In the High Court of South Africa
(Western Cape Division, Cape Town)

[REPORTABLE]

CASE NO: 7689/2018

In the matter between:

LAKES FORESTRY & DEVELOPMENT CC Plaintiff

and

COGNAD PROPERTIES CC Defendant

Coram	**:**	**FRANCIS J**
Judgment by	**:**	**FRANCIS J**
For the Plaintiff	**:**	**Adv C W Kruger**
Instructed by	**:**	**Van Der Spuy Cape Town**
For the Defendant	**:**	**Adv Theoniel Potgieter**
Instructed by	:	**Jordaan, Van Wyk Attorneys Inc**

Judgment was reserved on **3 October 2023.**

The judgment was handed down on **16 February 2024.**

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 7689 /2018

In the matter between:

LAKES FORESTRY & DEVELOPMENT CC **PLAINTIFF**

and

COGNAD PROPERTIES CC

DEFENDANT

JUDGMENT: 16 FEBRUARY 2024

FRANCIS, J

INTRODUCTION

[1] This matter involves a dispute between Lakes Forestry & Development CC ('plaintiff') and Cognad Properties CC ('defendant') in relation to clearing and

establishing a pine forest on the Oudebosch Farm situated in Riversdale in the Western Cape ("the farm") which is owned by defendant

[2] An old pine plantation existed on the farm which was ravaged by fire. The farm was left to stand for many years and degenerated into a jungle due to uncontrolled natural pine regeneration and wattle and black wattle infestation (both forms of weed will be referred to as 'black wattle'). This was the situation when Dr Maretha Prinsloo ('Dr Prinsloo'), the person representing defendant, concluded a Tree Harvesting Agreement ("the agreement") on 14 July 2012 with Mr Paul Van der Spuy ('Van der Spuy'), an experienced forester representing plaintiff.

[3] The agreement grants plaintiff the right to harvest trees on the farm subject to various conditions. A map of the farm is attached to the agreement, depicting a conservation area, the house on the farm, and a cultivation or plantation area. The agreement was drafted by plaintiff and provided to defendant for comment prior to being signed by the parties.

[4] In essence, the agreement requires a forestry operation to be executed by plaintiff. This entails the systematic clearing of black wattle and the establishment of an orderly commercial pine forest, eventually allowing pine trees of an appropriate maturity to be sold, and the proceeds to be shared by the parties according to an agreed formula (clauses 3 and 6). In return, plaintiff agreed to clear the farm of black wattle infestation. The parties agreed what plaintiff would be entitled to for trees removed during the cultivation process (clause 6.9.1). The

agreement was for an undetermined period and terminable by either party on not less than 18 months written notice (clause 5), and plaintiff was to act as an independent contractor and not as agent of defendant (clause 4.1). Plaintiff's obligations are further set out in clauses 7.1.1 to 7.1.20 of the agreement. The agreement further included a breach clause which required the party in breach to remedy any breach within 10 days (or such reasonable longer period as may be necessary) failing which the innocent party could sue for specific performance or damages (clause 15). Should the parties be unable to agree promptly on any factual matter arising from or in connection with the agreement, such dispute would be referred for expert determination (clause 13).

[5] Plaintiff commenced forestry operations on the farm and all went well until about November 2016 when a dispute arose between the parties in relation to the performance by plaintiff of its contractual obligations. The dispute was referred to Mr Barry Joubert ('Joubert') by both parties for expert determination as was required by the agreement.

[6] Joubert was tasked to deliver a report on three specified issues and he produced a report dated 26 November 2016 ('the Joubert report') in which he expressed an opinion favourable to defendant.

[7] Relying on the Joubert report, defendant gave plaintiff notice to rectify its breach within 10 days of 5 January 2017. Plaintiff rejected the Joubert report and, on 20 January 2017, defendant cancelled the agreement.

[8] Plaintiff issued summons against defendant claiming specific performance as well as damages of R1 115 416.19 relating to timber harvested by a third party while the agreement was still in force ('the main claim').

[9] Defendant filed a plea denying that plaintiff was entitled to the relief prayed for. It pleaded that plaintiff had repudiated the agreement. In the alternative, defendant pleaded that plaintiff had breached the contract in the following specific instances which entitled defendant to cancel: the failure to clear 50 ha of black wattle, the removal of pine trees within three years, and the felling and removal of pine trees after three years contrary to the agreement and without adhering to industry standards and the applicable fire prevention security measures. Defendant also filed a counterclaim for damages in respect of trees removed and sold by plaintiff, allegedly contrary to the agreement.

[10] Defendant relied principally in its plea and counterclaim on Joubert's findings as conclusive proof of plaintiff's breaches of the agreement which entitled it to subsequently terminate the agreement and to found its counterclaim for damages.

[11] In its plea to the counterclaim, plaintiff denied that it had repudiated the agreement or that the agreement had been properly cancelled. It denied that it was contractually bound to clear 50 ha of black wattle and pleaded that it had complied with all its contractual obligations. The plaintiff admitted that it had felled and removed pine trees within three years of the commencement of the agreement but explained that those trees were felled at the specific request of

defendant, and that plaintiff paid defendant the agreed amount for the trees. Plaintiff also admitted that it had felled and removed pine trees after three years of the commencement of the agreement but alleged that this was done in accordance with the provisions of the agreement, and it denied that it did not adhere to industry standards or apply proper fire prevention and security measures.

ISSUES

[12] The parties agreed, and it was so ordered, that the merits and quantum at issue in both the main claim and counterclaim be separated and only the issue of the alleged breaches of the agreement are to be decided at this stage of the trial. Issues relating to quantum will stand over for later determination, if necessary.

[13] Based on the pleadings in respect of both the main claim and counterclaim, the central issues to be determined by this court are whether plaintiff breached the agreement in the respects specified by the defendant and, consequently, whether the agreement was validly cancelled. The conclusive answer to these issues, according to defendant, is provided by the expert determination of Joubert. Thus, this court must perforce decide whether the parties are bound by Joubert's findings.

EVIDENCE

[14] Van der Spuy, a member of plaintiff, and Mr JH Venter ('Venter') testified for the plaintiff whilst Mr DAG Dobson ('Dobson'), Mr Alex Prinsloo (Álex') and Dr

Prinsloo testified for defendant. Venter and Dobson were called as witnesses in their capacity as forestry experts. In addition, the parties submitted a joint bundle of documents which included all the relevant correspondence exchanged between the parties as well as photographs and documents relevant to this matter. The parties also handed in copies of expert reports and a joint minute prepared by Venter and Dobson.

[15] Plaintiff gave notice that it intended calling Dr Jacob Cornelus Steenkamp ('Dr Steenkamp') as an expert and filed his report which forms part of the documentation admitted into evidence. Unfortunately, Dr Steenkamp had passed on by the time this matter was heard but both Venter and Dobson commented on this report.

[16] Extensive evidence, both oral and documentary, was placed before this court over several days. I do not intend repeating verbatim the oral evidence led as it all forms part of the record. I will merely highlight those aspects which I believe to be immediately relevant for the determination of this dispute. Much of the background facts recited below were gleaned from the witnesses and the correspondence exchanged between the parties and are largely common cause or not placed seriously in dispute. It is necessary to cover in some detail the background facts as they provide context to the dispute and the oral evidence of the witnesses.

RELEVANT BACKGROUND FACTS

[17] After signing the agreement, plaintiff commenced the clearing of black wattle on the farm. The areas to be cleared were disclosed by plaintiff to Dr Prinsloo each year. Van der Spuy sent an e-mail to Dr Prinsloo, with an accompanying map, of the work he proposed doing in the year to come and reported on the previous year's work. On 22 November 2015, Van der Spuy once again sent an e-mail to Dr Prinsloo but on this occasion, he also advised both Dr Prinsloo and Alex that plaintiff would commence thinning (removing some plants and trees) in area R1 in January 2016. He explained that these thinning's "*will be done to make room so that the trees can become bigger in that specific section*". Van der Spuy also indicated that the thinned out trees would be "*harvested for (plaintiff's) own gain as the contract specifies*".

[18] On 23 November 2016, Dr Prinsloo responded to Van der Spuy's e-mail, which she copied to Alex, by stating that Alex was impressed with the work done thus far and that Alex would talk to Van der Spuy about the plans for the future.

[19] Van der Spuy continued as he had proposed and, on 9 October 2016, sent an e-mail to Alex and Dr Prinsloo summarizing the work that had been done and the work that was proposed to be done for the following year.

[20] Alex visited the farm during October 2016 and formed the opinion that plaintiff was harvesting trees which, in his view, was contrary to the terms of the agreement.

[21] Van der Spuy sent Dr Prinsloo and Alex an e-mail on 22 October 2016 in which he advised them that he was aware of Alex's view and offered an explanation of what plaintiff had been doing with regard to the thinning taking place on the farm. Van der Spuy confirmed that plaintiff was harvesting trees for its own gain which, according to him, was permitted in terms of the agreement. Van der Spuy suggested that Prinsloo speak to "*Barry from forestry*" to find out if the work being done was 'right'.

[22] Dr Prinsloo responded by way of an e-mail on 24 October 2016 in which she stated that she was under the impression that Van der Spuy would not cut down strips of trees but would rather thin out trees that were too close together. She also enquired how many tons of wood had been felled.

