REPUBLIC OF SOUTH AFRICA

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

Case No: 25767/2006

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

SIGNATURE 30/12/2020 DATE

In the matter between:

RALPH WERNER KOSTER	Plaintiff
and	
INDUSTRIAL ZONE LIMITED	First Defendant
SOUTH AFRICAN NATIONAL PARKS	Second Defendant
MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	Third Defendant
MINISTER OF PUBLIC WORKS	Fourth Defendant

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 11h00 on 30 December 2020

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This action arises from the conclusion of an agreement of sale of immovable properties in June 2003 between the first defendant, as seller, and the plaintiff as purchaser ('*the agreement*').

[2] The plaintiff called one witness only being his erstwhile attorney, Mr Van Velden, who testified to a host of correspondence – some of which he authored and some not. More about the status and the evidentiary weight to be attached to the content thereof later.

[3] The summary of the facts set out hereinafter is common cause or largely undisputed.

Summary of facts

[4] The immovable properties, which are the subject matter of the agreement, are 9 farms, exceeding 24 000 hectares in total, situated in the Western Cape, more particularly Knysna and Uniondale ('*the properties*').

[5] At the time of the conclusion of the agreement, the properties formed part of the Tsitsikama National Park,[1] and were later incorporated into the Garden Route National Park.[2]

[6] The first defendant was, and still is, the owner of the properties.

[7] In 1993 and 1994, the first defendant's predecessors-in-title concluded lease agreements with the National Parks Board of South Africa ('*NPB*'), later called the South African National Parks ('*SANPARKS*'). In terms of the lease agreements, the NPB leased the properties (the Uniondale property in respect of the first lease, and the Knysna properties in respect of the second lease) for a period of 30 years and had full management rights over the properties (at a rent of 10 cents per hectare with no escalation).

[8] Clause 13.1 of the lease agreements provided that the NPB held a pre-emptive right over the purchase of the properties: if the first defendant wished to sell these properties, it was obliged to first offer them to the NPB, by way of "*written notice...on the same terms and conditions as those offered by or to a third party*", and the NPB had the "*right to accept such offer within 90 days of the said notice being received by it.*"

[9] The agreement made reference to the Knysna lease agreement (clauses *inter alia* 9.1.1 and 9.2) and express reference to NPB's pre-emptive right therein (clause 22).

[10] Clause 10 of the agreement - "*Expropriation*" - makes provision for automatic termination of the agreement under the following circumstances:

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[1] Schedule 1 to the National Parks Act No 57 of 1976, having been declared in 1977

[2] Schedule 2 to the National Environmental Management: Protected Areas Act No. 57 of 2003, having been declared in 2011

> '[Clause 10.2] If, prior to the registration of transfer of the property into the name of the purchaser, any such notice of expropriation or intended expropriation is received in respect of the property...[Clause 10.2.2] should the expropriation be in respect of the whole of the property, then this agreement shall be cancelled automatically and the provisions of clause 12 shall apply.'

[11] Clause 22 - *"Condition Precedent"* - provides for the fulfillment of two suspensive conditions in order for the agreement to be final and binding. The first condition is the failure by NPB to exercise its pre-emptive right within a 90 day period, while the second condition is for the purchaser (i.e. the plaintiff) to raise "*sufficient funds for the development of the property within 120 days from the date of fulfillment*" of the first condition. In both instances, the non-fulfillment of the conditions would mean the lapse of the agreement, it being of no further force and effect (as formulated in clause 22.2) and resulting in the restoration of the "*status quo ante*".

Fulfilment of the second suspensive condition

[12] On 5 May 2003, the first defendant furnished the NPB with the written notice as required by clause 13.1 of the Knysna lease agreement. The NPB failed to exercise its pre-emptive right, which it was obliged to do by 5 August 2003. This resulted in the fulfillment of the first condition.

[13] In terms of the agreement, the second condition was required to be filled within 120 days of the first condition being fulfilled, such date being 5 December 2003.

[14] On 15 December 2003 the first defendant received a notice of intended expropriation from the Department of Environmental Affairs and Tourism ('DEAT')

which was signed by its (Acting) Director-General, one Pam Yako. This notice, which was addressed to the first defendant's CEO, stated that:

> 'I would like to inform you that the Government intends to expropriate in terms of section 3 of the Expropriation Act, 63 of 1975, the following immovable property from you: [thereafter followed a list of the properties].
>
> Notice of Expropriation will follow in due course.'

