 June 2016 till 30 April 2017;

R38 500.00 (Thirty Eight Thousand Rand) as from 1 June 2017 till 30 April 2018 (on condition that the number of the children attending the crèche grows to a 100 or more. In the event of this target not being reached, the rental shall remain on R35 000.00 (Thirty Five Thousand Rand) a month);

R42 350.00 (Forty Two Thousand Three Hundred and Fifty Rand) as from 1 June 2018 till 30 April 2019 (on condition that the number of children during this period increases to a 120 or more and if not, then the rental will remain at R38 500.00, assuming that the number of children attending the crèche has reached the target of a 100, but has not reached the target of a 120).

In the event of neither the target of 100 or 120 children having been reached, then the rental will remain on R35 000.00, (Thirty Five Thousand Rand.)

5.1.1 The rental shall be payable monthly in advance by not later than the 1<sup>st</sup> (FIRST) day of each Month, commencing on the Commencement Date, free of exchange and without deduction or set-off to the Lessor by means of electronic transfer into a bank account of and to be identified by the Lessor, or in such other way or at any other address which the Lessor may notify the Lessee from time to time.”

There is nothing in the wording of this clause that infers that the amounts to be paid per month is anything but rental. The increase of rental if more children attend, when interpreted, cannot be interpreted as not constituting rental. There is no splitting of the rental amount for two different purposes recorded.

[40] Mr Van der Merwe was adamant that he knew what the apparent purpose to which this clause was directed was; the Van Sitterts had to live off the income as they had no other income and therefore there was not the normal 10% escalation clause. Consequently if there were more children they would receive more income. But, simultaneously the lessee was protected because if the nursery school did not grow the rent would not increase. He was part of the discussions and knew why the clause was drafted as it was.

[41] The version of Ms Saunders is rejected. In her evidence in chief she described the transaction as a "rent to buy." This is exactly what the Van Sitterts and Mr Van der Merwe unwaveringly testified; the Saunders would rent for three years while running the business as going concern, that would give them time to build up good financials to buy the business. It must be remembered it was common cause that Ms Saunders did not have the finances to buy the business, that there was a verbal agreement to buy Kraaines and that the written sale of the business agreement was provided to her.

[42] Her version renders the sale agreement invalid because she simply did not know what the sale price was; without a purchase price in these circumstances, no sale it concluded. Ms Saunders was very vague and did not impress the Court as credible when attempting to explain, in terms of the lease agreement, what the purchase price was. She was taken through the contracts she did not sign and it was highlighted how often she manually deleted and added terms and conditions to the contracts. Yet, the lease agreement she did not amend the "lease" to "buy" or any

other clause referring to leasing and not buying. It was thus highly improbable that she would not have amended it had she thought it was wrong.

[43] On her own version she did not sign the sale of the business agreement because she had not received the financials and the registration documents. On probabilities, if the lease agreement was the sale of business agreement then surely normal human reaction would not be, I need the financials, but; why must I sign two sale agreements? Furthermore, if the lease agreement was the sale agreement, why would she need those documents, she had committed to the sale by signing the lease agreement.

[44] I am satisfied that the Van Sitterts proved on a preponderance of probabilities that the lease agreement is that what the language of the provisions set out; a lease agreement. The evidence of the Van Sitterts and Mr Van der Merwe was reliable and credible and the context and background to the lease agreement supports the written agreement as it stands.

[45] The Van Sitterts also proved that there was a verbal sale agreement of the business. It is common cause that Ms Saunders wanted to buy the nursery school and took occupation to do so. She did not sign the written agreement of sale. She said the amount of R1 million was mentioned but she never knew where this amount came from. The Van Sitterts' and Mr Van der Merwe's evidence was reliable that the purchase price was R1million. Ms Saunders repudiated this verbal agreement. Her conduct heralded non-performance and the Van Sitterts accepted it and terminated the agreement. All the requirements for repudiation were proven.

[46] I must just remark that I took note of the arguments in the heads of arguments and the fact that I do not specifically address them does not mean I did not consider it. Both counsel however worked from the wrong premise. Counsel for the Van Sitterts relied heavily on the parol evidence rule, it is applicable, but since the Emdumeni matter the parol evidence rule has been confirmed by the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and*



*Another* (CCT 70/2020) [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) (11 June 2021) as only limiting evidence on contracts in certain circumstances. Counsel for the Saunders submission that the parol evidence rule is not applicable because the issue relates to oral evidence is completely incorrect. The whole issue revolves around the lease agreement, was it a sale or lease agreement in terms of the oral agreement.

The quantum of the damages

[47] In the heads of argument on behalf of the Van Sitterts it was submitted that the plaintiffs' evidence was the best evidence to assess the damages having run Kraaines for 30 years. They are not claiming any escalation of fees the children had to pay as damages suffered and presented the best evidence available to them. The fact that the evidence is open to some criticism is not a reason for a court not to grant damages.

[48] The evidence was that the children paid R1 800 per month. For the period of the lease the past loss of income is calculated for the three-year lease period equates to R1 800 for 65 children subtracting monthly expenses which comes to R117 000 per month and totals at R1 872 000.