[23] Van der Spuy did not respond to the e-mail. He had indicated in his e-mail of 22 October 2016 that he would not be available at the end of October or in the second week of November.

[24] On 15 November 2016, defendant's attorney, MJ Vermeulen Inc ("Vermeulen") addressed a letter of demand to plaintiff alleging that plaintiff had failed to exterminate 50hectares('ha') of invasive plants and was felling/harvesting/clearing pine trees contrary to the agreement and not in accordance with the requisite safety standards. It was proposed that an expert be appointed to conduct an investigation and to settle the factual dispute between the parties. Plaintiff was given 24 hours to provide an undertaking that it would

not fell any pine trees, or remove any trees that had been felled, prior to the expert determining the factual dispute.

[25] Alex and Dr Prinsloo visited the farm on 17 November 2016. Thereafter, an e-mail was sent to Van der Spuy in which Dr Prinsloo expressed her shock at how much of the pine forest had been harvested and she indicated that they have "called in expert help". Dr Prinsloo advised Van der Spuy that he could expect a letter from their attorney requesting plaintiff to stop all further activity on the farm.

[26] Vermeulen duly sent a letter dated 18 November 2016 advising that defendant would lock the gate and forbade all access to the farm. A key would be provided to plaintiff provided that defendant was notified beforehand of the aim of the visit to the farm and no harvesting or removal of pine trees was permitted.

[27] Plaintiff's attorneys, Jordaan van Wyk ("Jordaan") responded to Vermeulen on 22 November 2016, stating that the locking of all the gates was unlawful and was contrary to the agreement. They demanded that the gates be unlocked and that plaintiff be given access to the farm.

[28] On the same day, 22 November 2016, Vermeulen responded and denied that plaintiff had been deprived of its right of access and repeated that plaintiff could have access to the property provided that no pine trees were felled/harvested or cleared and that the pine trees that already been felled must not be removed pending the resolution of the dispute by the expert. It was also proposed that

Joubert be appointed as the expert to determine the dispute in terms of clause 13 of the agreement.

[29] Vermeulen and Jordaan exchanged correspondence on 23 November 2016 in which they agreed that Joubert be appointed as the expert to determine the dispute between the parties. It was also agreed that plaintiff be granted access to the farm but only to exterminate evasive plants and not undertake any thinnings/harvesting pending receipt of Joubert's report.

[30] A letter of instruction dated 23 November 2016 was sent to Joubert. Although it is dated 23 November 2016, it appears that the letter of instruction was sent to Joubert on or after 25 November 2016. A file note from Vermeulen indicates that he spoke to Joubert on 25 November 2016 and gave him 'background' and arranged to send Joubert the instruction. In the letter of instruction, Joubert is requested to urgently carry out an inspection of the farm property and to answer the following questions:

> "***3.1 Have 50 hectares of the farm property been cleared? With 'cleared' we refer to felling and removing of 'Black wattle and Blackwood' trees and – if so – whether such clearing has been done in accordance with the prescriptions and guidelines that apply in the industry?***
>
> ***3.2 as what would you describe or qualify the cutting down of pine trees that has already occurred? As:***
>
> ***3.2.1 harvesting?; or***

3.2.2 thinning?

33.3 was the cutting down and removal of the pine trees – whether this is harvesting or thinning – undertaken in accordance with the standards as set by the industry? If the answer to this is in the negative, your report should please also deal with the full details thereof."

Joubert was also invited to contact Vermeulen if he had any queries.

[31] Joubert visited the farm and was accompanied by an employee of the plaintiff, Tienie Berg ('Berg'), who acted as Joubert's driver. From the invoice dated 28 November 2016 submitted by Joubert to Vermeulen, it appears that he visited the farm on 25 November 2016. The following insertion appears on the invoice, "*visit farm property 8:45 – 13:15 - 25.11.2016*"

[32] On 27 November 2016, Dr Prinsloo wrote a letter to Joubert in which she explained her understanding of the agreement and made comments on the work Van der Spuy performed on the farm and what he ought to have done. In her letter to Joubert, she included an e-mail which she intended sending to Van der Spuy but did not do so ('the intended e-mail'). In this e-mail, she *inter alia* expressed major concern with the work Van der Spuy had performed on the farm with regard to the spacing and felling of trees and also indicated that defendant wished to cancel the agreement so that a 'new one' could be concluded.

[33] Joubert furnished his report which is dated 26 November 2016. It is unclear when he completed the report. Joubert was not called as a witness so it was not possible to ascertain exactly when he had completed his investigation and finalized the report. Joubert's answers to the three questions posed to him in his letter of instruction are as follows:

> "***In summary:***
>
> - ***There were not 50 ha cleaned of wattle. Wattles in the plantation area are not eradicated as was agreed.***
> - ***A degree of excess harvesting did take place that cannot be designated as thinning.***
> - ***The spacing operations are reasonably consistent with the industry but the same prescription being used throughout, is not consistent with industry standards***."

[34] The report was provided to Jordaan on 28 November 2016. Van der Spuy then wrote an e-mail to Joubert, which was copied to Vermeulen, in which he sought clarity on certain aspects of the report. He asked whether 50ha of weed control had been done over the last 4 years and also whether any of the sections on the property had been completely denuded, that is clear-felled and not thinned.

[35] Joubert responded by way of an e-mail dated 29 November 2016 in which he indicated that when he had compiled his report, he had '*cleared out'* with defendant what area had to be assessed and the feedback from Dr Prinsloo was that the decision regarding the area to be cleared rests with defendant and that he, therefore, had to assess the conservation area. Joubert also mentioned that before he had compiled his report, he had clarified his letter of instruction with Vermeulen. He had pointed out to Vermeulen that 'harvesting' was not the

correct term and Vermeulen explained that what was meant was "*more than normal thinning*".

[36] Van der Spuy responded to Joubert's e-mail later that day and provided him with the correspondence Van der Spuy had previously sent to Dr Prinsloo relating to weed control in the conservation area. He also stated that the weed control was in line with the agreement and that in addition to weed control in the conservation area, weed control was also being done in the pine section "*which is a greater area than that specified in the contract*".

[37] In a subsequent e-mail dated 29 November 2016, Joubert revised his initial estimate of the extent to which the conservation area had been cleared from 10 to 12ha to a maximum of 30ha.

[38] On 1 December 2016, Jordaan advised Vermeulen that plaintiff agreed to Mr Louis Vermaak ("Vermaak") removing roundwood and poles from the farm provided that any monies received from Vermaak would be paid into Vermeulen's trust account for the benefit of plaintiff. An undertaking to do so was conveyed by Vermaak to Jordaan on 2 December 2016.

[39] On 5 December 2016, Jordaan enquired from Vermeulen if plaintiff could return to the farm to continue with the thinning process. The request was denied in a letter from Vermeulen to Jordaan on 6 December 2016 in which it was reiterated that no further thinning would take place before the breaches identified by Joubert were addressed.

[40] On 8 December 2016, Van der Spuy wrote to Dr Prinsloo and Alex advising them that plaintiff completely withdrew from the farm on 7 December 2016 due to the uncertainty about the activities on the farm. He advised that he could not continue with the current team to address the undertaking of weed control. He also indicated that he could not undertake any fire protection but that he was prepared to assist if needs be.

[41] A letter was sent by Jordaan to Vermeulen on 9 December 2016 advising that it was essential from plaintiff's financial point of view to continue with the thinning process and that plaintiff could not confine itself to merely exterminating weeds. He also stated that defendant's attitude was making it impossible for plaintiff to perform in terms of the agreement. Clarity was sought on exactly what defendant's requirements were, and confirmation was given that plaintiff desired to continue to execute the agreement and tendered its performance.

[42] Vermeulen responded on 13 December 2016, enquiring whether the withdrawal from the farm amounted to a repudiation of the contract and enquired how plaintiff proposed to remedy its breach of contract, specifically its obligation to clear the agreed number of hectares of invasive vegetation.

[43] Jordaan responded on 14 December 2016 and denied that plaintiff had repudiated the agreement. He emphasized, instead, that plaintiff was being prevented from performing in terms of the agreement and, once again, tendered performance.

[44] In a letter dated 15 December 2016, Vermeulen enquired if plaintiff accepted the Joubert report as correct and expressed the view that it appeared that plaintiff disputed Joubert's report and requested a written response in this regard.

[45] On 5 January 2017, Vermeulen advised Jordaan that plaintiff's repudiation of the agreement was accepted and that without prejudice to defendant's right to rely on the fact that "*the agreement had already lapsed, alternatively is hereby cancelled*", plaintiff was given notice to remedy its alleged breach of contract within 10 days of 9 January 2017 by completing the extermination of 50ha of wattle and blackwood. Plaintiff was advised that if it failed to remedy its breach, the agreement would be cancelled and defendant reserved its right to claim damages from plaintiff.

[46] Jordaan provided a lengthy response on 12 January 2017. It denied that plaintiff had breached the agreement. It was pointed out that Joubert had erred in his report in limiting himself only to weed control in the conservation area. Furthermore, it was stated that plaintiff was of the opinion that almost 158ha of weed control had taken place in the plantation and that, consequently, it had complied with its obligation regarding weed control in terms of the agreement. It denied that it had been engaged in excessive thinning and, once again, tendered plaintiff's performance.

