

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



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal Case No: AR

129/2022

In the matter between:

ROSALIND SANDER

APPELLANT

and

JAMES NAYSMITH

RESPONDENT

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg
(Mathenjwa AJ sitting as court of first instance):

1. The appeal is upheld.
2. Clause 5.2.2 of the loan agreement is severed from the loan agreement and the loan agreement as amended is found not to be in contravention of the Subdivision of Agricultural Land Act 70 of 1970.

3. The respondent is ordered to pay the costs of the application which costs shall include the costs of the application for leave to appeal and the costs of the appeal as well as the costs of Senior Counsel where employed.

APPEAL JUDGMENT

ZP Nkosi J (PC Bezuidenhout J concurring with the order)

[1] What lies at the heart of this appeal is the interpretation to be accorded to the terms of the agreement, titled “Loan Agreement”¹ which was entered into by and between the parties, with the appellant as the lender and the respondent as the borrower. The dispute which arose between the parties has its genesis in the “pre-emptive right election” found in clause 7 of the agreement.

[2] The appellant instituted arbitration proceedings seeking to enforce a right of pre-emption in the agreement. The arbitration proceedings were adjourned sine die and the matter was referred to the High Court for a declaratory order relating to the validity of the agreement.

[3] The respondent (applicant in the court a quo) instituted the declarator proceedings, by notice of motion, seeking the following relief:

- ‘1. A Declaratory Order that the Loan Agreement concluded between the APPLICANT and Rosalind Sanders (hereinafter referred to as “the RESPONDENT”), a copy which is annexed hereto marked “LOAN AGREEMENT”, be wholly declared null and void as same is in contravention of the Subdivision of Agricultural Land Act 70 of 1970;
2. Costs of the Application;
3. Further and / or alternative relief’.

The respondent averred in his founding papers that if the agreement is declared to be null and void and unenforceable, the provisions thereof as relied upon by the appellant (respondent in the court a quo), are not severable from the rest of the agreement.

¹ Annexure “RS1”.

[4] The court a quo (per Mathenjwa AJ) granted a declaratory order sought by the respondent and found that the provisions of clause 5.2.2 of the agreement were not severable from the rest of the agreement. The reasons therefor are captured in the judgment as follows:

[31] Mr Alberts conceded during argument that the agreement was a loan agreement. The concession was correctly made considering that the agreement is titled as being a loan agreement, it records the respondent as a lender, the applicant as a borrower, the capital amount lent to the borrower, and the repayment of the loan.

[32] ...I observe that the purpose of the agreement are specified in clause 2 of the preamble of the agreement, where it is stated that the borrower has or will use these funds in the acquisition of the property. Clause 4 of the preamble goes further and records that the borrower would acquire all the land on the Durban side of the Thornville road. In clause 2.2 of the agreement the parties incorporated the preamble as part of the entire agreement. Therefore, the purpose of the loan as expressed by the parties in the preamble is part of the agreement.

[33] The agreement provides for three ways in which the loan would be repaid. What is relevant is clause 5.2.2 of the agreement which provides that in the event of the consent to the subdivision being obtained, then the lender would take possession of ownership of the stand on which her personal residence is situated at no purchase cost, in full settlement of the loan.

[34] On reading the agreement as a whole, it appears that the main purpose of the loan agreement was to enable the respondent to purchase a portion of the property. The respondent also protected her interest in the property. Clause 6.1 of the agreement records that in order to secure the respondent's interest in the property, a mortgage bond would be registered over the property in favour of the respondent. In this manner, the respondent protects her interests in the property.

[35] I accept that the respondent protected her investment or interest in the property by registering a mortgage bond on the property. In my view the protection of the respondent's interest was subsidiary to the main purpose of the loan agreement to purchase the property.'

[5] The learned Judge then traversed the provisions of s 3 of the Subdivision of Agricultural Land Act² ('the Act'); the case law applicable; severability of clause 5.2.2 from the agreement; and concluded as follows:

'[39] ...although the agreement is not an agreement of sale, since the purpose of the loan is to purchase a specific portion of the farmland, and the Minister has not consented to the subdivision of the farmland, the agreement is prohibited by the Act.

...

[41] In my view, even if clause 5.2.2 was severed, the remainder of the clauses of the agreement will still reflect that the main purpose of the agreement was to enable the lender to purchase a portion of undivided farm land.'

The appeal is with leave granted on petition to the Supreme Court of Appeal.

[6] The main issue in the appeal still lies in the interpretation of the agreement. That is, to establish whether or not the main purpose of the agreement was to enable the appellant to purchase a portion of undivided farm land in a manner prohibited by the Act. If not, whether the offending clause(s) is / are severable from the agreement.

[7] The state of the law relating to interpretation of contracts was stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*³ as follows:

'[18] ...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 objective, not subjective. A sensible meaning is to preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.... The "inevitable point of departure is the language of the provisions itself", read in context and

² Subdivision of Agricultural Land Act 70 of 1970.

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

having regard to the purpose of the provision and the background to the preparation and production of the document.’ (Footnotes omitted.)

The rule is reinforced and / or reaffirmed in numerous decisions.⁴

[8] It is submitted by appellant’s counsel that the agreement has not contravened the Act, as the interest provided for in the agreement is not the acquisition of ownership in the property; does not connote ownership; and does not constitutes a right to acquire the property. In this regard, counsel referred this court to *Corondimas and Another v Badat*⁵ in which a narrow meaning of the word “sale” when used in relation to fixed property was accorded.⁶ However, see, *Geue and Another v Van der Lith and Another*.⁷

[9] The agreement reveals history to its conclusion. That is despite what would appear to be facts in dispute between the parties regarding the surrounding circumstances for its conclusion to which the *Plascon-Evans* rule would apply in any event.

