HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: Electronic publishing only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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DATE JUDGE P.A. MEYER

Case No: 28143/17

In the matter between:

AYANDA QAYISA N.O. First Applicant
THEMBALIKAYISE JOHN LUPEPE N.O. Second Applicant
VUYO KONA N.O. Third Applicant
KWEZI KOMANISI Fourth Applicant

and

ALTICON GROUP (PTY) LTD First Respondent
STI CONSULTING SERVICES CC Second Respondent
MEC: GAUTENG PROVINCIAL GOVERNMENT DEPARTMENT OF HUMAN SETTLEMENTS Third Respondent
REGISTRAR OF DEEDS, JOHANNESBURG Fourth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Fifth Respondent
HEINRICH CORNELIUS VON LANDSBERG Sixth Respondent
MICHAEL NICOLAS GEORIOU Seventh Respondent
FERDI KLEYNHANS Eighth Respondent
DAGGAFONTEIN DEVCO (PTY) LTD Ninth Respondent
EKURHULENI METROPOLITAN MUNICIPALITY Tenth Respondent

RODASH 117 (PTY) LTD Eleventh Respondent

***Case Summary*: Contract – Breach – Condition – Right of cancellation upon breach – Prior written notice to be given – Effect of notice stating incorrect amount.**

JUDGMENT

MEYER, J

[1] This application essentially concerns a claim by the first applicant, Mr Ayanda Qayisa N.O, the second applicant, Mr Thembalikayise John Lupepe N.O., the third applicant, Mr Vuyo Kona N.O., in their capacities as the trustees of the Uhuru Business Trust (the trust), and the fourth applicant, Mr Kwezi Komanisi (Mr Komanisi), for specific performance of a written agreement of sale of certain immovable properties comprising portions of the farm Daggafontein located near Springs (the land) concluded between the second respondent, STI Consulting Services CC (STI), as the owner and seller of the land, and the ninth respondent, Daggafontein Devco (Pty) Ltd (Daggafontein), as the purchaser, on 25 May 2017 (the sale of land agreement).

[2] The sixth respondent, Mr Heinrich Cornelius von Landsberg (Mr von Landsberg) is STI's managing member and the eighth respondent, Mr Ferdi Kleynhans (Mr Kleynhans) was Daggafontein's sole director at the time of the conclusion of the sale of land agreement. The seventh respondent, Mr Michael Nicolas Georgiou (Mr Georgiou), was a signatory to the sale of land agreement; he bound himself as surety and co-principal debtor in favour of STI for the due performance of Daggafontein's payment obligations arising from the sale of land agreement. The trust and Mr Komanisi also claim to be entitled to the transfer to them of the entire issued share capital of Daggafontein, and such relief they claim from the first respondent, Alticon Group (Pty) Ltd (Alticon). STI cancelled the sale of land agreement on 13 June 2017 and concluded a subsequent written sale agreement of essentially the same land with the eleventh respondent, Rodash 117

(Pty) Ltd (Rodash). Other parties cited as respondents in these proceedings, but against whom no relief is claimed, is the third respondent, the MEC: Gauteng Provincial Government, Department of Human Settlements (the department), the fourth respondent, the Registrar of Deeds, Johannesburg, the fifth respondent, the Companies and Intellectual Property Commission, and the tenth respondent, the Ekurhuleni Metropolitan Municipality (the municipality).

[3] The notice of motion is divided into two parts: Part A in which certain urgent relief was sought and Part B in which the substantive relief referred to in the preceding paragraphs is sought. The urgent relief sought was resolved amongst the parties and the urgent court made the draft order to which they agreed an order of court, and reserved the question of costs of Part A for determination by the court hearing Part B. The parties are *ad idem* that the successful parties in claiming or resisting the substantive relief should also be awarded the costs of Part A.