[47] Vermeulen responded on 13 January 2017 and indicated that Joubert was appointed by both parties and pointed out that in order to limit its damage, the

defendant had arrangements in place to, among other things, address weed control in the interim. This was being done without prejudice to any of the parties' rights.

[48] In a letter dated 20 January 2017, the agreement was cancelled in a letter from Vermeulen. The letter states that "*the agreement between the parties has already been cancelled by virtue of (plaintiff's) repudiation and (defendant's) acceptance thereof. In the alternative – as far as is required – the agreement is hereby cancelled by virtue thereof that proper notice was given to (plaintiff) to remedy its breach of contract and he failed to do so*". The letter also stated that the money received from Vermaak for the timber that he had removed was in Vermeulen's trust account and plaintiff was invited to submit an to invoice Vermaak in this regard.

[49] In a letter dated 13 February 2017, plaintiff rejected the cancellation of the agreement and tendered to continue with the control of weed. It also proposed that a "new" independent expert be appointed to resolve the dispute between the parties, claiming *inter alia* that Joubert was biased.

[50] The parties reached an impasse and plaintiff initiated the action proceedings presently before this court.

ORAL EVIDENCE

Van der Spuy

[51] Van der Spuy is a forester by experience and training and is a member of the plaintiff.

[52] He explained the difference between the cultivation area and the conservation area referred to in the agreement. The cultivation area is that area where the commercial pine forest is to be cultivated whilst the conservation area is the area which defendant wanted to conserve and turn it into a fynbos reserve. Van der Spuy testified that fire on the farm led to a proliferation of weed in the form of black wattle. When one goes onto a property such as the farm, it takes a very long time before the forest is mature enough to be felled for harvesting. It takes about seven years to commence clear-felling and harvesting. The longer the period of time taken to harvest, the more commercially viable the trees are because they become bigger. It was also necessary to carefully space out the trees in order to allow them to grow optimally.

[53] Van der Spuy testified that it was the defendant who decided where clearing on the farm would take place each year. He agreed that the conservation area fell within the sole discretion of defendant while the cultivation area fell within the discretion of the defendant. Van der Spuy explained that this was so because defendant did not have the knowledge to thin, harvest, or cultivate the pine trees in the cultivation area. On the other hand, defendant wanted to take charge of the

conservation area in order to establish a fynbos reserve in the area in front of the house.

[54] Prior to November 2016, defendant never informed plaintiff which area to clear and it was up to defendant to report on what had been cleared for a particular year and what was to be done in the year ahead. There was no feedback from defendant and, according to him, there were never ever complaints. Up until that stage, he had only been reporting on the clearing of black wattle in the conservation area. He had not reported, or said anything, about what was being done in the cultivation area.

[55] On 22 November 2015, he advised the defendant that plaintiff would commence thinning section R1 in January 2016 and that these thinned out trees would be harvested for defendant's own gain. In previous years, defendant had conducted uneconomic thinning by just slashing and leaving the little trees where they fell. Plaintiff was now at the stage where the thinning could be more selective to achieve a proper spacing of the trees. In order to do this, he used the method of corridor thinning.

[56] Van der Spuy explained that corridor thinning takes place by mapping out sections of the forest into compartments. A strip of trees is removed to open a corridor into the plantation. When corridors are cleared, no distinction is made between thicker and smaller trees. Everything is cleared out of the corridor, be it black wattle or big or smaller pine trees. This type of thinning was an intermediate step which was to be followed-up by further selective thinning in the

remaining tree rows by using standard forestry practices. A team of about 10 workers would go into the corridor and chop down or fell the trees while other workers cleared the branches off these trees. A tractor would then pull the trees to the main road where they are stacked, cut into specific lengths, and transported away to be sold. Corridor thinning is done in such a way that, on average, a row of three metres will be cleared and there will be four metres of trees standing.

[57] Van der Spuy testified that he had conducted an exercise using Google Earth to calculate the number of hectares of black wattle cleared on the farm. Although not 100% accurate, Google Earth is accepted by the industry as an appropriate measuring tool. According to Van der Spuy, a total of 271 hectares of black wattle was cleared until November 2016 in the plantation, 33,63 hectares was cleared in the conservation area, and 32.6 hectares was cleared in a corridor which fell within the plantation area. Thus, the area cleared on the farm property was far more than 50 ha. Accordingly, Joubert, who was supposed to assess the extent of the clearing on the farm property, was wrong.

[58] In so far as the Joubert report is concerned, Van der Spuy testified that Joubert never requested any information from him prior to the report being released. Berg, although employed by Van der Spuy, did not represent plaintiff but was merely providing transport for Joubert on the day that the latter visited the farm. It was put to Van der Spuy during cross-examination that the instruction to Joubert was urgent and, therefore, both parties accepted that he would handle the matter

as he deemed fit. Van der Spuy agreed that the matter was urgent, but Joubert could have contacted him telephonically to receive clarity or input. Furthermore, Joubert only interacted with Dr Prinsloo and received instructions directly from her, including the instruction delimiting the area to be measured.

[59] Van der Spuy also disagreed with Joubert that there had been a measure of overthinning. According to Joubert, there was still 3600 stems (trees) per hectare but in the normal cause of events, if trees were planted 3 metres apart, this would result in 1100 stems per hectare. In fact, more thinning would have to be conducted to achieve the desired stem count.

[60] Van der Spuy testified that the trees felled during 2016, some of which were thick trees, were cut and taken out of the plantation to be sold because he was entitled to do so. These trees were taken out as part of the thinning process and did not qualify to be dealt with as harvested timber. He referred to this as harvest thinning. which was covered by clause 6.9.1 which entitled him to thin out the smaller and thinner trees for his own monetary benefit. According to him, the trees removed during the thinning process were all part of the same genus.

[61] According to Van der Spuy, the use of the terms ‘smaller’ and ‘bigger’ trees is relative to the trees that were cut down during the thinning operation. Van der Spuy explained that all the trees in the corridor that were removed varied between 8 and 15 centimeters in diameter. He indicated that when the trees were eventually to be clear-felled and taken to the sawmill, they would be approximately 35 to 45 centimeters in diameter.

[62] Van der Spuy was asked why he did not report on the work he had done in the cultivation area but had merely confined his reports to work done in the conservation area. His response was that he did not think it necessary to report in respect of matters in the cultivation area because defendant was in full control of the conservation area while the plaintiff was in full control of the plantation area.

Venter

[63] The next witness to be called by plaintiff was Venter. He is an expert in forestry management affairs. He explained that silviculture refers to the cultivation of trees mainly for commercial purposes and encompasses the treatment and management of trees from being planted until they are harvested. In so far as the wood harvested on the farm was concerned, it was intended that there would be a mixture of poles and saw logs which would be sold to the sawmill and cut into planks.

[64] According to Venter, the farm was not a normal planted plantation but a jungle. The word ‘jungle’ is commonly used to describe any uncontrolled growth of whatever crop is being grown on a property such as the farm. There is unlikely to be a uniform stem count, with some areas of the farm being less dense than others and the spacing of the trees not being uniform.

[65] When faced with a jungle, a small private owner would usually fell everything and start all over again. In other words, such an owner would cut to waste and then start again. But, in the matter at hand, defendant tried to fix the situation. The first step was to take out the real rubbish such as the smaller trees, all the wattle and everything else that goes with it. The intention with the first step is to clean up the area and to open up the plantation as much as possible. The clearing has to be done in a measured manner because if it is done too quickly there is a risk of the remaining trees falling over because they are not thick or strong enough at the base to carry the weight of the crown. So, one starts off by creating some space in the jungle forest by cutting off the smaller trees which are usually below 6 centimetres in diameter. The aim is to get down to 400 stems per hectare. Thus, the plantation would have to be progressively cleared in order to achieve proper spacing and reduce competition for the trees. He emphasized that the clearing of black wattle was a work in progress, the results of which could not be conclusively adjudged after 3 or 4 years of clearing.

[66] In a corridor thinning operation, one can never take out only thinner trees because big trees might be standing next to the thinner trees. He described the corridor thinning process as a brutal thinning where one goes in and takes out everything in the corridor, whether it is slightly bigger or slightly smaller than the average. The fact that some bigger trees are taken out does not change the nature of the thinning operation.

[67] Venter visited the farm in 2021. He observed that part of the plantation had not been thinned. There was still black wattle visible but there were signs that there were previously quite thick portions of wattle that had been slashed down. Venter testified that what occurred on the farm between 2012 and 2016 was not clear felling but was part of the thinning process. According to Venter, there is no industry standard for converting a jungle into a plantation. He did not see anything that would suggest that plaintiff did not follow acceptable forestry practices for the clearing of a jungle. He agreed that the corridor thinning or strip felling conducted by plaintiff was an acceptable thinning method in the forest industry. Venter testified that during the thinning process, it was necessary to clear out the trees that had been cut so that the biomass is not left lying on the ground which is a fire risk. These trees are taken to the roadside and cut up and sold to recover some of the costs associated with the thinning exercise.