[15] The first defendant regarded this notice, and still does, as one of the two types of alternative notices contemplated under clause 10 which would trigger the automatic cancellation of the agreement – in this instance a notice of intended expropriation.

[16] Having received such a notice, the first defendant advised the plaintiff of this on 17 December 2003, and recorded in its covering letter to the plaintiff (which attached the 15 December 2003 notice) to "*Please note that in terms of clause 10.2.2 of the [agreement], the agreement is now cancelled.*"

[17] On 21 January 2004, the first defendant sent a further letter to the plaintiff (captioned "*Original Guarantee: Reference No: DAAA 03257 01G*"), which after referring to its previous "*...letter of 17 December 2003 re the cancellation of the agreement due to the Notice of Intended Expropriation received from the Parks Board*", recorded that the first defendant was accordingly returning "*the original abovementioned guarantee for onward forwarding to the Land Bank.*"

[18] The plaintiff and his attorney of many years Mr Van Velden did not respond to the first defendant's aforesaid letters at that time.

[19] On 28 January 2004, the plaintiff's attorney, after having discussed the first defendant's letters of 17 December 2003 and 21 January 2004, and then returning

the guarantee to the Land Bank, addressed a letter to DEAT, in which he *inter alia* stated that "*We would be pleased if you could furnish us with the necessary particulars in due course, seen in the light of the fact that my clients Deed of Sale was cancelled in terms of the Notice of Intended Expropriation*".

[20] On 21 June 2004, the plaintiff, through Mr. Van Velden's letter of that date, for the first time communicated with the first defendant in regard to DEAT's notice of 15 December 2003, and the first defendant's letters of 17 December 2003 and 21 January 2004. In this letter the plaintiff contended that the cancellation of the agreement was invalid and stands to be set aside on the basis that the NPB had "*reasonable opportunity to obtain the property...and that they did not comply with the right of first refusal within the period of 90 days.*"

[21] In reply to this letter, the first defendant addressed its letter of 1 July 2004. In this letter the first defendant denied the correctness of the plaintiff's contentions stating that "*the fact remains that the seller received a notice of intended expropriation as envisaged in clause 10.2 of the sale agreement and upon receipt of such notice acted in accordance with the agreement between the parties as set out in clause 10.2 of the agreement.*"

[22] The plaintiff did not respond to this letter. The next communication occurred 25 months later and was made by the plaintiff to the first defendant through Mr Van Velden's fax of 8 August 2006, which after referring to the first defendant's "*notice of cancellations dated 21 January 2004*" (being a reference to the first defendant's 17 December 2003 and 21 January 2004 letters) stated that "*We hereby confirm that it came to our attention that the notice of expropriation was not continued with*", and the plaintiff claimed transfer of the properties.

[23] The first defendant responded on 14 August 2006, once again contending that the agreement was cancelled by virtue of clause 10.2.2 and that "*Upon cancellation of the agreement, the status quo ante was restored. Neither party has any claim against the other*".

[24] In Mr Van Velden's letter of 31 October 2006 to the first defendant, addressed on behalf of the plaintiff, the plaintiff for the first time requested the first defendant "*to immediately proceed to appoint your conveyancer and to instruct him/her to proceed with the registration of the property in our client's name*" and that "*Your failure to appoint your conveyancer and/or to instruct him/her to proceed to register the property in our client's name as a result of the letter of 15 December 2003 referred to above constitutes a breach of your obligations in terms of the agreement of sale*", gave the first defendant "*14 days from the date of delivery of this letter to comply with your obligation to appoint your conveyancer and to instruct him/her to proceed to register the property in our client's name*", and in the event of the first defendant failing to do so recorded that "*our client intends to institute legal proceedings against you to enforce registration of the property in his name.*" and that arbitration proceedings would not be appropriate since "*any contemplated litigation will of necessity involve the status of the letter of 15 December 2003, which in turn will necessitate the citation of at least the Minister of Environmental Affairs and Tourism as well as the South African National Parks...*"

[25] Met with a refusal by the first defendant to comply with his 31 October 2006 letter of demand and a denial of its obligation to do so, the plaintiff instituted these proceedings on 20 November 2006.

The orders sought by the plaintiff

[26] In these proceedings, in the first instance the plaintiff seeks the granting of declaratory orders as a necessary first step to the granting of the orders, which would result in the transfer of the properties to him. Thus he seeks as follows: An order declaring that:

> '1.1 The document issued by the Acting Director-General: Environmental Affairs and Tourism dated 15 December 2003 did not have the effect of an automatic cancellation of the deed of sale entered into between the Plaintiff and the First Defendant annexed to the Plaintiff's Particulars of Claim as annexure "RK1"
>
> 1.2 The Plaintiff is accordingly, against tender to comply with all his own obligations in terms thereof, entitled to enforce the operation of the deed of sale against the First Defendant and to obtain registration of the property in his name.'