[10] The following history and common intention of the parties may be discerned from the following provisions of the agreement:

- (a) The appellant and respondent intended to acquire the property *jointly* (clause 3.1). (My emphasis.)
- (b) The parties then decided on a *partnership* (clause 4 of the preamble).
- (c) By virtue of the above the appellant had paid to the respondent for her share of the property to be acquired (the advance and residual) (clause 1.3).

⁴ See, inter alia, *Dexgroup (Pty) Ltd v Trustco Group International (Pty Ltd and Others)* 2013 (6) SA 520 (SCA) para 16; *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10-12; and *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) paras 61-63.

⁵ *Corondimas and Another v Badat* 1946 AD 548 at 558.

⁶ See also *Soja (Pty) Ltd v Tuckersland and Development Corporation (Pty) Ltd* 1981 (3) SA 314 (A) at 324 in fine-325A.

⁷ *Geue and Another v Van der Lith and Another* 2004 (3) SA 333 (SCA) para 13-15.

- (d) Upon realising that the partnership agreement is unlawful, as it transgressed the Act, the parties then agreed to the loan agreement since the appellant had already invested on the property and she needed to secure her investment in it.
- (e) The appellant protected her capital input by converting it into an interest in and to the property (clause 3.4).

[11] Since the learned Judge found that the main purpose of the loan was to purchase a specific portion of the farmland before the Ministerial consent was obtained, it is necessary to traverse the terms of the agreement to establish whether or not the agreement was calculated to circumvent the prohibition by the Act. The preamble contains a recordal of the history or background of the agreement. It records that the lender has contributed funds towards the acquisition of the agricultural property which was intended to be held in partnership but there is a new arrangement agreed to and the parties wish to record its terms and conditions (clause 5 of the preamble).

[12] From the preamble, it appears to me that the parties were moving away from the agreement as set out in annexure "A" (which appears to have been related to a partnership) to a new arrangement (the loan agreement). I assume that is why annexure "A" was not attached as it was not part of the new arrangement.

[13] In clause 3 the parties convert the capital paid by the appellant (advance and residual) initially agreed for the joint purchase of the agricultural land to a loan as the parties had realised that agricultural property is not capable of being jointly owned in undivided shares. So, in return for the full capital paid, the appellant (as lender) acquired an interest in and to the property (clause 3.5).

[14] I am of the view that having an interest in the property is not the equivalent to the purchasing of a share in the undivided property but to be an agreed stipulation dealing with the capital invested and the repayment of the capital invested. The farm was registered and owned by an individual and not a juristic person which owns shares. The

repayment method of the loan is provided for in clause 5 and provides a repayment “in one of the following three manners” (clause 5.2). In the method of repayment, I consider there to be a return on the “interest” acquired by the appellant for her loan. If the main purpose of the loan was to purchase a portion of the property, it makes no sense why there should be such a provision in the agreement. I believe it was purely inserted as a security provision.

[15] The first manner of the repayment of the loan advanced to the respondent is that if the property is sold, the proceeds will be shared equivalent to their respective interests i.e. what each party contributed. The second manner is a subdivision subject to the required legal consent (clause 5.2.2 which contravenes the Act).⁸ This clause can be severed from the other manners of repayment, as it is but one of the manners agreed to by the parties. I believe there is no reason in law or in fact why this unlawful “manner” should render the whole agreement unlawful and invalid.

[16] The third manner provides for a pre-emptive right to either party in respect of the whole of the property (clause 5.2.3). This is not a pre-emptive right for a sub-divided portion (causes 7.1 and 1.4).

[17] So, with the offending clause severed, there would be nothing left, in my view, which would still render the agreement null and void and invalid as the court a quo found. What remains intact is the appellant’s investment, and the return on her investment. Nothing should turn on the provisions of the preamble since it only records the history of the agreement and to explain why the capital initially paid for the joint acquisition of the agricultural land was rearranged to a loan between the parties. I therefore believe that the court a quo erred in its findings that the main purpose of the agreement was to purchase a portion of the undivided land and that severance of the offending clause 5.2.2 would not save the agreement.⁹

Order

⁸ Ibid.

⁹ See *Four Arrows Investments 68 (Pty) Ltd v Abigail Construction CC and Another* 2016 (1) SA 257 (SCA); *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA) para 35.

[18] In the result, the following order is issued:

1. The appeal is upheld.
2. Clause 5.2.2 of the loan agreement is severed from the loan agreement and the loan agreement as amended is found not to be in contravention of the Subdivision of Agricultural Land Act 70 of 1970.
3. The respondent is ordered to pay the costs of the application which costs shall include the costs of the application for leave to appeal and the costs of the appeal as well as the costs of Senior Counsel where employed.

P C Bezuidenhout J:

[19] I have been privileged to have read the judgments of both Nkosi J and Steyn J in this matter. In the judgment of Nkosi J the appeal is upheld and it was ordered that paragraph 5.2.2 of the loan agreement be severed therefrom and that the loan agreement as amended be found not to be in contravention of the Subdivision of Agricultural Land Act 70 of 1970. In her judgment Steyn J found that it was not a loan agreement but considering the factual matrix that it was a disguise for a sale agreement of agricultural land and not a loan agreement. She found that the court a quo was correct that paragraph 5.2.2 was part of the loan agreement and was not severable from the rest of the loan agreement. She accordingly proposed that the appeal be dismissed with costs. I concur with the order of Nkosi J but for the reasons that are different and additional.

[20] The relief which was sought in the notice of motion was a declaratory order that the loan agreement concluded between Applicant and Respondent be wholly declared null and void as same is in contravention of the Subdivision of Agricultural Land Act 70 of 1970. The order was granted with costs by the court a quo.