[68] Venter differed sharply with defendant's expert, Dobson, on whether the thinning and strip clearing exercise conducted by plaintiff qualified as harvesting. Venter was of the view that the goal of the corridor cleaning or row thinning was to enable access for the final harvesting and to reduce the stem count to improve the final crop. The converting into money was a secondary outflow. Dobson expressed the view that as soon as the thinned trees were converted into money, this amounted to harvesting. If no row thinning was done in the jungle, it would not be possible to optimally harvest the pine trees because the trees were standing too close together and one would get very little diameter growth. Thus, according to Venter, it was imperative, and in fact peremptory, to open-up

corridors in a jungle otherwise one could not get to the rest of the trees. According to him, it is an expensive operation to make a corridor and a contractor was unlikely to make any money out of this exercise.

[69] Venter was asked to comment on Joubert's conclusion that a degree of excess harvesting had taken place that could not be designated as thinning. Venter disagreed with Joubert's finding in this regard. According to Venter, Joubert's finding implied that there were certain areas that must have been clear felled which was not the case. He also has some difficulty with the fact that no specific indication was given as to how much over thinning had taken place. If it was 2 percent overthinning, this was acceptable in most operations. Given the fact that the farm was a jungle, and the difficulties experienced therein, even 5 to 15 percent over felling would be acceptable. Venter also did not agree with Joubert that there was a deviation from forestry practices.

[70] Venter confirmed that he had read through Dr Steemkamp's report. He agreed with the opinions, statements of fact, and conclusions arrived at by Dr Steenkamp, including that corridor thinning was still a thinning operation and not a harvesting operation.

Dobson

[71] Dobson was appointed by defendant to establish the volume of pine removed by plaintiff during the corridor thinning process undertaken by plaintiff in 2016, and

to provide an opinion on the market value of the wood harvested in 2016. He completed his inspection of the farm during the week of 12 August 2019.

[72] Dobson testified that when timber is felled in order to convert it to money with the intention to recover some of the costs of the operation, this is classified as harvesting. It may also be referred to as a partial harvest because it is a thinning operation but it is still a harvesting operation if the trees are removed and processed in order to make money out of them. In his view, the thinning operation conducted by plaintiff amounted to harvesting because income was derived from the trees that had been felled during the thinning process.

[73] Dobson testified that his figures of the tonnage or the mass of timber that was removed from the plantation during the thinning process. were similar to the figures provided to him Van der Spuy. Plaintiff had declared 1441 tons of sawlogs and poles while Dobson had measured volumes of 1439. Dobson was asked about the size of the sawlogs and poles and his response was that they were about 13.5 to 17.5 centimeters in diameter.

[74] Dobson agreed that corridor thinning is not selective. Trees of all sizes are taken out, whether they are large or small trees in that specific corridor. By doing a corridor thinning, there was no way that one could only select the smaller and unthrifty or smaller trees. One had to take out some of the larger trees, which would probably have been left for the final crop if such thinning was not done. He expressed the view that having regard to the poles and saw logs that had been taken out, they could not be classified as smaller or thinner trees.

[75] Dobson testified that, in his view, the clearing of wattle in the conservation area meant that the area had to be clear felled, that is completely eradicated of weeds. On the other hand, in the cultivation area, unthrifty trees and black wattle would be cleared through a process of strip felling and follow-ups will have to be done by spraying herbicides, for example. He stated that wattle clearing is an ongoing process since the wattle seeds remain in the soil forever and lay dormant until stimulated by external stimuli such as fire.

[76] Dobson was asked during cross-examination if was there anything that he saw when he visited the farm that plaintiff had done unnecessarily, or should not have done, with reference to the ultimate objective of establishing a commercially viable plantation. His response was 'no*',* adding that he supported the corridor thinning as it was the correct thing to do.

[77] Dobson was asked if the bigger trees had been cut down and left at the roadside but never sold, would that qualify as harvesting. His response was that it would not because he defined harvesting- with reference to the literature he consulted - as the processing and converting of timber into money. If the timber was brought out of the plantation and left on the roadside to rot, it would not be harvesting. The moment you make money out of the timber, it is harvesting. If trees are cut down but no money is made, then it is not harvesting.

[78] Dobson agreed with most of the findings made by Dr Steenkamp in the latter's report. Dobson agreed that it was virtually impossible to eradicate black wattle,

that the chemical control of wattle was not 100% effective and that follow-up operations are always necessary, and that corridor thinning conducted on the farm served as clearing at the same time. He further agreed with Dr Steenkamp's comment that the area of corridor thinning was 76ha and that this area alone equates to 32.6ha of black wattle clearing.

[79] Dobson testified that the enumeration conducted by him indicated that the stocking rate of the trees, though acceptable, was very variable throughout the cultivation area. In cross-examination, he agreed that the purpose of the enumeration was not to show that stocking was bad but rather to assist him with calculating the amount of timber that had been removed. However, he stated that this enumeration was useful because it showed exactly what the situation in the plantation was. He was challenged on the utility of extrapolating the results based on a small sample to draw conclusions in respect of a wider area, especially because the sample used had significant outliers. Dobson, however, stuck to his version that his assessment was that the variable stocking rate indicated that the cultivation exercise was not well executed

Alex

[80] Alex testified that he was a member of defendant at the time the agreement was entered into with plaintiff. The other members did not reside in Cape Town and he acted as caretaker of the farm. He had signed the agreement but he was not party to negotiating it. His sister, Dr Prinsloo, negotiated the agreement on behalf of defendant.

[81] Alex testified that defendant had to maintain a firebreak along the property adjacent to their neighbor, Piet Muir. He made it known to Van der Spuy on numerous occasions that Van der Spuy should broaden the firebreak by cutting down the pine trees but he never did so. After the agreement was terminated, defendant engaged Joubert to provide a fire plan and, thereafter, employed Vermaak to cut down the trees and clear the firebreak. Alex agreed that the firebreak was in the cultivation area and that if Van der Spuy had cut down those trees as he had been asked to do, it would have been sold and '*that would be fine'*.

[82] Alex stated that he initially visited the farm once a month but reduced his visits during 2015 and 2016. Up until 23 November 2015, Alex was complimentary about Van der Spuy's work and did not log any concerns. He testified that Dr Prinsloo did not discuss with him Van der Spuy's e-mail advising her that he would commence thinning in January 2016. It was put to Alex that he never complained about what he saw and what Van der Spuy was doing. Alex agreed that he did not complain. In his view, Van der Spuy had carte blanche to carry out his professional duties as a forestry cultivation expert and to do whatever he had to do to maximise the eventual yield of the plantation.

[83] He testified that the first time that he thought there was something wrong in the cultivation area was around the beginning of November 2016. It was only when he was alerted by his neighbor, Mr Muir, that he had a wakeup call and first formed the opinion that Van der Spuy was removing too many trees. He was

shocked by the number of trees that had been removed from the corridors that Van der Spuy had opened up in the forest.

[84] Alex testified that Joubert provided expert advice to defendant prior to being appointed by the parties to determine the dispute. Joubert had expressed adverse comments against plaintiff in respect of all the issues that were subsequently referred to him for determination. He also testified that there was an interested buyer for the farm and that the agreement with defendant would make it difficult to sell.

Dr Prinsloo

[85] Dr Prinsloo testified that she is now the sole member of defendant as she purchased the shares of the other two members. She testified that defendant had a serious black wattle problem in the conservation area and the farm as a whole. A number of contractors had previously been engaged to address this problem but without success. Defendant's main concern was to establish a fynbos reserve in the conservation area in front of the house. Defendant also had to deal with the wattle problem on the farm because there were complaints from Work for Water about the situation. Van der Spuy's main interest was to develop a commercially viable pine forest.

[86] Dr Prinsloo testified that she understood the contract to mean that Van der Spuy would clear 50 ha of wattle in the conservation area in the first 4 years. This was her immediate and principal concern. The clearing of wattle in the cultivation area

was, according to her, besides the point because the cultivation area was likely to only yield commercial value in 7 to 10 years once the pine forest was established.

[87] Dr Prinsloo stated that when Van der Spuy indicated that he would commence thinning in January 2016, she went down to the farm and asked him what this would entail. He said that it would merely be a continuation of what happened during the first three years and she was quite happy with that explanation. Van der Spuy walked her through the pine forest and she asked him to point out what trees were to be thinned, and he did so. They were very small trees, both pines and some wattle, and 6 centimeters in diameter or length. Dr Prinsloo did not know where section R1 was but later found out that it is one of the best sections of the farm. She testified that she initially did not understand the difference between thinning and harvesting. She thought that they were the same thing. However, she was quite happy that the agreement specified that before plaintiff harvested, the parties would discuss the matter.

[88] It was put to Dr Prinsloo that nowhere in the contract does it state that 50 hectares had to be cleared in the conservation area and her response was that it was a verbal agreement and, in any event, if one has regard to the e-mails that Van der Spuy had sent to her, it was clear that it was always specified that black wattle was being cleared in the conservation area but not a word was spoken about any wattle being cleared in the cultivation area.

[89] Dr Prinsloo testified that she had a problem with the change in *modus operandi* in 2016. Van der Spuy had never mentioned the word corridor thinning or strip felling. She could not offer an explanation why it was not put to Van der Spuy during his cross-examination that he said that would not be change the thinning regime. She could not offer an answer. Also, it was pointed out to Dr Prinsloo that Van der Spuy had expressly told her that he would be changing the thinning regime and her response was that she saw the discrepancy.