[4] I now turn to the facts relevant to the determination of the issues between parties. Motion proceedings in which final relief is sought, however, 'cannot be used to resolve factual issues because they are not designed to determine probabilities' (*per* Harms JA in *National Director of Public prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D-E). I, therefore, must accept the facts alleged by the opposing respondents, unless they constitute bald or uncreditworthy denials or are palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. Such finding 'occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of the evidence. (*Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) at 18A-B). That test for rejecting the facts put up by the opposing respondents on the papers is not satisfied *in casu*.

[5] The trust has many business interests across a wide spectrum of activities, including the undertaking of property development. Alticon is a property development, design and management consulting company. It offers a full range of services that includes professional planning, design, costing, development and project management. During the latter part of 2015, Alticon introduced the trust and Mr Komanisi to the business opportunity of acquiring and developing the land with a subsidy from the department. The project envisaged the initial construction of 15

511 mixed use houses as part of the department's integrated residential development programme. The services which Alticon provided in connection with the envisaged project included a comprehensive due diligence and feasibility study, the planning, design and costing of the proposed development, the incorporation of the company, Daggafontein, which company was to acquire and develop the land, and the submissions to all the relevant government departments for project approval and accreditation. According to Alticon, it carried all those initial costs but was to be repaid all amounts it expended in bringing the project to a point where Daggafontein would be accepted by the department as the developer of the project. It is common cause that Alticon was to be appointed as project consultant for the project as a whole and be paid 8% on design development and 3% on project management calculated on the total project value, which was in excess of R2 billion.

[6] It was envisaged that the trust and Mr Komanisi would own the issued shares in Daggafontein, although they had at that stage not provided definitive instructions as to the percentage of shares that would be held by the shareholders. According to Alticon, their acquisition of shares in Daggafontein, however, was conditional on Alticon being paid by the trust and Mr Komanisi 'or the proposed shareholders of Daggafontein at the time' for all the initial costs it expended, which, according to it, had not yet been paid in full, as well as Daggafontein acquiring ownership of the property, which also had not materialised. According to Alticon the 'whole premise and condition precedent for the transfer of the shares' had fallen away as a result of the cancellation of the sale of land agreement and the resultant cancellation of the agreements concluded between Daggafontein and the department. Daggafontein, according to Alticon, is a shell company 'with no assets and with huge outstanding liabilities to the First Respondent [Alticon]'. The version of the trust and Mr Komanisi, on the other hand, is that-

'Alticon was to be paid for the services it rendered on that score, and we take no issue with that. It moreover was certainly not any kind of suspensive condition or a prerequisite for the transfer of the shares.'

The facts alleged by Alticon, however, must be accepted and the relief which the trust and Mr Komanisi claim against it relating to the transfer of the Daggafontein shares to them and the appointment of Messrs Lupepe and Komanisi as the directors of Daggafontein, therefore, must fail.

[7] On 23 January 2017, a 'developmental rights (land availability) agreement' was concluded between STI and Daggafontein (the STI/Daggafontein development rights agreement), in terms whereof it was agreed that STI would make available the land to Daggafontein to be developed as a mixed housing development forming part of a mega housing project '. . . on the principles of a Smart City with a view to transferring ownership of such land or any portion thereof in accordance with the provisions of this agreement'. The STI/Daggafontein development rights agreement was subject to certain suspensive conditions, including that both the department and the municipality approve the development of the land by Daggafontein and enter into agreements with Daggafontein or a third party with whom it has contracted, recording the terms and conditions of such approval (clause 3.1), that 'an agreement of purchase and sale is being concluded contemporaneously with this agreement between STI Consulting Services CC (as seller) and Daggafontein Devco (Pty) Limited (as purchaser) in respect of the land' (clause 3.2.1.2) and that Daggafontein '. . . timeously complies with the said sale agreement and, hence, also: (a) by no later than 17 February 2017, pays an amount of R15 000 000.00 (fifteen million Rand) to STI Consulting Services CC; and (b) by no later than 28 February 2017 furnishes a guarantee for the balance of the purchase price which was agreed upon in the sale agreement referred to in clause 3.2.1.2'. The guarantee 'must be issued in favour of the seller or the seller's nominee and expressed to be payable on registration of transfer and subject to no other conditions' (clause 3.2.2.). The STI/Daggafontein development rights agreement expressly provides that it 'will automatically terminate and be of no further force or effect' in the event of the non-fulfilment of the suspensive conditions (clause 3.3).