[21] From the record it appears that there were many discussions and letters before what is termed “the loan agreement” was concluded. These issues have been dealt with in detail in the other two judgments and accordingly it is not necessary to repeat them herein.

[22] In paragraph 11 of Appellant’s answering affidavit she stated that she had constructed a residential home on a portion of the property and had made financial contributions which were referred to as a result of which the property value had increased. In response thereto in his replying affidavit Respondent sets out a reply of approximately 12 pages dealing with various letters from one Martindale, which appears to be Appellant’s brother, and various other letters and issues which have no bearing on what was stated by her in paragraph 11 of her answering affidavit. The replying affidavit, in my view, contains many issues which should have been dealt with in the founding affidavit and that it should therefore have been excluded. It has been held in the judgment that there were other ways of dealing with it and it should be accepted. In my view the long replying affidavit and what is raised in there are new facts and should have been excluded. There is also no confirmatory affidavit from one Karen, who it is alleged in Appellant’s affidavit, would be attached.

[23] It is trite that the sale of land has to be in writing and agricultural land to comply with the Subdivision of Agricultural Land Act and not any oral agreement. Annexure “A” which was referred to was also never signed and therefore never became a binding agreement between the parties. It was also not attached to the papers. The issue is therefore whether it was a sale agreement or a loan agreement or a disguised sale agreement.

[24] In terms of the definitions of sale in the Subdivision of Agricultural Land Act 70 of 1970 it includes a sale subject to a suspensive condition and that sold should have a corresponding meaning. In section 3(e)(i) no portion of agricultural land whether

surveyed or not and whether there is a building thereon or not shall be sold or advertised for sale except for the purposes of mining as defined in section 1 of the Mines Works Act 1956 (Act 27 of 1956) and to such portion be sold. It is therefore as accepted by everyone that the sale of a subdivision of agricultural land cannot proceed without the consent of the Minister.

[25] In my view it is necessary to consider the terms of the "Loan Agreement" in more detail.

[26] In paragraph 4 of the preamble the loan agreement sets out as follows:

"The basis of the agreement, as set out in annexure "A" was that the borrower would acquire all the land on the Durban side of the Thornville Road and that the portion of the property on the Pietermaritzburg side would be acquired in partnership referred to above and all expenses, risks and benefits in that portion only would be shared equally."
(My underlining)

In paragraph 2.2 it states that the preamble shall form part of the agreement. In paragraph 3 it deals with loans and in paragraph 3.1 it states:

"The borrower has acquired the property which is an agricultural property and is not capable of being owned in undivided shares. It was the intention of the lender and the borrower that the property be jointly owned notwithstanding the legal impediment to this. The basis of this amnesty is as set out in the preamble and annexure "A"." (My underlining)

[27] A consideration of the agreement including the preamble which forms part of the agreement sets out that the basis of the agreement was that the borrower would acquire land. However, it does not continue that this is still the intention. It specifically mentions as set out above in paragraph 3.1 that such agricultural land cannot be owned in undivided shares. It is therefore apparent that the parties realized that although it was

their intention to subdivide it could not be done. As certain money had already been paid it was then agreed to change it to a loan agreement with a bond to be registered over the property. The bond was registered over the property to secure Respondent's funds that she had spent on the said property.

[28] It was contended on behalf of Respondent and found by Nkosi J that if paragraph 5.2.2 which is one of the methods to repay the loan, and which reads:

"The borrower has applied for consent to divide the property into stands of approximately 5 hectares each. In event of consent to the subdivision being obtained then the lender shall take possession and ownership for such stand on which the personal residence is situated at no purchase costs and full settlement of the loan. The lender shall be liable for the costs of transfer of the stand."

Is deleted the above would then ensure that the agreement is a loan agreement. The offending portion of the agreement which makes it null and void would then be excluded.

[29] The preamble remains part of the agreement if clause 5.2.2 is excluded. Paragraph 4 sets out what was the intention namely to purchase a portion of the land. Clause 5.2.2 is not a conditional sale of the property or that the sale is subject to such relief being granted. Nor is it a suspensive condition. It is one of three ways in which the loan can be repaid.

[30] It is undisputed that money was spent and that a bond has been registered. It then sets out three manners in which the loan could be repaid and 5.2.2 is one of those. In my view, there is no suspensive condition that the sale is dependent upon permission being granted by the Minister. It is set out as one of the manners in which the loan can be repaid if the Minister consents.

[31] As it appears the Minister's consent has not been obtained the loan can only be repaid either in terms of 5.2.1 or 5.2.3 considering the bond that has been registered. Although it may be possible to argue that paragraph 5.2.2 does not have to be severed from the loan agreement for it to be a valid loan agreement it is not necessary to deal therewith at this stage. I therefore agree with Nkosi J that by severing clause 5.2.2 of the loan agreement the subdivision of the land is no longer an issue and the agreement would then also not be in contravention of the Subdivision of Agricultural Land Act 70 of 1970.

[32] I accordingly concur with the order of Nkosi J.

Steyn J dissenting:

[33] I have read the judgments of my brother Nkosi J and P C Bezuidenhout J and I am respectfully unable to agree with their reasoning or the order issued. The judgment by Nkosi J has set out the relevant facts, comprehensively insofar as it relates to the "pre-emptive" right found in the agreement as per clause 7 and its reasons for favouring severability of clause 5.2.2 of the agreement. Whilst I support the contention that one of the main issues of the appeal is the interpretation of the agreement as stated in the judgment, I am, for the following reasons, in disagreement with the reasons and the conclusion reached by both my brothers.