[90] Dr Prinsloo stated that Alex was wrong that there was an interested buyer for the farm but she conceded that it would be difficult to sell the farm whilst her contractor was busy on the farm.

[91] Dr Prinsloo agreed that it was an implied term of the agreement that the parties had in mind that the person appointed to conduct the investigation in terms of clause 13 of the agreement would be an expert who would be unbiased and not favour of any specific party and act impartially and skillfully. He also had to base his report on facts.

[92] Dr Prinsloo testified that by 15 November she had already taken advice from Joubert who expressed the opinion that Van der Spuy was not doing his job properly, and she had already made up her mind that Van der Spuy must go. Thus, by the time Joubert was appointed as an expert, she had already known what his views were.

[93] Dr Prinsloo was shown Vermeulen's letter of 15 November 2016 in which he had pointed out instances of alleged breaches of the agreement by plaintiff. She conceded that all the breaches identified in the letter were based on advice received from Joubert who had already expressed an opinion adverse to plaintiff on all the instances of breach mentioned in Vermeulen's letter. She further conceded that at the time Joubert was appointed, she was sure what the outcome was going to be.

[94] Dr Prinsloo was shown the letter from Joubert to Van der Spuy in which Joubert indicated that he had to assess the conservation area. Her response was that he knew the conservation area had to be assessed but she did not ask him to specifically assess it. She later backtracked after been shown Joubert's e-mail in which he stated in effect that he confined his assessments of the conservation area after receiving feedback from Dr Prinsloo. She confirmed that this was correct.

[95] Dr Prinsloo was asked if she expected Van der Spuy to respond within 10 days to remedy the breach to eradicate the black wattle. Her response was that she did not expect Van der Spuy to do so but expected him to respond and say that he would come to clear it. If he did so she would have happily conceded.

[96] Dr Prinsloo agreed that the fire break that was cut by Vermaak fell in the cultivation area, and that the timber removed from the firebreak would eventually have been for the account and benefit of plaintiff. She, however, denied that

plaintiff was entitled to be compensated because the agreement was cancelled due to plaintiff's breach.

Joint minutes of Dobson and Venter

[97] The parties submitted into evidence minutes a joint minute by Venter and Dobson in relation to this matter.

[98] Both experts agreed in relation to thinning that:

[98.1] Thinning operations can be to waste (no harvesting) or with product (harvesting).

[98.2] Both types of thinning operations were employed at different stages during the course of the contract. The initial thinning/spacing was selective, fell to waste operations, and the last operation was accompanied by harvesting, employing non-selective row or strip felling.

[98.3] Row/or strip felling is an acceptable thinning method in the forestry industry.

[98.4] The row thinning was an intermediate step which was to be followed by further selective thinning in the remaining tree roads (as per standard forestry practice).

[99] The point of disagreement with regard to thinning was as follows:

[99.1] According to Dobson, as soon as the row thinning was carried out, the intention was to harvest the thinned trees (convert them into money) and as such it becomes a “partial harvesting operation”. According to Venter, the goal/intention was to enable access for the final thinning and to reduce the stem count to improve the final crop, the converting into money being a secondary out blow.

[100] On the issue of black wattle:

[100.1] Both agreed that less than 50 hectares were cleared in the conservation area.

[100.2] Agreed that the area in the conservation area was cleared and, is now in a properly cleared condition. Dobson stated that this was due to the follow-up efforts of defendant and Venter stated that it is impossible for him to determine the validity of that statement, due to the time lapse and the state of follow-up work. In addition, the nature of clearing black wattle will require follow-up operations for a long time.

[100.3] Dobson mentioned observing wattle trees with white mottling during the enumerations he did in 2019 (which was some three years after the last work done by the plaintiff). Venter also observed summer wattling in December 2021 (which is about 5 years after the last work was done by plaintiff).

[100.4] It was agreed that generally wattling is only found in wattle trees older than 8 years indicating that at least some wattle were not felled during the preceding thinning operations or otherwise in other cleaning operations.

[100.5] Venter noted that his observations was that there was a reasonable clearing of the wattle between the trees, taking into account the level of infestation and the fact that it would normally only require a "keeping it down" approach until after clear-felling.

DISCUSSION

Joubert's findings

[101] Joubert was appointed in terms of clause 13 of the agreement which states as follows:

> "***13. EXPERT DETERMINATION***
>
> ***13.1. Should the parties be unable to agree promptly on any factual matter arising or in connection with the terms of this agreement, any party may give notice that the matter be referred for expert determination, in event whereof the following provisions shall apply:***
>
> ***13.1.1 the expert (who shall act as an expert and not as an arbitrator) shall be such person(s) agreed upon by the parties. Failing such mutual agreement on the appointment of an expert, the parties shall promptly refer the issues, at their joint cost –***

13.1.1.1 if the matter related to tree harvesting, forestry or any activities relating thereto, to Forestry services and Facilitators and forestry management consultants);

13.1.1.2 if the matter relates to a field other than tree harvesting, forestry or a related activity, to the Chairperson for the time being of George Bar Council, with instructions to appoint (a) suitable expert or experts within 10 (ten) business days of receipt of such instructions,

13.1.1 The experts as appointed shall only be dismissed by the mutual agreement of the parties.

13.1.2 The parties shall promptly and simultaneously, exchange with each other and submit to the expert, and in any event in accordance with the experts' written directions, their arguments and submissions in connection with any matter of fact referred to the expert(s) in accordance with this clause 15.

13.1.13 Following receipt by the experts of the written arguments and other submissions of the parties pursuant to the provisions of this clause 13, the experts shall at the request of the parties or any one of them, as soon as reasonably practicable, present the parties with their written opinion pertaining to the mailer of fact referred to them.

13.1.14 the formal written opinion of the experts shall be conclusive in any proceedings between the parties.

13.1.5 The fees and expenses of the experts shall be borne equally by the parties unless otherwise directed by the experts."

[102] According to defendant, Joubert was appointed jointly by the parties, visited the property, and answered the three questions posed to him in the letter of instruction. Clause 13.1.4 is an alternative dispute resolution mechanism between the contracting parties in terms of which they agreed jointly to appoint an expert to determine the dispute between them and they agreed to accept the determination as final and binding. Thus, Joubert's report is conclusive of the dispute between the parties.

[103] On the other hand, plaintiff sought to impugn Joubert's report on a number of grounds. It was submitted that Joubert was not an expert, that the conclusions reached by Joubert were factually incorrect, that he was biased in favor of defendants, and that he had strayed from the joint mandate given to him and instead based his report and factual findings on the unilateral change of his instructions by Dr Prinsloo and Vermeulen. Despite the extensive evidence and argument led on why the Joubert's report was deficient and should be disregarded, Joubert was not called as a witness to defend his report or the serious allegations relating to the shortcomings in the report advanced by plaintiff.

[104] The appointment of an expert in a specific field is usually dictated by considerations of commercial utility: efficiency, the production of an authoritative

outcome, limiting the financial costs associated with lengthy legal battles, and certainty and finality in resolving the dispute. The parties often choose an expert due to his or her experience, education, skill and judgment which they agree to apply to the problem to be dealt with on their behalf. In the nature of things, the appointment of an expert also implies that the manner in which the expert determines the issue referred to him or her should be untrammeled by procedural impediments or constraints that typically apply to arbitrations and courts in a curial context. The parties will be bound by the decision of the expert as long as the decision is arrived at honestly and in good faith (see ***Lufuno***[1]), and decisions are only open to challenges on very limited grounds such as fraud and the like (***Ex parte Minister of Justice***[2]). Mistake or negligence on the part of the expert does not render the report open to attack (***Ocean Diners***[3]). The expert must, however, execute his mandate fairly (***Tahilram***[4]) and must execute his mandate faithfully in the sense that he must not depart from his instructions in any material respect. Axiomatically, if an expert does not act impartially or independently and departs from the instructions given to him by the parties, his determination cannot be relied on as a conclusive determination of the dispute referred to him.

[105] While Joubert's expertise in certain aspects of the forestry operations was called into question by plaintiff's expert, Venter, all the other witnesses, including Van der Spuy appeared to accept that Joubert was experienced and qualified in the field of forestry operations; this is certainly evident from his curriculum vitae

[1] ***Lufuno Mphaphuli & Associates v Andrews and Another*** **[2007] SCA 143 (RSA)** at para [33].
[2] ***Ex parte Minister of Justice: In re: Nedbank v Abstein Distributors*** **1995 (3) SA 1 (A)** at para 27.
[3] ***Ocean Diners v Golden Hill Comstruction*** **1993 (3) SA 331 (A)** at 342G-343B.
[4] ***Tahilram v The Trustees for the time being of the Lukamber Trust and another*** **(845/20) [2021] ZASCA 173 (9 December 2021)** at para [15].

which was admitted into evidence as an exhibit. In any event, as Mr Potgieter SC (defendant's counsel), argued, the agreement does not refer to the qualifications/or experience of the appointed expert and that only such a person must be agreed upon by the parties. When this dispute first arose, Van der Spuy had no difficulty in referring Prinsloo's to Joubert mto comment on the manner in which Van der Spuy had performed his work. I, therefore, have no difficulty in accepting that Joubert was an expert with regard to the specific assignment entrusted to me by the parties, and that he was properly appointed to determine their dispute in terms of clause 13 of the agreement.