[8] On 26 January 2017, an agreement of purchase and sale was concluded between STI, as the owner and seller of the land, and Daggafontein, in terms of which agreement STI sold the land to Daggafontein. The purchase price was payable by way of a non-refundable deposit in the amount of R15 million on 7 February 2017, and the balance on registration of transfer. In respect of the balance purchase price, Daggafontein was obliged, by no later than 28 February 2017, to furnish one or more approved banker's guarantees made out in favour of such party or parties as STI may indicate and expressed to be payable on registration of

transfer. On 20 April 2017, this agreement was cancelled due to the non-payment by Daggafontein of the non-refundable deposit.

[9] On 22 March 2017, a turnkey development agreement 'for an integrated and mixed-use development programme' (the turnkey agreement) and a subsidy agreement (the subsidy agreement) were entered into between Daggafontein and the department. Daggafontein was to develop the land and the department was to pay for the development. It was envisaged, in terms of the turnkey agreement, that the trust would own 40%, Mr Komanisi 20%, a Mr David Lupepe 20% and a Mr Mhanisi Malaba 25% of the shareholding in Daggafontein. It was recorded in clause 3.1 of the turnkey agreement that Daggafontein '. . . has the right to develop the land either by virtue of being the owner of the land or having acquired the development rights in terms of a development rights agreement'. In terms of the subsidy agreement, Daggafontein warranted, *inter alia*, that '. . . it holds the right to develop the land either by virtue of being the owner of the land (as prescribed in the project application) or by having acquired the development rights in terms of the development rights agreement . . . '. The right to develop the land referred to in the turnkey and subsidy agreement was the right arising from the STI/Daggafontein development rights agreement, which agreement, by the time of the conclusion of the turnkey and subsidy agreements, had already terminated and became of no further force or effect due to the non-fulfilment of its suspensive conditions.

[10] Nevertheless, on 25 May 2017, a second written agreement of purchase and sale was concluded between STI and Daggafontein in terms which STI sold the land to Daggafontein (the sale of land agreement). An addendum to the sale of land agreement was concluded on the same day. The land sold were portions 115 and 196 of the Farm Daggafontein for a purchase consideration of R170 million. Options were also given to Daggafontein to acquire the other portions comprising the Farm Daggafontein. An initial non-refundable amount of R10 million was payable by no later than 29 May 2017. Mr Georgiou, as I have mentioned at the outset, bound himself as surety and co-principal debtor in favour of STI for payment of all amounts due by Daggafontein in terms of the sale of land agreement. It appears that Mr Georgiou was to be the funder of part of the purchase price and that he would have obtained a 10% shareholding in Daggafontein, although his name did not feature in

any of the subsequent shareholding proposals mooted by the trust and Mr Komanisi nor in the relief claimed in Part B of the notice of motion.

[11] The sale of land agreement further provides that Mr von Landsberg or STI would be entitled to apply to Investec Bank Limited (Investec) for a loan in the amount of R40 million, which, if approved and granted, would be deducted from the total purchase price of R170 million, and for which loan Mr Georgiou was obliged to bind himself as surety and co-principal debtor with STI in favour of Investec. In this regard the addendum to the sale of land agreement provides as follows:

- It is agreed that the seller or its director, HEINRICH CORNELIUS VON LANDSBERG, is entitled to apply to Investec Bank for a R40 000 000.00 (forty million Rand) loan in respect of which MICHAEL NICOLAS GEORGIOU is obliged to bind himself as a surety and co-principal debtor with the applicant for the loan in favour of Investec Bank. Should the loan be granted and advanced by Investec Bank the second part of the purchase price will be reduced by the amount of the loan advanced to the seller or its said director and the purchaser will be obliged to make the necessary arrangements with Investec Bank that the seller or its said director be released from all liability under the loan and that the liability to repay the loan become a liability of the purchaser. The process shall be completed by Friday 2nd June 2017.
- A normal valuation process with the bank will continue, with a view to obtain funding to the capacity accepted by the bank at earliest convenience. The valuation expert to be used will be Teuns Behrens from Investec.
- This will leave the outstanding amount to be determined at this point as follows
    - Total sale price of R170,000,000
    - Less R10,000,000 deposit
    - Less R40,000,000 facility from Investec
    - Less additional Investec bond supported post land valuation
    - Equals outstanding amount
- Notwithstanding alternative inflows of capital into the project, the balance shall be paid as follows
    - 100% of the outstanding amount no later than the 6 month anniversary of the advancement of the deposit amount.'

[12] Clause 18.6.1 of the sale of land agreement is also presently relevant. It reads:

'18.6.1 Should the seller or the purchaser (the "transgressing party") fail to comply punctually with any provision of this agreement, the other party ("the aggrieved

party") will be entitled to notify the transgressing party in writing thereof and should the transgressing party remain in default 7 (seven) days after the notice, the aggrieved party will be entitled without further notice and without prejudice to his other rights:

18.6.1 (i) to cancel this agreement and claim damages from the transgressing party; or alternatively

18.6.1 (ii) to enforce specific performance by the transgressing party of his obligations in terms of this agreement and to claim damages from him.'

[13] It is common cause that Daggafontein failed to pay the initial amount of R10 million on or before 29 May 2017, or at any time thereafter. According to Mr von Landsberg, he, subsequent to the conclusion of the sale of land agreement has spoken to Mr Georgiou on a number of occasions who assured him that the initial payment of R10 million would be forthcoming. When the amount was not paid on 29 May 2017, he elected not to exercise his right to apply to Investec for the R40 million loan until such time as the initial payment had been made.

[14] On 5 June 2017, STI's attorneys, Bredells, on its behalf, addressed a letter of demand to Daggafontein, which letter was also sent to the attorneys of record for the trust and Mr Komanisi, Peyper Attorneys (STI's notice). It reads thus:

RE: AGREEMENT OF SALE BETWEEN STI CONSULTING SERVICES CC AND DAGGAFONTEIN DEVCO (PROPRIETARY) LIMITED – VARIOUS PORTIONS OF THE FARM DAGGAFONTEIN 125, I.R., GAUTENG

'1. We represent STI Consulting Services CC ("STI"), the abovementioned seller.

2. In terms of an agreement of purchase and sale dated 25 May 2017 various portions of the farm Daggafontein 125, I.R., Gauteng, were sold by STI to Daggafontein Devco (Proprietary) Limited ("Daggafontein Devco"). A subsequent addendum to the agreement of sale was signed on the same date.

3. In terms of the sale agreement:

3.1 An amount of R10 000 000 (ten million Rand) was payable to STI by 29 May 2017. This amount was not paid;

3.2 An additional amount of R40 000 000 (forty million Rand) was payable to STI by 2 June 2017. The amount was not paid.

4. We have instructions to demand the immediate payment of the aforesaid amounts in terms of clause 18.6.1 of the agreement and to inform you that if payment is not made within 7 (seven) days after this notice STI will exercise its rights in terms of clause 18.6.1.(i) or (ii), as it deems appropriate at the time.'

[15] Bredells, on behalf of STI, also addressed a letter on the same day to Mr Georgiou, which letter reads as follows:

'RE: AGREEMENT OF SALE BETWEEN STI CONSULTING SERVICES CC ("STI") AND DAGGAFONTEIN DEVCO (PROPRIETARY) LIMITED ("DAGGAFONTEIN DEVCO") – VARIOUS PORTIONS OF THE FARM DAGGAFONTEIN 125, I.R., GAUTENG

I attach a copy of the letter which I have just despatched to The Directors, Daggafontein Devco (Proprietary) Limited. You have bound yourself as surety and co-principal debtor with Daggafontein Devco in favour of STI for the proper performance by Daggafontein Devco in terms of the sale agreement. In view of this, STI is entitled to claim payment of the unpaid amount/s from Daggafontein Devco or from you, the one to pay the other to be absolved. Should Daggafontein Devco fail to comply with the demand made in the attached letter, STI will exercise its rights against the said company and you (the one to pay the other to be absolved) or against you, as it deems fit at the time.'