[49] The future loss of income is calculated from the end of the lease agreement till the property was sold on 1 March 2020. Based on the same calculation as the past loss of income for the period 1 June 2019 to February 2020 the damages amount to R468 000.00. For the period 1 March 2020 [incorrectly on heads as March 2019] to May 2022, a period of 25 months at R17 000 per month income totalling R459 000 per month.

[50] On behalf of the Saunders it was submitted that the Van Sitterts had not proven their damages at all. They had testified without reference to supporting documents, like bank and financial statements and in any event Ms Saunders had

testified that they had run at a loss for three years. The Van Sitterts had not put the best evidence before Court. To prove their damages an expert had to testify to also taking into account contingencies. The claim of the Van Sitterts boils down to punitive damages which is not a cause of action in South African law. They also have not put evidence before Court as to how they mitigated their damages.

#### Decision on the quantum of damages

[51] In *Novick v Benjamin* 1972( 2) SA 842 (A) the Court found as follows:

“A fundamental principle of our law is that for a breach of contract the sufferer should be placed by an award for damages in the same position as he would have occupied had the contract been performed, so far as that can be done by payment of money, provided (a) that the sufferer is obliged to mitigate his loss or damage as far as he reasonably can, and (b) that the parties, when contracting, contemplated (actually or presumptively) that that loss or damage would probably result from such a breach of contract.”

Put differently, “Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”<sup>2</sup>

[52] Both the parties knew that the Van Sitterts wanted to retire and could only do so if they sold the business. If there thus was a repudiation of the contract both parties knew presumptively that from a breach of the sale agreement the Van Sitterts would suffer damages.

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<sup>2</sup> *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) par [27]

[53] The date from which damages run is the date of the breach. What date then constitutes the date of breach? In the pleadings the date of repudiation is the date that the Saunders denied that the Van Sitterts were the owners of the Kraaines and refused to sign the sale of business agreement. Both these facts are common cause and the date thereof is 15 April 2019. However, the amount of damages is computed not from the date of breach, but the date when performance was required. She was to obtain finance as soon as possible. There was accordingly no specific time for performance so the Court can look to other dates, but not the date of repudiation. On behalf of the Van Sitterts this was not pertinently argued but the damages are claimed from the anticipatory breach, the refusal of Ms Saunders to sign the sale of business agreement. This agreement is unsigned but dated 2016. It is common cause that it was handed to Ms Saunders in 2016. The damages must thus be calculated from the effective date, being the date the Saunders took occupation of the premises and is to be calculated until the property was transferred on 1 March 2020 because that is when they mitigated their damages.

[54] How is the amount of damages to be computed. The Van Sitterts must be placed back in the position as they were before the contract was concluded; when they were running the business. The Saunders had the onus to prove that the Van Sitterts did not mitigate their loss. The Saunders did not prove that the Van Sitterst did not act reasonably in all the circumstances; "the position seems clear enough that according to our law the duty to mitigate would go no further than to require the innocent party to act reasonably in all the circumstances, the onus of proof being on the defaulting party."<sup>3</sup>

[55] I am satisfied that the Van Sitterts testified to what amounts constituted income and expenditure and what their profit was. They have not included increases and had mitigated their damages in selling the property. They were the owners of the business and had 30 years of experience in the business and was the best evidence put before Court. The only contingency that must be factored in is the fact that, as

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<sup>3</sup> Novick matter p858B

testified to, children in a nursery school come and go. As for the past loss I would thus find it reasonable to work with 55 children and not 65 children at R1 800 per child per month for the period 1 June 2016 to 31 May 2019. R1 800 per month is in fact a lower amount and very reasonable. I also leave the expenses at R65 000 per month rendering it a very reasonable income per month. This amount then totals R1 224 000.00.

[56] As for future loss of income a reasonable timeframe from which to calculate the damages would be from when the Saunders abandoned the property, 1 June 2019. I find that the period to run until the property was sold, 10 March 2020 and not for a further period. I see no reason why the same amounts as set out in the past loss of income claim cannot be utilised. Accordingly; 55 children at R1800 per month excluding the first 10 days of March with the expenses at R65 000 per month. The amount of damages then totals R306 000.

[57] I make the following order

[57.1] The defendants, jointly and severally, are ordered to pay to the plaintiffs the amount of R1 224 000 as past loss of income.

[57.2] The defendants, jointly and severally are to pay the plaintiffs the amount of R306 000 as future loss of income.

[57.3] The defendants are ordered to pay the plaintiff's interest on the amounts set out in 57.1 and 57.2 in terms of the Prescribed Rate of Interest Act 55 of 1975 from date of service of summons.

[57.4] The Defendants are ordered to pay the costs on a party and party scale.

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**S. POTTERILL**

**JUDGE OF THE HIGH COURT**

CASE NO: 35560/2019

HEARD ON: 7, 8 AND 10 AUGUST 2023

FOR THE PLAINTIFFS: ADV. H. VAN GASS

INSTRUCTED BY: I Nieuwoudt Attorneys

FOR THE DEFENDANTS: ADV. K.A. SLABBERT

INSTRUCTED BY: GVS Law

DATE OF JUDGMENT: 26 January 2024