[106] In this matter, Mr Kruger argued that they were a number of respects in which Joubert's findings could be impugned because Joubert was not impartial and independent. The evidence tends to support his argument. It is apparent from the evidence led that Joubert had in fact expressed his sentiments to members of defendant on the questions posed to him in his letter of instruction before being instructed. He expressed a view adverse to plaintiff. This much was conceded by Dr Prinsloo during her extensive cross-examination by Mr Kruger. Even if a perception of bias is not sufficient to disqualify an expert, it seems to me that, at the very least, the fact that Joubert had already expressed a view *albeit* preliminary on the questions posed to him, he ought to have alerted Van der Spuy to this fact and the latter could then decide whether or not he still wanted Joubert to continue in the role of expert. Van der Spuy testified that he was

unaware that Joubert had already expressed adverse comments on the questions posed to him.

[107] A further aspect which appears to have impugned Joubert's partiality is that he did not correspond with or invite the views of plaintiff. However, he did receive the views of Dr Prinsloo. He did, however, receive the views of Dr Prinsloo. He was also in contact with Vermeulen and sought clarification on a particular aspect of a question posed to him. While an expert can determine the manner in which he performs his task, fairness dictates that he abide by the contractual provisions regulating the performance of his task as dictated by the contract in terms of which he was appointed. In terms of clause 13.1.2 of the agreement, the parties were to exchange their arguments and submissions and simultaneously submit these to the expert. In this matter, Joubert did not provide guidelines or directions on how the parties were to exchange their written arguments and submissions. Joubert, however, appears to have received submissions from defendant and interacted with Vermeulen. He did not have any interaction with van der Spuy or any of plaintiff's representative.

[108] Mr Potgieter sought to argue that Berg, an employee of plaintiff, accompanied Joubert when the latter inspected the farm and to this extent Joubert would have interacted with the plaintiff and received submissions from them. However, Van der Spuy's evidence was that Berg was merely a driver and had no mandate to present plaintiff's position to Joubert. The defendant called no witnesses to

controvert Van der Spuy's testimony in this regard and I have no reason to reject his evidence as false or improbable.

[109] Even if it can be argued that Joubert was impartial, his failure to follow the terms of the contract on how he should undertake his task is fatal. The fact that the parties agreed that the matter was urgent did not give Joubert a license to disregard the contractual provisions relating to his appointment. Joubert could have contacted Van der Spuy telephonically, if needs be. Of course, it might be argued that Joubert was not alerted by the parties to the provisions of the contract relating to his procedural obligations. However, in my view, this is one of the first things he ought to have clarified when he took on the instruction. Joubert's letter of instruction invited him to contact Vermeulen if there were any queries.

[110] In any event, even if one accepts that by omitting to alert Joubert to the provisions of clause 13 of the agreement and by approving his letter of instruction, the parties impliedly left it up to Joubert to conduct the investigation as he deemed fit, untrammeled by clause 13.1.2, the problem still remains that Joubert consulted or received submissions and/or sought clarification from only one of the parties. This, in my view, impugned Joubert's partiality as an independent expert. Although it was not an express term of the agreement, it can hardly be argued that the person appointed as an expert should not act independently and in an impartial manner; this much was conceded by Dr Prinsloo during her cross-examination.

[111] One of the consequences of Joubert acting in a partial manner is that he deigned to accept the unilateral alteration of the joint mandate provided to him. As noted, the letter of instruction furnished to Joubert was that he was inter alia requested to answer the question if "*50 hectares of the farm property been cleared*?". However, his report indicates that contrary to the joint instruction given to him by the parties, he confined his investigation to an assessment of only the conservation area.

[112] Joubert also sought to clarify the instruction with Vermeulen before compiling his report which led to the alteration of the initial question on an issue that was agreed jointly by the parties. In the initial letter of instruction, Joubert was asked to answer the question whether the pine trees cut down by plaintiff could be described or qualify as "harvesting" or "thinning". The joint instruction to Joubert simply required an answer expressed as a choice of one or two options; harvesting or thinning. Joubert, then, in his discussion with Vermeulen, pointed out that "harvesting" is not the correct term whereupon Vermeulen explained what was meant was "more than normal thinning". This means that the initial question jointly posed was unilaterally altered by Vermeulen and this fundamentally changed the nature of the question the parties had agreed upon. Joubert's conclusion was that "*a degree of excess harvesting did take place that cannot be designated as thinning*". Quite simply, Joubert answered a question that was not put him to jointly by the parties and, in effect, asked the wrong question and in the process misconstrued his mandate.

[113] On a conspectus of the evidence before this court, I am satisfied that Joubert did not act as an independent expert. Nor did he act fairly and, as a consequence, he asked, and answered, the wrong question and in so doing misconceived the scope of the joint mandate given to him in his letter of instruction dated 23 November 2016. Accordingly, the parties are not bound by Joubert's determination of the dispute.

Alternative basis for breach

Repudiation

[114] Both plaintiff and defendant alleged repudiation of the agreement by each other in the pleadings. However, the issue of repudiation was not pursued or relied on by either parties as the basis for breach during the trial or argument.

[115] Whether repudiation has been established must be considered objectively, in the context of what a reasonable person would have understood by the communication in question[5].

[116] The question to be determined in the present matter is whether the correspondence exchanged between the parties would lead a reasonable person to conclude that the parties no longer intended to proceed with the agreement. The onus lies on the party who asserts repudiation to prove that the other party has repudiated the contract. In my view, there si no evidence for this court that prior to the purported cancellation of the contract on 20 January 2010 that either

[5] ***Tuckers Land and Development Corporation (Pty) Ltd v Hovis*** 1980 (1) SA 645 (A) at 653F.

party had concluded that the other party did not intend to fulfil the agreement. On the contrary, although the parties differed on whether a breach of the agreement occurred, they still acted as if the agreement was in place. Plaintiff continually tendered its performance while defendant repeatedly advised plaintiff that if could have access to the farm *albeit* it restricted the type of activity, plaintiff could.

Breach of the agreement

[117] As an alternative to Joubert's findings, defendant sought to rely on the oral and documentary evidence presented at the trial to prove plaintiff's breach of the agreement and its justification of the subsequent cancellation. In its notice of cancellation, the reason provided by defendant for cancelling the agreement with plaintiff was that plaintiff failed to clear 50 hectares of black wattle in the conservation area and was thus in breach of clause 3 of the agreement. Whether clause 3 imposed an obligation on plaintiff to clear 50 hectares of black wattle throughout the farm (as contended by plaintiff) or only in the conservation area (as contended by defendant) requires an interpretation of clause 3 of the agreement. In addition, what is meant by "clearing", the extent of the clearing that had to take place, and the trigger points for the parties' entitlement to financial reward requires a consideration of clauses 6 and 7 of the agreement.

[118] The relevant clauses of the agreement are reproduced verbatim below:

> ***"3. GRANTING OF RIGHT TO HARVEST TREES***

3.1 COGNAD hereby grants to the contractor the right to harvest pine on the property subject to the terms and conditions set out in this agreement. The Contractor shall attend to the clearing of 20 hectares per annum of the Blackwattle and Blackwood trees. The area to be cleared annually, being within the sole discretion of COGNAD and in accordance with the stipulations of this clause 3.

3.2 The parties agree that the Contractor annually clear a total of 20 hectares of Blackwattle and blackwood, subject to the following:

3.2.1 In the first year following conclusion of this agreement, the Contractor shall clear the stated 20 Hectares;

3.2.2 during the second year following conclusion of this agreement, COGNAD shall have the choice to either request the Contractor to do a follow up clearing of 20 hectares of the area cleared accordance with clause 3.2.1 together with an additional 10 hectares. COGNAD shall notify the Contractor in writing of their election within 11 (eleven) months from the anniversary of this agreement.

3.3.3 the aforesaid formula contained in 3.2 above, shall mero moto apply annually for the duration of this agreement.

3.3.4 The Contractor shall be responsible to annually issue to COGNAD with a diagram setting out the areas cleared during the preceding year, which diagram shall be signed by both parties and annexed to this agreement.

3.3.5 The parties specifically record that the conservation area falls within the sole discretion of COGNAD, whilst the cultivation area falls within the sole discretion of the Contractor.

6. CONSIDERATION PAYABLE TO COGNAD

6.1 The parties record that the value of the wood to be harvested in the cultivation area, will be determined with reference to the market related value of the wood, as determined by an independent consultant appointed jointly by the parties. The Contractor shall however not be entitled to commence the felling of the trees, before the parties have not reached consensus on the value of the wood. Failing consensus, the matter shall be referred for expert determination.

6.2 The Contractor shall not be entitled to commence felling of the trees, until the value of the wood, as referred to in clause 6.1 above, have not been agreed upon between the parties in writing.

6.3 The parties further record that they will regard themselves bound by the value in respect of the wood, as arrived at by the independent consultant, referred to in clause 6.1 above.

6.4 The Contractor shall in writing notify COGNAD 30 (thirty) days prior to the Contractor commencing felling of the trees, in accordance with this clause 6, to enable the parties to give to the provisions of clause 6.1 above.