[34] The agreement is pivotal to the outcome of the appeal and therefore I would quote from the relevant clauses in full:

"

LOAN AGREEMENT

By and Between

ROSALIND SANDERS

(The LENDER)

JAMES NAYSMITH

(The BORROWER)

PREAMBLE

It is recorded that:

- 1 The LENDER has contributed or will lend monies to the BORROWER.
- 2 The BORROWER has or will utilise these funds in the acquisition of the PROPERTY.
- 3 The CAPITAL lent by the LENDER to the BORROWER has been done so other than as a purely commercial transaction at arms length and in order to allow the LENDER to acquire a share in an agricultural property.
- 4 The basis of the agreement, as set out in Annexure "A", was that the BORROWER would acquire all the land on the Durban side of the Thornville Road and that the portion of the PROPERTY on the Pietermarizburg side would be acquired in the partnership referred to above and all expenses, risks and benefits in that portion only would be shared equally.
- 5 The PARTIES wish to record the terms and conditions of their arrangement in this written memorandum."

6

THE PARTIES AGREE AS FOLLOWS

1 DEFINITIONS

. . . .

2 INTERPRETATION

- 2.1 The headnotes to this agreement and to the individual paragraphs are for reference purposes only, and shall not govern the interpretation of any of the clauses of this agreement, or any of the provisions contained herein;

- 2.2 The preamble shall form part of this agreement;

. . . .

3 LOAN

- 3.1 The BORROWER has acquired the PROPERTY which is an agricultural property and is not capable of being owned in undivided shares. It was the intention of the LENDER and

the BORROWER that the PROPERTY be jointly owned notwithstanding the legal impediment to this. The basis of this joint amnesty is as set out in the Preamble and Annexure "A".

- 3.2 The LENDER has contributed an amount as set out in the definitions as the ADVANCE towards the costs of acquisition and improvement of the PROPERTY.
- 3.3 The LENDER shall contribute the RESIDUAL to the BORROWER within seven (7) days of the date of signature of this agreement.
- 3.4 In return for the full CAPITAL (being the ADVANCE and the RESIDUAL) loan the LENDER has acquired an Interest in and to the PROPERTY.
- 3.5 The Interest referred to above shall be calculated by comparing the respective contributions of the two PARTIES to the acquisition and improvement of the PROPERTY. Any contributions made after 1 October 2007 and not reflected in Annexure "B" shall be supported documentary evidence when possible and shall be disclosed as contemporarily as possible to the other PARTY.

4. **INTEREST**

- 4.1 The loan of the CAPITAL by the LENDER to the BORROWER shall not attract interest.
- 4.2 As from 1 October 2007 until date of payment to the BORROWER of the RESIDUAL, both days inclusive, the outstanding balance of the RESIDUAL shall attract interest at the prime lending rate of the Standard Bank of South Africa as published from time to time. Such interest shall be paid to the BORROWER together with the RESIDUAL and shall not alter the percentage interest of the LENDER in and to the PROPERTY.

5. **REPAYMENT OF THE LOAN**

- 5.1 This agreement shall continue in perpetuity until fulfilment of its terms and conditions.
- 5.2 The loan shall be repaid in one of the following three manners.
 - 5.2.1 In the event of the PROPERTY being sold to a third party the BORROWER and LENDER shall be entitled to payment equivalent to their respective percentage interests in and to the PROPERTY from the proceeds of the sale. Such allocation to be made prior to the deduction of personal costs from the sale provided however that joint costs incurred in the sale shall be deducted from the proceeds prior to their division.
 - 5.2.2 The BORROWER has applied for consent to divide the PROPERTY into stands of approximately five Hectares each. In the event of consent to the subdivision being

obtained then the LENDER shall take possession and ownership of such stand on which her personal residence is situated at no purchase cost in full settlement of the loan. The LENDER shall be liable for the costs of transfer of the stand.

- 5.2.3 In the event of either PARTY exercising their preemptive right in terms of this agreement then he or she shall only be liable to pay an amount equivalent to the other PARTIES percentage Interest in and to the PROPERTY.

6 SECURITY

- 6.1 In order to secure her interest in and to the PROPERTY the BORROWER hereby consents to the registration of a mortgage bond over the PROPERTY in favour of the LENDER recording the terms and conditions of this loan agreement.
- 6.2 The costs of registration shall be for the account of the LENDER.
- 6.3 The BORROWER shall not unreasonably fail to sign any documents required for this purpose.

7 PREEMPTIVE RIGHT

- 7.1 In the event of either PARTY wishing to sell the PROPERTY (or dispose of it other than by testamentary disposition) to any third party he or she (the Offeror) shall, prior to concluding an agreement of sale with a third party, offer the PROPERTY to the other PARTY (the Offeree) on the same terms and conditions as are contained in a written offer of purchase by a third party.
- 7.2 The Offeree shall have a period of not less than fourteen (14) days during which time to accept the offer to purchase the PROPERTY subject to the same conditions contained in the written offer signed by a third-party purchaser.
- 7.3 In the event of the Offeree failing to accept the offer or declining the offer the Offeror shall be free to contract with the third party for the sale of the PROPERTY, subject to:
- 7.3.1 the limitation that the Offeror shall not contract with such third party on terms and conditions materially different to those contained in the written offer which was not accepted by the Offeree; and
- 7.3.2 such written offer may not contain terms which are of a personal nature which the Offeree cannot fulfill.
- 7.4 In the event of their being any change to the terms and conditions then such alternate terms and conditions shall first be offered to the Offeree for a further period of seven (7) days for acceptance prior to a final agreement being reached with the third party purchaser.