[16] STI's notice was not responded to, nor was the initial amount of R10 million paid to STI. On 13 June 2017, STI cancelled the sale of land agreement due to the non-payment of the amounts demanded in terms of its notice. Bredells, on behalf of STI, addressed the following letter to Daggafontein, which letter was also copied to Mr Georgiou and sent to Peyper Attorneys (STI's cancellation): It reads thus:

'RE: AGREEMENT OF SALE BETWEEN STI CONSULTING SERVICES CC AND DAGGAFONTEIN DEVCO (PROPRIETARY) LIMITED – VARIOUS PORTIONS OF THE FARM DAGGAFONTEIN 125, I.R., GAUTENG

1. We represent STI Consulting Services CC, the abovementioned seller.
2. We refer to our letter of the 5th June 2017 in which payment was claimed of the amounts of R10 000 000 and R40 000 000 respectively. Neither payment was made.
3. Acting on the instructions of our client, we hereby cancel the agreement. Our client reserves the right to claim such damages from Daggafontein Devco (Proprietary) Limited as it may have suffered or still may suffer as a result of the breach of contract.'

[17] By letter dated 14 June 2017, Peyper Attorneys, on behalf of Daggafontein and Mr Georgiou, responded to STI's cancellation. Therein Mr Peyper, *inter alia*, stated the following:

'3. The Agreement *inter alia* provided that:

3.1 a first payment of R10 000 000.00 (Ten Million Rand) plus VAT will be due on 25 May 2017;

See: clauses 1.5.1, 1.7.4, 1.9 and 4.1.1(i) of the Agreement

3.2 that Von Landsberg will be entitled to apply to Investec Bank for a R40 000 000.00 (Forty Million Rand) loan in respect of which Georgiou will be obliged to bind himself as surety and co-principal debtor with the applicant (Von Landsberg) for the repayment of the loan in favour of Investec Bank;

See: clause 4.1.2(i) of the Agreement

4. The Addendum *inter alia* provide that:

4.1 the first payment in the amount of R10 000 000.00 (Ten Million Rand) plus VAT will be due on 29 May 2017;

See: first paragraph under heading "Payment Terms"

4.2 the process of Von Landsberg acquiring a loan from Investec Bank as envisaged in terms of clause 4.1.2(i) of the Agreement should be completed by 2 June 2017;

See: last sentence of second paragraph under the heading "Payment Terms"

4.3 the parties to the Addendum made the Addendum subject to the approval conditions of Investec Bank in respect of the bond.

See: handwritten sentence initialled by signatories to the Addendum on the last page of the Addendum

5. Regarding our clients' obligations in terms of the provisions of the Agreement read with the provisions of the Addendum, it is our instructions that:

5.1 Daggafontein Devco caused the transfer of an amount of R10 000 000.00 plus VAT to the bank account nominated by the Seller;

5.2 Georgiou is still prepared to bind himself as surety and co-principal debtor in favour of Investec Bank in respect of Von Landsberg's intended application for a loan in the amount of R40 000 000.00. Von Landsberg is the applicant in this loan and our client would like to enquire what progress he made in respect of his application to Investec Bank.

6. Your letter of breach dated 5 June 2017 was incompetent due to *inter alia* the demand in paragraph 4 thereof calling for payment of the amount of R50 Million (R10 Million in terms of paragraph 3.1 and R40 Million in terms of paragraph 3.2). Daggafontein was, on 5 June 2017, only indebted in an amount of R10 Million plus VAT.

7. Daggafontein accordingly insist on specific performance and reserve its right to approach the court for appropriate relief should the need arise.'