6.5 The parties further record that the following formula to apply in determining the payment from trees felled by the Contractor, to COGNAD as follows:

6.5.1 Trees felled after 7 (seven) years from commencement of this agreement, 10% (ten percent) of the value of the wood, plus VAT;

6.5.2 Trees felled after 9 (nine) years from commencement of this agreement, 15 % (fifteen present) of the value of the wood, plus VAT;

6.5.3 Trees felled after 11 (eleven) years from commencement of this agreement, 20% (twenty percent) of the value of the wood, plus VAT;

6.5.4 Trees felled after 15 (fifteen) years from commencement of this agreement, 25% (twenty-five percent) of the value of the wood, plus VAT;

6.6 Should the Contractor elect to fell trees prior to 7 (seven) years from commencement of this agreement, the Contractor will be liable for

payment to COGNAD of 10% (ten percent) of the value of the wood, plus VAT, provided that the Contractor will not be entitled to fell and remove any wood within 3 (three) years from commencement of this agreement.

6.7 – 6.9 ….

6.9.1 For the avoidance of doubt, the parties record that the thinning out of the smaller and thinner trees will not form part of the felling of the trees, as contained in this clause 6, but forms part of the cultivating of the trees to be harvested at the later stage. The trees removed as part of the said cultivating process, will not entitle COGNAD to any payment from the Contractor, in accordance with this clause 6.

[119] Plaintiff's obligations are set out in clauses 7.1 to 7.1.20 of the agreement and the relevant parts of this clause 7 are reproduced verbatim below:

7. THE CONTRACTOR'S GENERAL RIGHTS AND OBLIGATIONS

7.1 The contractor shall –

7.1.1 at its own cost and risk harvest the pine trees on the property and remove the same from the property;

7.1.2 in carrying out the harvesting and removal of trees, act with due care and diligence and apply industry standards;

7.1.3 – 7.1.6 ….

7.1.7 carry out all tree harvesting in accordance with industry standards and comply with all statutory and other requirements regarding safety and the work place and also ensure that the requirements under any authorizations shall be complied with;

7.1.8 – 7.1.12 ….

7.1.13 in accordance with industry standards attend to the pruning and maintenance of the trees on the property in order to realize the maximum harvesting potential thereof;

7.1.14 keep such area upon which the felling and harvesting of trees take place in a neat and tidy condition;

7.1.15 not leave any felled trees on the property, but remove the same from the property within 30 (thirty) days after same have been felled;

7.1.16 – 7.1.20 ….

[120] Unfortunately, the agreement is not a model of clarity. It also relates to the specialized area of forestry operations which has its own lexicon. The agreement, to, lacks a definitions clause that could have been helpful in defining the meaning of the technical terms used in it and this trial. Having said this, various principles for interpreting contracts have evolved which may guide this court in trying to divine the meaning of the agreement. The court also had the benefit of the views of the experts with regard to the technical meaning of certain of the words used in the agreement and in the forestry context.

[121] As a basic principle, the agreement should be given a sensible, business-like meaning, one that upholds rather than undermines the apparent purpose of this document. In ***Endumeni***[6], the court set out the principles which guide the process when interpreting a document. The language used remains the point of departure and one does not resort to the ordinary or subjective meaning of the words in the minds of either parties when they concluded the agreement. One certainly is not confined to what the contracting parties actually thought the words meant at the time. The meaning of the language is to be ascertained by paying regard to the words used and the ordinary rules of grammar and syntax, but always read in context and having regard to the purpose of the provision and the background to the preparation and production of the document". The interpretative exercise is a unitary one and the text and context must always be viewed together from the outset, as part of the interpretative process, and they must be checked and re-checked against each other to determine the true meaning of the words used.

[122] Having regard to the text of the agreement and the context provided by the documentation and oral evidence, I am of the view that clauses 3.1 to 3.2 – 3.3.4 refers only to the clearing of black wattle in the conservation area. If clause 3.1 is to be interpreted to refer to the farm as a whole, it would mean that defendant would have to determine how, where, and when clearing was to take place in the cultivation area as well. This clearly was not what the parties intended. It was not disputed that defendant had little interest in the cultivation area. Also, Van der

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Spuy testified that Dr Prinsloo lacked the knowledge to thin, harvest, or cultivate the pine trees in the cultivation area. On the other hand, plaintiff was interested in developing the cultivation area to a commercially viable pine forest. It seems to me that the wording of agreement and the manner in which plaintiff performed its obligations reflect the parties' different interests:

[122.1] The map demarcates the farm into a conservation area and a cultivation area.

[122.2] Clause 3.5 specifically records that the conservation area falls within the sole discretion of defendant whilst the cultivation area falls within the sole discretion of plaintiff.

[122.3] Van der Spuy testified that Dr Prinsloo was only interested in the conservation area and not what took place in the cultivation area. Thus, there was no reason for defendant to obtain plaintiff's consent to clear the cultivation area. This is supported by the evidence which indicates that plaintiff did not require, or ask for defendant's consent, to undertake any clearing in the cultivation area.

[122.4] During the first three years, Van der Spuy only reported back to plaintiff with regard to black wattle cleared, or to be cleared, in the conservation area. It was only in November 2015 that Van der Spuy advised Dr Prinsloo that he would commence with thinning in the cultivation area. In my view, given the tenor of the e-mail, the purpose thereof was not to obtain

defendant's consent to commence thinning in the cultivation area. Rather, the intention was primarily to trigger clause 6.9.1 and to remind defendant that the timber obtained from the process of thinning would be for plaintiff's benefit.

[122.5] Plaintiff appears to have known that the clearing of black wattle was confined to the conservation area. This is apparent from the e-mail Van der Spuy sent to Joubert and others on 30 November 2016 where he indicated that defendant cleared black wattle "in the pine section, which is a greater area than that specified in the contract". It will be recalled that Joubert's stated that Dr Prinsloo had provided him with her assessment of what the contract meant and in his e-mail to Van der Spuy dated 29 November 2016, he refers to clause 3.1 of the agreement which he interpreted to mean that the area to be cleared was the conservation area. Van der Spuy's response was an implied admission that the area referred to in clause 3.1 is the conservation area because he says that he had cleared an area (the pine section) which was greater than the area specified in the contract. He did not dispute Joubert's understanding of what that specified area was, namely the conservation area.

[123] Clause 3.2 of the agreement sets out the manner and extent in which the black wattle was to be cleared. In my view, the clearing of black wattle in the conservation area is a material term of the agreement. Indeed, it was the primary reason for the defendant concluding the contract with plaintiff. Twenty

hectares had to be cleared in the first year followed by an additional 10 hectares and follow up clearing. This *modus operandi* was to endure throughout the duration of the agreement. The agreement commenced in 2012 and by the time plaintiff was placed on terms, a period of 4 years had lapsed. This means that a minimum of 50 ha of black wattle ought to have been cleared and/or followed-up. It was not disputed that on whatever definition of cleared is used - be it clear-felling or thinning – less than 50 hectares of black wattle was cleared in the conservation area. Having failed to clear the requisite amount of black wattle, plaintiff was in breach of a material term of the agreement.

[124] Although defendant purported to cancel the agreement for the failure of plaintiff to clear 50 hectares of black wattle in the conservation area, defendant expanded the instances of breach in its plea to include the allegation that that plaintiff felled and removed pine trees contrary to the agreement and failing to adhere to industry standards or applying proper fire prevention security measures with regard to trees felled after three years.

[125] It was common cause that plaintiff felled and removed pine trees within three years of the commencement of the agreement. However, it was not disputed that plaintiff felled and removed those trees at the request of defendant who was duly paid the agreed amount for these trees by plaintiff. Accordingly, there is no substance to the plea raised in respect of plaintiff felling and removing trees within the first three years of the agreement.

[126] Plaintiff admitted that it felled and removed pine trees three years after commencement of the agreement but submitted that this was done in the process of thinning out the trees as part of cultivation of the trees for later harvesting. As such, the trees removed fell to be dealt with in terms of clause 6.9.1 of the agreement which entitled plaintiff to fell such trees for its own benefit. Defendant, on the other hand, was of the view that the trees felled and removed were actually harvested and plaintiff ought to have been given notice of its intention to do so and reached agreement with defendant on the value of the trees.

[127] I agree that trees felled and removed after three years of the agreement fell to be dealt with in terms of clause 6.9.1 of the agreement. There was no dispute that plaintiff was responsible for the cultivation area and whatever occurred in that area. Plaintiff was engaged an independent contractor and could determine how the cultivation process, which included thinning, should take place. This much was conceded by Alex who testified that Van der Spuy had carte blanche with regard to the activities in the cultivation area.

[128] Venter, Dobson and Dr Steenkamp all agreed that thinning operations were employed at different stages during plaintiff's execution of the agreement, and they had no problem with the manner in which plaintiff conducted the thinning operation in the cultivation area. While Dobson expressed concern that the high variability of stocking across the plantation indicated to him that the spacing exercise had not been well executed, he agreed with plaintiff's experts that

thinning was the correct thing to do and he also said that when he inspected the farm, he could not see anything that plaintiff should not have done towards the ultimate objective of establishing a commercially viable plantation.