- 7.5 The Offeror may dispose of the PROPERTY by way of testamentary disposition provided that any heir or legatee is bound by the terms and conditions of this agreement which shall persist despite the death of the Offeror.
- 7.6 The preemptive right as set out above may be exercised by the LENDER or her nominee in which case it will be assumed and deemed that the debt recorded in this loan agreement has been legally transferred to the nominee and that exercise of the preemptive right is in settlement of such debt.
- 7.7 This Preemptive Right shall be contained in any agreement of sale to a third party who shall be bound to offer the PROPERTY to the other PARTY should such third party only acquire an interest in the PROPERTY and not the PROPERTY as a whole.
- 7.8 For the purposes of the preemptive right as set out above “sell” shall include the disposal by either party of his or her rights in terms of this agreement by way of cession or any other means and PROPERTY shall similarly include the PARTY’S interest¹⁰.
(My emphasis)

[35] In the judgment penned by Nkosi J, much importance has been placed on the preamble and it was held that the parties were moving away from the agreement as set out in Annexure “A”.¹¹ However, the judgment states in its conclusion that *‘nothing should turn on the provisions of the preamble since it only records the history of the agreement.’*¹² Clause 2 of the agreement, however, pertinently states that it shall form part of the agreement. P C Bezuidenhout J seems to acknowledge that the preamble remains part of the agreement but still concludes that the agreement was a loan. In my view, the content of the preamble cannot be wished away. Annexure “A”, dealing with a partnership never formed part of the papers. It was submitted by counsel for the appellant, Mr Roux SC, that the appellant inter alia acquired an ‘interest’ in the property, as opposed to ownership in a portion of the farmland as contemplated in the attachment to RS1.

[36] It is necessary to state at the onset that confusion was caused in filing the various agreements before court. The respondent, however clarified the position by

¹⁰ See record at pages 22 to 26.

¹¹ See paras 11 and 12.

¹² See para [17] supra.

stating that the agreement that was attached to the founding affidavit was the agreement that was originally agreed to by the parties. However, when the matter served before the arbitrator it was noted that the agreement signed by both parties, dated 2 January 2008, contained an express amendment to the loan agreement signed on 23 December 2007.¹³

- [37] The court *a quo* decided on the following issues when the application was heard:
- (a) Whether the agreement was null and void for being in contravention of the Subdivision of Agricultural Land Act 70 of 1970 (hereinafter the “Act”) as the primary purpose of the parties was a sale of an undivided portion of agricultural land, without the consent of the Minister; and
 - (b) Whether the provisions of clause 5.2.2 of the agreement were severable from the loan agreement.

[38] It is important to make the following observation and that is that the notice of motion before the court *a quo* sought the following relief:

- ‘1. A Declaratory Order that the Loan Agreement concluded between the APPLICANT and Rosalind Sanders (hereinafter referred as “the RESPONDENT”), a copy of which is annexed hereto marked “LOAN AGREEMENT”, be wholly declared null and void as same is in contravention of the Subdivision of Agricultural Land Act 70 of 1970.’¹⁴

[39] It is evident that the court *a quo* went further than merely dealing with the declarator sought. Yet, I am of the view that it was not misdirected on the law when it also considered the severability of clause 5.2.2.

[40] Importantly, the court *a quo* found that the main purpose of the agreement was to enable the appellant to purchase a portion of the said property, hence clause 6.1 of the agreement records that in order to secure the appellant’s interest in the property, a mortgage bond would be registered over the property in favour of the appellant. In doing so, the court held that the appellant protected her investment or interest in the

¹³ See para 2.2 at 152.

¹⁴ See record at page 1 and 2.

property.¹⁵ Essentially, the court *a quo* rejected the appellant's factual version that the principal intention of the parties was to 'protect her investment in the property', but found that this was subsidiary to the main purpose of the agreement which was to purchase the property.

Purpose of the Agreement

[41] The appellant dealt with the principle purpose of the agreement as follows in her answering affidavit:

'The principal purpose of the loan agreement was to secure / protect my investment in the property. A subsidiary, but not principal purpose, was a sub-division to secure ownership of a portion of the property in lieu of my investment'.¹⁶ (My emphasis)

[42] The appellant's contention must be seen in the light of the following facts. On 22 July 2016 the appellant's attorneys stated in a letter addressed to the respondent's attorneys that the appellant had purchased the property known as [...] of the Farm [...], KwaZulu-Natal. In addition, it was claimed that the appellant had leased her portion of the said property to a third party and that the lessee has an option to purchase her interest in the property subject to certain conditions.¹⁷ On 26 July 2017, a year after the first letter, the appellant's attorney sent a further letter addressed directly to the respondent stating that the appellant is the owner of at least one third of the property ("the Pike letters").¹⁸

[43] The contentions as per the Pike letters fortify the court *a quo*'s conclusion reached that the appellant's protection of her interest by registering a mortgage bond over the property was subsidiary to the main purpose of the agreement, which was to purchase the property.

Background facts to the Agreement

¹⁵ See court *a quo* judgment para 34 at volume 3, page 250.

¹⁶ See para 21 of the affidavit.

¹⁷ See annexure 'Pike Letter' at 219 and 220.

¹⁸ See Annexure 'Pike Letter 2' at 222.

[44] It is common cause, in my view, that the appellant and respondent as well as their respective, then spouses, were personal friends, as at 2006. The appellant averred in her answering affidavit that the following, surrounding circumstances support a proper interpretation of the loan agreement:

[17] The surrounding circumstances relevant to a proper interpretation of the Loan Agreement are the following:

- a. Denton Sander, my husband, acting for me, and the Applicant, agreed, early in 2006, orally, that the Property would be purchased and registered in the Applicant's and my name.
- b. On the assumption that the property had been registered in the Applicant's and my name, in and during 2006, I built on the Property a residential home.
- c. I also invested monies in the development of the Property.
- d. On or about September 2007 I established that the Applicant had, contrary to our agreement, purchased the property in his name in June 2006 and registered it in his name on the 11th December 2006. I attach hereto a deeds office search as annexure RS2.
- e. Denton and I confronted the Applicant, at the Property, we drew it to his attention that he had registered the Property in his name contrary to the agreement reached.
- f. This led to Applicant and myself entering into a written partnership agreement on the 18th June 2007. A copy of same is attached as RS3.
- g. After RS3 was signed the Applicant sought payment of the balance of the monies re: the purchase price of the Property.
- h. I was advised by my brother, John Martindale, that my investment in the property was not sufficiently protected by RS3. The problem with RS3 was that the property being registered in the Applicant's name, could be bonded or sold by the Applicant without my consent. This would undermine my investment in the Property.
- i. This led to further negotiations between the Applicant and myself, duly represented, culminating in the substitution of the partnership agreement with the Loan Agreement.
- j. Once the Loan Agreement was signed my investment in the Property was sufficiently protected by the registration of a mortgage bond, a reserved right of pre-emption, the right to share in the proceeds of the sale, my share to be commensurate with my

investment, [or] if a sub-division took place then and in that event transfer of a portion of the property'.¹⁹

[45] The following factual matrix however, gives context to the agreement. It is found in the surrounding circumstances stated by the respondent before the court *a quo*. The facts are contained in the letter dated 16 October 2007 from the respondent and his wife, Karen, addressed to the appellant and her husband, Denton (“the Naysmith letter”). The facts set out in this letter were never disputed by the appellant. It reads as follows:

‘Dear Ros and Denton,

I am resorting to writing all forms of communication between both parties with regards the land at Umlaas Road due to the fact that stories have been spread around about Karen and myself.

As was agreed in the beginning the land was to be purchased on a 50/50 basis. The land was to be purchased in a cc of which Ros and I were joint share holders. Late last year Denton had a huge argument with Karen and told me that he wanted nothing more to do with the land and I must either cancel the deal or take it on my own. I then changed the sale agreement and instructed the attorneys that they must register the property in my name. After the transfer Denton then asked if you could buy 1/3 of the property as that is what you could afford.

Please note that the property together with all alteration remains my sole asset until it is paid in full. I will instruct the attorneys to draw up a sale agreement. Please do not read anything into what I have written I am just protecting both parties and do not want any misunderstandings.

Please find attached document for your perusal. Should you have any corrections which you feel need to be made to the schedule of accounts we are more than willing to discuss this matter.

I would ask that you arrange your own driveway by the end of November and feel that it would be in both our interests that you install your own borehole, in which case the costs on the schedule will be reimbursed and I will hand you the other motor.

¹⁹ See Volume 2 at 119-120.

As you are aware my mother is coming to Natal in December 2007, it was agreed by both of us that you could reside in her cottage until then. Please assist in making sure that the cottage is available at the beginning of December 2007.

It is sad that a friendship has been destroyed and stories have been spread regarding us, your house, who is going to live in it etc. I assure that we will not go down the same road spreading stories and would request that you both have the integrity to do the same. Maybe if we all consider each other and each others feelings we will become friends again. (Would that not be great)

Regards,
James & Karen²⁰
(My emphasis)

[46] I am mindful of the fact that the Naysmith letter was filed by the respondent in reply to the appellant's answering affidavit. However, the appellant could have filed a supplementary affidavit if she wanted to contest the facts, provided that such supplementary affidavit was applied for and authorised by the court. She never did.

[47] Since the majority follows the route of severing clause 5.2.2 from the loan agreement, I find it necessary for purposes of this dissenting judgment to consider the intention of the parties and whether they wanted to move away from the original agreement of sale.

[48] It is trite that in determining an agreement's severability, a subjective test should be applied. In *S v Prefabricated Housing Corporation (Pty) Ltd and Another*²¹ the Appellate Division held:

'The only issue arising in this appeal is therefore this: does such invalidity vitiate the whole agreement (as the Court *a quo* decided and respondents maintain), or can the tainted part (2)

²⁰ See record at 191.

²¹ *S v Prefabricated Housing Corporation (Pty) Ltd and Another* 1974 (1) SA 535 (A).

and any other portions of the agreement dependent thereon be excised, leaving the remainder intact and operative (as the appellant contends)?

The first step in the enquiry concerns the proper criterion to adopt for determining the agreement's severability. In contracts it would seem that a subjective test is adopted, namely, what was the intention of the parties at the time the contract was concluded? (See, for example, *Collen v Rietfontein Engineering Works*, 1948 (1) SA 413 (AD) at p. 435). A somewhat subjective test used to be applied also to statutes (see, for example, *Kneen v Minister of Labour and Another*, 1945 AD 400 at pp. 406 - 409). But that was departed from and an objective criterion was finally and authoritatively laid down in *Johannesburg City Council v Chesterfield House (Pty.) Ltd.*, 1952 (3) SA 809 (AD) at p. 822D - F, where CENTLIVRES, C.J., said (again my numbering to facilitate reference):

"The rule... is that (i) where it is possible to separate the good from the bad in a statute and (ii) the good is not dependent on the bad, then that part of the statute which is good must be given effect to, provided that (iii) what remains carries out the main object of the statute."

It follows that each of the three requirements is complementary to the others and all must be fulfilled before the good can be regarded as severable and still effective.²²

(My emphasis)

The Act

[49] In *Tuckers Land and Development corporation (Pty) Ltd v Truter*,²³ Berker AJ considered s 3(e) of the Act and held:

'But what mischief did the Legislature attempt to prevent by s 3 (e) of the Act? Bearing in mind that a transfer of a portion of agricultural land can in any event not take place without the Minister's consent by virtue of the provisions of s 6 of the Act (which prohibits the Registrar of Deeds to register "a right referred to in s 3 (e)" unless the written consent of the Minister has been submitted to him), the conclusion seems inevitable that the very evil the Legislature tried to prevent by the introduction of s 3 (e) was the entering into of contracts of sale of such land without the Minister's consent. The very introduction of s 3 (e) into the Act, which was not necessary to prevent transfers of portions of agricultural land (which is one of the fundamental mischiefs the Act tries to prevent) in my view is a strong indication that contracts of sale of such land in contravention of s 3 (e) are void.²⁴ (My emphasis)

²² Ibid at 539B-539F.