[18] It is common cause that Mr Peyper was wrong in stating that Daggafontein 'caused the transfer of an amount of R10 000 000.00 plus VAT to the bank account nominated by the Seller' (STI), and correct in stating, or suggesting, that the amount

of R40 million was not yet payable in terms of the sale of land agreement at that time and that the demand for payment thereof was premature. It is, as I have mentioned, common cause that Daggafontein failed to pay the initial amount of R10 million on or before 29 May 2017, or at any time thereafter. Furthermore, on the facts presented by STI, its attorney, Mr Bredell, misread the addendum to the sale of land agreement and erroneously included the demand for payment of the amount of R40 million in STI's notice. This amount, it concedes, was not payable at that time and, in terms of the sale of land agreement, formed part of the balance purchase price (R160 million), which was payable within a period of no longer than six months calculated from 25 May 2017.

[19] It is clear from a reading of the papers that neither the trust, the trustees nor Mr Komanisi or Mr Georgiou were willing to fund the payment of the initial amount of the purchase price for the land, nor was Daggafontein in a financial position to do so. The explanation proffered by the trust and Mr Komanisi for the non-payment of the initial amount is that they had 'an internal arrangement' with Mr Georgiou that 'he was to make payment of the R10 million by 29 May 2017' and that, as far as they were concerned, he had paid the amount and had 'intimated as much to both Mr Peyper and [Mr Lupepe] personally'. They concede, however, that 'this subsequently turned out to be incorrect'. In this regard they also state in their founding affidavit that '[i]t is so that the R10 million was not paid timeously, notwithstanding the assurances Georgiou gave us'.

[20] As a result of the cancellation of the sale of land agreement between STI and Daggafontein, the department cancelled the turnkey and subsidy agreements on 8 August 2017. Thus, the development rights agreement lapsed due to the non-fulfilment of its suspensive conditions, the sale of land agreement was cancelled on 13 June 2017 due to the non-payment of the initial amount of R10 million and the turnkey and subsidy agreements were cancelled by the department on 8 August 2017.

[21] STI, on 22 June 2017, concluded a subsequent purchase and sale and option agreement with Rodash. An addendum to this agreement was concluded between STI and Rodash on 4 July 2017 (the STI/Rodash agreement). In terms of the STI/Rodash agreement, Rodash purchased essentially the same land for the amount

R170 million and options were granted to it to purchase the other portions of the Farm Daggafontein. The STI/Rodash agreement is unconditional and not subject to any suspensive conditions. It was, according to a director of Rodash, Mr Nel, concluded in consequence of urgent negotiations which followed upon the cancellation of the sale of land agreement between STI and Daggafontein. The project, according to him, -

'. . . envisages the creation of infrastructure in a mega township consisting 17 000 individual stands over a period of 5 years commencing from the beginning of 2018. This will assist the crucial housing need in the area and any further delay . . . would prejudice the whole project and the service delivery of land to the "poorest of the poor".'

Rodash also entered into new development agreements in respect of the land with the department.

[22] The trust and Mr Komanisi contend that they are entitled to specific performance by STI of its obligations in terms of the sale of land agreement, because STI's notice on which it based its right to cancel does not comply with the requirements of the sale of land agreement in that it demands payment of a larger amount (R50 million) than was payable at the time (R10 million) and that STI's conduct in demanding the amount of R50 million 'without Von Landsberg applying to Investec for 80% of the deposit amount' amounted to a repudiation of the sale of land agreement, which repudiation Daggafontein refused to accept. The contentions of the trust and Mr Komanisi, in my view, are unmeritorious.

[23] In *Rautenbach v Venner* 1928 (TPD*)* 26 at 30-31, Greenberg J said-

'. . . that the correct principle is to ascertain in every case whether all the conditions on which the right is dependent have been fulfilled. If they have been fulfilled, then the right comes into existence whether it be a right of forfeiture or of any other kind. And in construing the words setting out the conditions, the object of the conditions will have to be considered in order to assist in the question of construction. This I think was the course that was followed in the cases of *Barrett v. New Oceana Transvaal Coal Company, Limited* [1903 T.S. 431] and *United Bioscope Cafés, Limited v. Moseley Buildings, Limited* (*supra*) [1924 A.D. 60]. In the present case the object of sec. 8 of the agreement was that appellant should be notified in writing of the amount payable and given one month in which to pay it. If this is so, then I do not see why a notice which demanded three amounts of £5 15s. 1½d. in respect of three periods is not as good a notice as if one amount in respect of one of the periods had been demanded. If instead of sending one notice in respect of the three amounts the respondent