[129] In terms of clause 6.9.1 of the agreement, plaintiff was entitled to the proceeds of thinning or the removal of smaller or thinner trees that did not form part of the trees to be harvested. The term “thinner” or “smaller” trees is not defined in the agreement and all the experts agreed that corridor thinning was indiscriminate as bigger and smaller trees are taken out in the corridor. Both Van der Spuy and Venter testified that the term bigger or smaller was relative to the trees being cleared out in the corridor. Van der Spuy’s evidence was also not seriously challenged that the diameter of trees removed was between 15 and 17 centimeters while a mature fully grown pine tree could be in the range of 35 to 45 centimeters. Dobson agreed that this type of strip felling of necessity would include bigger trees and that it would not make sense to cut around such trees during the strip felling process.

[130] I am not persuaded by Dobson’s view that, regardless of the diameter of the trees, thinning qualifies harvesting if they are sold or, conversely, if money is not made from the thinning exercise, it is not harvesting. I find Dr Steenkamp and Venter’s opinions more persuasive: the process engaged in by plaintiff is in the nature of thinning-harvesting where the primary object was to thin as part of the cultivation process and the money derived from the sale of the timber was a secondary object. If one is to accept Dobson’s opinion on harvesting and

thinning, clause 6.9.1 of the agreement will be meaningless because plaintiff could be the sole beneficiary of any proceeds from the removal of any trees as part of the thinning process. This is clearly not what is intended by clause 6.9.1 of the agreement where it expressly states that the trees removed during the cultivation process will be for the benefit of plaintiff alone.

[130] In light of the foregoing, I am of the view that all the trees that were felled and removed during the cultivation process (that is, before the actual harvesting) by plaintiff falls to be dealt with in terms of clause 6.9.1 and the proceeds therefrom are for the benefit of plaintiff alone. Having arrived at this conclusion, defendant's counterclaim for damages relating to the trees removed by plaintiff must fail.

CANCELLATION

[131] In terms of clause 15 of the agreement, cancellation was only possible after the party alleged to be in breach was offered 10 days (or such reasonable longer period that may be necessary) to rectify the breach and failed to do so. This principle, termed a *lex commissoria*, is valid and enforceable strictly according to its terms[7].

[132] According to defendant, the letter of 5 January 2017 ('notice to remedy') sent by plaintiff's attorneys was confusing and contradictory and did not comply with what is required of a lawful demand. The said letter made reference to the agreement having lapsed alternatively having been cancelled, or plaintiff having repudiated the agreement. In addition, contrary to the agreement, the notice required the

[7] ***Development CC and Others v H and Another* 2017 All SA 14 WCC** at paras 33 – 37.

"extermination" rather than the clearing of the black wattle. The notice does not state the amount of black wattle that plaintiff was still required to clear in order to rectify its breach or where the clearing was to take place and whether such clearing should be in the form of a follow-up or a new clearing. In other words, plaintiff was not advised in precise terms what was required in order to remedy the breach.

[133] While the notice to remedy is somewhat confusing, as I noted in paragraph [116] above, the parties until then acted as if the agreement was still in force. Before receiving the notice to remedy, plaintiff had no reason to doubt that this notice was a breach notice and that the failure to remedy the breach may lead to cancellation. This is evident from plaintiff's response to the notice to remedy. On 12 January 2017, Jordaan sent a letter to Vermeulen in which he stated amongst other things that "***were your clients to continue with cancelling the contract, our client will immediately continue with the necessary legal action to recover any damages suffered due to cancellation***" (own underlining).

[134] I disagree with plaintiff's submission that notice to remedy was deficient because it referred to 'extermination' and the manner and number of hectares to be completed was not indicated. In my view, the notice to remedy was unambiguous and left plaintiff in no doubt what was required of it. The parties had previously used the term 'extermination' to mean weed control and they used the term 'weed control' interchangeably with black wattle. The term 'extermination' was used repeatedly in correspondence exchanged between the parties prior to the

notice to remedy. Thus, in the letter dated 6 December 2016, Vermeulen sent a letter to Jordaan and referred to plaintiff's breach of contract being among other things "*too little extermination of invasive plants occurred*". In a letter to Dr Prinsloo dated 8 December 2016, Van der Spuy made reference to the fact that the team could not continue to do "just weed control". This was repeated in a letter dated 9 December 2023 from Jordaan to Vermeulen where it was indicated that plaintiff could not only confine itself to the "*extermination of weeds*". Again, in correspondence dated 13 December 2016, Vermeulen wrote a letter to Jordaan noting that plaintiff had breached the agreement by failing to undertake "*the extermination of the agreed number of hectares of invasive plants*". Jordaan expressed the same sentiments in a letter dated 14 December 2016 to Vermeulen where he complained that plaintiff was prevented from performing its contractual obligations and that "*no extermination of evasive plants or thinning*" will take place. In the response to the notice to rectify of 12 January 2018, in the context of responding to the alleged breach of contract, plaintiff noted that Joubert had limited himself to only "*weed control*" in the conservation area but that almost 158 hectares of "*weed control*" took place in the plantation.

[135] After the parties received Joubert's findings, there was an extensive exchange of correspondence and they also attempted to convene meetings in order to try and settle dispute between them. Although plaintiff denied that it had committed any breach, plaintiff was undoubtedly aware that the breach alleged against it was the failure to clear 50 hectares of black wattle (or weed) in the conservation area.

Thus, in my view, by the time the notice to remedy was sent to plaintiff, what breach committed was alleged to be and what was required to remedy the breach. Van der Spuy was also well aware that Joubert had found that at maximum 30 ha of black wattle had been cleared in the conservation area (which was very similar to the figures Van der Spuy had subsequently arrived at). This situation is analogous to the situation pertained in the matter of ***Sewpersadh and another v Dookie***, the respondent argued that he was not aware of the full amount required to be paid to comply with the breach due to other amounts needing to be added to the purchase price[8]. The court held that even if that was so, the respondent knew that the purchase price was to be paid within 24 months and that he had not done so and, to that extent it would have been clear to him what the breach was that the appellants required him to remedy[9].

[136] When there is a breach of contract, the first step is to issue a letter of demand, this was described in the matter of ***Godbold v Tomson***, "The purpose of such a notice is to inform the recipient of what he is required to do in order to avoid the consequences of default. It should be couched in such terms as to leave him or her in no doubt as to what is required, or otherwise the notice will not be such as is contemplated in the contract".[10] In ***Standard Bank of South Africa v A-Team Africa Trading CC***, it was held that the exact wording of the letter of demand is immaterial provided it is clearly and unequivocally informs the debtor that his failure to perform timeously may result in the cancellation of the contract[11]. In light

[8] [2009] 4 All SA 338 (SCA) paragraph 14
[9] Ibid paragraph 15
[10] **1970 (1) SA 61 (D) at 65A-D**,
[11] [**2015] JOL 33798 (KZP)** paragraph 14

of the foregoing, I am of the view that the notice to remedy clearly and unequivocally informed plaintiff of the manner in which it had breached the agreement and of the consequences of failing to rectify its breach.

[137] In terms of clause 15 of the agreement, the party in default is given 10 days or such reasonable longer period as may be necessary to remedy the default. In this matter, plaintiff argued that 10 days was too short to clear 20 hectares of black wattle in the conservation area. This may well be so. However, plaintiff bore the responsibility of querying the time period as being unreasonable and it ought to have proposed a period of time that in its view was more acceptable. Plaintiff did not do so and cannot now complain that the time to remedy the breach was unreasonable.

[138] Plaintiff also requested relief for damages relating to trees that had been cut and removed from the cultivation area by any third party whilst the agreement was in force. It is common cause that Vermaak removed trees when he cut firebreaks. Both Alex and Dr Prinsloo confirmed that the firebreak was situated within the cultivation area and that plaintiff would have been entitled to the benefit of the timber removed from the firebreak. The only reason why Dr Prinsloo was of the view that plaintiff was not entitled to compensation in respect of those trees was due to her view that plaintiff was in breach of the agreement. I agree with plaintiff that trees removed from firebreaks falls to be dealt with in terms of clause 6.9.1 of the agreement. These trees fell within the cultivation area and appears that Vermaak felled and removed trees between 7 and 11 January 2017 which was

prior to the agreement being cancelled. Plaintiff is thus entitled to be compensated for any loss relating to the trees removed by Vermaak or any third party prior to the cancellation of the agreement on 20 January 2017.

[139] In summary, I find that plaintiff committed a material breach of the contract by failing to clear 50 hectares of black wattle in the conservation area, that the contract was validly cancelled, that plaintiff was entitled to the timber obtained from the trees that had been felled during the thinning process, that plaintiff was entitled to the proceeds from the trees cut and removed by Vermaak or any third party prior to 20 January 2017, and that defendant failed to prove its counterclaim.

[140] In so far as the issue of costs is concerned, both plaintiff and defendant have achieved a measure of success and, in my view, it is just and equitable that each party bear their own costs.

RELIEF

1. Plaintiff's claims are dismissed, subject to paragraph 2 below.

2. Defendant is directed to pay to plaintiff such damages as plaintiff may prove on account of the removal of timber by any third party from the farm prior to 20 January 2017.

3. Defendant's counterclaim is dismissed.

4. Each party is to bear their own costs in respect of both the main claim and the counterclaim.

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FRANCIS, J

Judge of the High Court, Cape Town