²³ *Tuckers Land and Development Corporation (Pty) Ltd v Truter* 1984 (2) 150 (SWA).

²⁴ Ibid at 155H-156A.

[50] The Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*²⁵ concerned itself with the purpose of the Act as follows:

'[13] The essential purpose of the Agricultural Land Act has been identified as a measure by which the legislature sought in the national interest to prevent the fragmentation of agricultural land into small uneconomic units. In order to achieve this purpose the legislature curtailed the common-law right of landowners to subdivide their agricultural property. It imposed the requirement of the Minister's written consent as a prerequisite for subdivision, quite evidently to permit the Minister to decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation. That it was the intention of the legislature to accord the Minister wide-ranging and flexible powers of regulation and control in order to achieve the purpose of the Act appears from s 4 of the Act, which makes provision for the following:

- (a) The Minister may 'in [her] discretion' refuse an application for her consent (s (2)).
- (b) The Minister also has the discretion to grant an application for her consent subject to the imposition of conditions, including conditions as to the purpose for or manner in which the land may be used (ss (2)(a)).
- (c) The Minister has the power to enforce any conditions so imposed (ss (3)).
- (d) The Minister may also vary or cancel any such condition (ss (4)).²⁶
- (e) The Minister may consider whether or not the land is to be used for agricultural purposes and, if satisfied that it will not be so used, she must consult with the relevant provincial authority before granting her consent to the application. In such cases the provincial authority has the power to determine conditions with regard to the purpose for or manner in which the land may be used, and to enforce them, or to vary or cancel them (ss (2)(b), (3) and (4)).' (My emphasis)

[51] The appellant has argued that the agreement has not contravened the Act as the interest provided for in the agreement is not related to the acquisition of ownership in the property since it does not connote ownership and does not constitute a right to acquire the property. Mr Roux relied on *Corondimas and Another v Badat*.²⁷ In my view, the reliance on *Corondimas* is misplaced when the reasoning of Brand JA is considered in *Geue and Another v Van der Lith and Another*.²⁸

²⁵ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC).

²⁶ *Ibid*, para 13.

²⁷ *Corondimas and Another v Badat* 1946 AD 548.

²⁸ *Geue and Another v Van der Lith and Another* 2004 (3) SA 333 (SCA), paras 11-15.

Interpretation

[52] In relation to the interpretation of the contract, I will be guided by the approach adopted by the Supreme Court of Appeal (“the SCA”), especially as was re-affirmed in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*:²⁹

‘In regard to the interpretation of the contract it was submitted that the arbitrator was bound by the “well-established rule that a contract must be interpreted by construing its plain words” and that it is only in cases of ambiguity or uncertainty that an arbitrator can take account of surrounding circumstances “or its so-called factual matrix”. It is surprising to find such a submission being made in the light of the developments in the interpretation of written documents reflected in *Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality*. These cases make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset. The approach of the arbitrator cannot be faulted in this regard.’³⁰ (Original footnotes omitted, my emphasis)

[53] The SCA more recently, in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,³¹ gave clear guidance as to how courts should apply the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:³²

‘Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings’ consent was indeed required. The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality* (“*Endumeni*”) offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the

²⁹ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) 520 (SCA).

³⁰ *Ibid*, para 16.

³¹ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] 3 All SA 647 (SCA).

³² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, “[t]he inevitable point of departure is the language of the provision itself”.³³ (My emphasis)

[54] In *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani*³⁴ Leach JA stated the following:

‘All that needs to be added is that it can be accepted that the way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term – see eg *Rane Investments Trust v Commissioner, South African Revenue Service* 2003 (6) SA 332 (SCA) (2003 (8) JTLR216; 65 SATC 333; [2003] 3 All SA 39) para 27. As is stated in Christie & Bradfield *Christie’s The Law of Contract in South Africa 6 ed (2011)* at 117, relying upon *Breed v Van Den Berg and Others* 1932 AD 283 at 292-293, this is because the parties’ subsequent conduct “may be probative of their common intention at the time they made the contract”.³⁵ (My emphasis)

[55] The Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and another*³⁶ affirmed the approach as per *Endumeni* and elaborated on the approach:

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

[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

³³ Ibid para 25.

³⁴ *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA).

³⁵ Ibid at para 21.

³⁶ *University of Johannesburg v Auckland Park Theological Seminary and another* 2021 (8) BCLR 807 (CC).

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 who 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 and evidence of the context in which a 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.”³⁷ (My emphasis)

[56] What is evident from the papers is that the document marked annexure “RS3”³⁸ came into existence in mid-2007. There are various copies of that document in draft form and I will accept, without deciding, that annexure “RS3” was the original agreement as amended.

[57] The question that then remains is whether the agreement is a legally binding loan agreement and whether it came about as a result of the factual circumstances detailed in the Naysmith letter.

[58] What is cumbersome for the appellant, in my view, is that the appellant relied on advice from her brother, John Martindale, that her investment in the property was not sufficiently protected by the document marked “RS3”. This concern of hers is but one of the surrounding facts that triggered the further negotiations and that led to the amended agreement.

³⁷ Ibid, paras 65-67.

³⁸ See page 147.

[59] The appellant however, in as much as she relies on the advice given by Mr Martindale, elected to not file any confirmatory affidavit from Mr Martindale. It is evident from the papers that Mr Martindale was instrumental to what was contained in the loan agreement. It was the respondent that attached correspondence of Mr Martindale to his papers which impacts on the probability of the surrounding circumstances as claimed by the appellant.