had sent a separate notice in respect of each of the amounts, I do not think that the notice in respect of the amount really owing, the notice which standing by itself would have been valid, could be invalidated by the other notices. If however the notice had been in such terms as to make it difficult for appellant to understand the details of what was demanded from him, then it might be said that he had not received such notice as was contemplated by the agreement. But if it is clear that the respondent did what he was required to do and gave the appellant such information as the agreement requires then I think the respondent is entitled to the rights provided for in the agreement.'

[24] In *Godbold v Tomson* 1970 (1) SA 61 (D) at 65C-D, Fannin J said this:

'The question for decision is always whether the conditions on which the right to cancel was dependent have been fulfilled (*Rautenbach v Venner* 1928 TPD 26 at 31). 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, and if it is in such terms as to leave him in doubt as to the details of what is required of him, then it may be that it will be held that the notice is not one such as is contemplated by the contract (*Rautenbach's* case, *supra* at 31).

[25] *Rautenbach* was quoted with approval by the Appellate Division in *Phone-A-Copy Worldwide (Pty) Ltd v Orkin and Another* 1986 (1) SA 729 (A) at 750G-H. There, Nicholas AJA said the following:

'What had to be ascertained was whether the conditions set out in s 13(1), on which the seller's right to terminate the agreement of sale was dependent, had been fulfilled. If the conditions had been fulfilled, then the right came into existence. Compare *Rautenbach v Venner* 1928 TPD 26 at 30 *in fine*. It was only if the notice had been in such terms as to make it difficult for the plaintiffs to understand the details of what was demanded from them that it might be said that they had not received such notice as was contemplated by the section (*ibid* at 31).'

(Also see *Klopper en Andere NNO v Engelbrecht en Andere NNO* 1998 (4) SA 788 (W) at 800B-801E.)

[26] The object of clause 18.6 of the sale of land agreement on which STI's right to cancel was dependent, was to provide for the giving of written notice to the defaulting party informing it of the particular breach of the sale of land agreement and what it is required to do in order to avoid the consequences of default (remedy the breach within seven days). The conditions set out in clause 18.6 had been fulfilled, and STI's right to cancel the sale of land agreement, therefore, came into existence. An initial amount of R10 million was payable by Daggafontein to STI by

no later than 29 May 2017, which amount was not paid by that date or at any time thereafter. STI's notice identified that specific breach. Daggafontein received the written notice, it was able to identify precisely what was being demanded from it, it was informed of what it was required to do in order to avoid the consequences of its default, but it nevertheless remained in default of paying that amount within seven days after being so notified. The demand for payment of also R40 million in the same notice constitutes a *plus petitio* on the part of STI (it claimed more than was just) and did not invalidate STI's notice in respect of the R10 million amount really owing. Daggafontein knew what had been required of it to remedy its breach in failing to pay the initial amount of R10 million and it knew that the further amount of R40 million demanded was not due at that time. It should have paid the R10 million in order to avoid the consequences of its default. Absent payment of the amount of R10 million the conditions set out in the breach clause of the sale of land agreement had been fulfilled, and STI became entitled to cancel the agreement.

[27] I now turn to the contention that STI's conduct in demanding the amount of R50 million 'without Von Landsberg applying to Investec for 80% of the deposit amount' amounted to a repudiation of the sale of land agreement on the part of STI. In their replying affidavit it is stated on behalf of the trust and Mr Komanisi that-

'. . . not only was Von Landsberg obligated to apply for the loan, but also he was to do so post haste. This obviously was then also so as to make sure that the deposit amount that was required (which was in actual fact meant to be R50 million) would be paid. . . .