[60] Once more, I consider it necessary to refer to the correspondence, so as to place it in context since it relates to the pre-agreement negotiations:

'From: "John Martindale"

To: "James Naysmith" . . .

Sent: 29 October 2007 08:43 AM

Subject: Property

James/Ros having spoken to you both about the issues surrounding the property these are my conclusions. If you disagree with any thing or feel that something needs to be changed please e-mail me your comments. If you are in agreement with me please send me an e-mail confirming this !!!

1 Agreed that the cost of the land is R233 333.33 less R12000 being the refund on the defunct borehole.

2 Agreed that R80000 paid to James for the grey/Locarno Fine Day

3 Agreed that R15000 paid to James by Laura Smith on behalf of Ros.

4 The following expenses paid by James are confirmed. Ros's share being 50 % as laid out below and James will get copies of invoices to me.

Legal Costs R10054

Fencing R22000

Grader R19500

Eskom R5000

Hendoc R11808.49

Poles R3221.93

Electric Cable R6000

Bore Hole R16599

Total R94183.42

- 5 Price of Logan's Run R16800 as payment by Ros to James
- 6 Stabling Wichita 12 weeks R4800
- 7 Commission on sale of horse box R1500
- 8 The fencing (R14000) put up at Ros's request for her account, not to be split.
- 9 When Ros is in a position to put in a new borehole James will pay 50 % of the cost of dropping the hole, he will give Ros the spare motor, all other costs will be paid by Ros.
- 10 As soon as the Rheebook property is sold a separate driveway and the new borehole will be installed.
- 11 Ros will make every effort to complete the new house by the end of November, however if it is not habitable (for Mrs E G Martindale) James will allow her some leeway to be mutually decided.

The financial position can be summerised as follows:

Owed to James

Land R221333.33

Other Exp. R94183.43

Total R315516.75

Less paid by Ros

R80000

R15000

R16800

R4800

R1500

Total R118100

Total Owing R197416.75

This sum will be paid by me on the signing of a satisfactory agreement to split the property, on transferr into Ros's name or re-registration of the property into joint names. In other words on the

conclusion of the current disagreement and a decision of the way forward. James is entitled to charge interest at prime on the net sum owed as from 1 November 2007.³⁹

[61] Mr Martindale, clearly had intimate knowledge of the discussions and what was agreed between the parties in 2007. In an e-mail sent by him to the respondent on 30 December 2007, he says:

'James I refer to our discussion on Sunday 30 December whereby we agreed that the document would be signed as soon as possible. I will contact the lawyers and try to find out why there has been this delay. This will be obviously be the updated document. At the same time I confirm that you will earn interest at prime on the outstanding funds until payment. My understanding is that this addresses your concerns sent to me in your e-mail of 29 December...'⁴⁰ (My emphasis)

[62] The appellant as per the correspondence from her brother, Mr Martindale, only made actual payment in terms of the agreement post the conclusion of it in January 2008. It is an important fact since the payment of the loan was made long after the property was purchased and paid for and registered in the name of the respondent. Given these facts, I am of the view that the agreement between the parties was never intended to be in principle, a loan. What the surrounding facts demonstrate is that it was essentially a purchase agreement for agricultural land disguised as a loan agreement.

[63] When all the contemporaneous documents and all the surrounding facts are considered in their proper context then it is evident that the appellant and the respondent were in agreement as to the sale of a portion of the agricultural land. That was the parties' intention from the beginning and for many months until the appellant on advice from those advising her decided that she needed to find a method of circumventing the Act and securing her interest in the property. To hold otherwise would be to ignore the correspondence that preceded the loan agreement. The agreement, in my view, remained a purchase agreement (prohibited by law) which was accordingly dressed up as a loan agreement.

³⁹ See record at page 202.

⁴⁰ See record at page 212.

[64] It is clear that the respondent purchased and obtained transfer and registration of the property, i.e. the farm, by paying the purchased price and without an investment or payment from the appellant or any third party. The appellant is silent on the circumstances of when payment of her share of the purchase price was made, or when she signed any transfer or registration documents to give effect to the oral agreement as referred to by her in her answering affidavit. Despite the aforesaid, she assumed that the property had been registered in both their names and in 2006, built a residential home on the property. The surrounding facts relied upon by the appellant without any confirmation seems highly improbable. I can find no factual basis for the averment by the appellant that the respondent was aware of the Act and the implications of it on their initial agreement.

[65] The submission of the appellant's counsel, Mr *Roux*, that both parties prior to the conclusion of the agreement had prior knowledge that Annexure "A" (referred to in clause 4 of the preamble) was illegal and unenforceable, is not borne out by the facts and the averments of the respondent in his founding affidavit.⁴¹

[66] In my view, the court *a quo* was neither misdirected on the facts or the law, when it held that clause 5.2.2 is an integral part of the agreement between the parties and not severable from the rest of the agreement.⁴² Should I be wrong in the severability of clause 5.2.2, then the preamble remains part of the agreement as is stipulated in clause 2.2 of the loan agreement. For these reasons, I cannot agree with the majority and would have proposed that the appeal be dismissed with costs.

⁴¹ See paras 6.4, 6.5, 6.6-6.8 of the record at pages 15-18.

⁴² See para [41] of the court *a quo*'s judgment: '[41] In my view, even if clause 5.2.2 was severed, the remainder of the clauses of the agreement will still reflect that the main purpose of the agreement was to enable the lender to purchase a portion of undivided farm land'.

Z P NKOSI J

STEYN J

P C BEZUIDENHOUT JJ

CASE INFORMATION

DATE OF THE HEARING : **27 JANUARY 2023**

DATE JUDGMENT HANDED DOWN :

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