As the court will see from Von Landsberg's affidavit he did not do this. In fact he testifies (para 3.5 of his affidavit) he did not do it because the deposit for the initial R10 million was not paid by 29 May 2017. His obligation was however not dependent upon payment of that amount in any way. The addendum (p. 244) in this regard is clear.'

And:

'This was accordingly the plan from the start. Von Landsberg did not apply to Investec (as he was obligated to do) so as to make sure that by far the largest portion of the initial deposit amount would not be paid. By failing to perform thus, he would make sure that Daggafontein Devco will not pay by far for the largest portion of the deposit, which would entitle STI – without any consideration of their *bona fides* or indeed simple justice between man and man – to then outright cancel the agreement. This was the plan all along. . . .

The evidence I tender in my founding affidavit as to Mr Peyper's letter – informing Bredells of their reliance upon something which was not agreed and which was in accordance with the

initial unsigned agreement – alleging a repudiation of what the true agreement between the parties was, should be considered in this context as well. By asking for R50 million (without Von Landsberg applying to Investec) and without Von Landsberg applying to Investec for 80% of the deposit amount, STI's conduct actually amounted to a repudiation of the agreement.'

[28] The provisions of the sale of land agreement must be interpreted in accordance with the established principles of interpretation. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.). The clear and unambiguous wording of the relevant provisions of the sale of land agreement makes it plain that the purchase price was the amount of R170 million, that a non-refundable deposit in the amount of R10 million was to be paid by no later 29 May 2017, that STI or its director, Mr von Landsberg was 'entitled to apply to Investec' for a R40 million loan, that the 'process' of obtaining the loan was to be completed by 2 June 2017, and that if the loan was approved and advanced by Investec to STI or Mr von Landsberg, the second part of the purchase price (R160 million) would be reduced by the amount of the loan.

[29] The dictionary meaning of the noun 'entitlement' includes 'something to which a person is entitled' (*The New Shorter Oxford English Dictionary* Vol. 1 (Clarendon Press Oxford) 1993 at 830) and of the verb 'entitle' is 'give a right to' or 'give a title to' (*Collins English Dictionary & Thesaurus* (HarperCollins Publishers) Third Edition 2006 at 257). It was thus the prerogative of STI or Mr von Landsberg (and not their obligation) to apply for a loan from Investec, and that of Investec to approve or decline the loan application. The loan proceeds did not form part of the initial amount or non-refundable deposit in the amount of R10 million as the trust and Mr Komanisi would have it, but were to reduce 'the second part of the purchase price'. Furthermore, payment of the initial amount of R10 million and the application for the R40 million loan from Investec were not reciprocal obligations. The amount of R10 million was payable by no later than 29 May 2019 and the process of obtaining the loan from Investec was to be completed by 2 June 2017. Nothing in context detracts from the clear and unambiguous wording of the relevant provisions of the sale of land agreement.

[30] The election made by STI or Mr von Landsberg not to apply to Investec for the R40 million loan until such time as the initial payment had been made, therefore, did not amount to a repudiation of the sale of land agreement on the part of STI, which vested Daggafontein with an election to keep the contract alive. My findings thus far are dispositive of the substantive relief claimed in Part B of the application rendering it unnecessary to deal with the other contentions raised, such as whether or not the trust and Mr Komanisi are non-suited due to their non-compliance with the provisions of s 165 of the Companies Act 71 of 2008 relating to derivative actions.

[31] In the result the following order is made:

Part B of the application is dismissed with costs, including those of Part A.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	30 April 2019
Date of judgment:	20 December 2019
Counsel for the applicants:	Adv Lubbe
Instructed by:	Peyper Attorneys, Bloemfontein C/o Smith Sewgoolam Inc., Johannesburg
Counsel for the 1st, 8th, 9th and 11th respondents:	Adv PF Louw SC
Instructed by:	Theron, Jordaan & Smith Inc., Klerksdorp C/o Couzyns Inc., Johannesburg
Counsel for the 2nd respondent:	Adv AG South SC
Instructed by:	Bredells, Pretoria C/o Moodie & Robertson, Johannesburg