[27] The orders sought in prayers 2 and 3 deal with the procedures that, upon the granting of the prayer 1 declaratory orders would bring about the registration of transfer of the properties into his name: orders directing the first defendant to appoint a conveyancer and to instruct such conveyancer to effect transfer of the properties into the name of the plaintiff without delay and as soon as is practically possible, and in the event of the first defendant failing in this regard, for the authorisation and empowering of the Deputy Sheriff to appoint such a conveyancer and to sign all the necessary documents and to do everything necessary to give effect to the registration of the properties into the name of the plaintiff against the performance by the plaintiff of all his obligations in terms of the agreement.

Plaintiff's pleaded case

[28] Plaintiff's cause of action can be separated into two broad components. The first is with reference to his compliance with the agreement and the fulfilment of all conditions, while the second is with reference to the meaning and effect of DEAT's 15 December 2003 notice of intended expropriation - annexure RK1 to the particulars of claim *('the notice')*.[3]

[29] In so far as the agreement is concerned the plaintiff pleads entitlement to registration of the properties into his name by virtue of: fulfilment of the suspensive condition in clause 22.1, compliance with all his other obligations in terms of the agreement, and all conditions in the agreement having been fulfilled.

[30] In so far as the notice is concerned, the plaintiff pleads that:

30.1. the correct legal interpretation of clause 10 is that the agreement would only be cancelled in the event of a legally valid and *bona fide* notice of expropriation having been given by a person/entity who in law is competent to do so, which notice gave or could give rise to a legally valid expropriation, irrespective of whether the notice is qualified by the word "intended" or not, and on the ordinary grammatical meaning of the contents of the notice it did not constitute a notice of expropriation or intended expropriation which could give rise to a legally valid expropriation;

30.2. A notice of expropriation can only be valid in law and have legal effect if there has been compliance with the Expropriation Act and

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[3] The plaintiff has, in his particulars of claim, referred to the notice interchangeably as the notice of expropriation, notice of intended expropriation, the notice or the document.

the National Parks Board Act[4] ('NPA') - there was no such compliance, and accordingly the notice is invalid;

30.3. A notice of expropriation can only be given by a competent person, such person being the Minister of Public Works, but was given by the DG of DEAT;

30.4. The notice was not given *bona fide* as a notice of intention to expropriate, and was also simulated,[5] because both the sender and the recipient (first defendant) of the notice, knew and understood certain matters as pleaded further in paragraph 21bis.1 to 21bis.5;

30.5. The notice of intended expropriation, on a proper construction, is not a valid notice of intention to expropriate within the meaning of clause 10.2 of the agreement because it states that "*Government*" intends to expropriate, "*Government*" is not an entity capable of forming an intention, and the author of the letter was as a matter of fact in no position and did not know what the intention of Government was.

The first defendant's defences

[31] The first defendant denied the fulfillment of the suspensive conditions.

[32] The first defendant denied that the notice was not one contemplated in terms of clause 10.2.2, and denied that it did not have the effect of automatically cancelling the agreement. The first defendant's interpretation of clause 10 is that it "*means, inter alia, that if, prior to registration of transfer of the property, the sellers were to receive notification of information giving rise to a reasonable belief on the part of the*

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[4] In fact the National Parks Act No. 57 of 1976 (now repealed)

[5] POC: 28ter

First Defendant that an expropriation might eventuate if pursued, the terms referred to in paragraphs 10.2.1, 10.2.2 and 10.2.3 of the [agreement] would apply."

[33] The first defendant pleaded the following additional defences: Prescription; waiver and/or abandonment by the plaintiff of his right to rely on the agreement and to obtain registration of transfer into his name; aquiesence and/or agreement by the plaintiff that the agreement had been cancelled; quasi-mutual assent in that the plaintiff by his and his attorney's conduct represented to the first defendant that he had waived and/or abandoned his rights, and/or acquiesced and/or agreed that the agreement was cancelled; repudiation in that the first defendant's conduct (as far as the plaintiff was concerned) amounted to a repudiation of the agreement, which was accepted by the plaintiff; since on the plaintiff's own version, the notice is an administrative action (which is also intended by the plaintiff to mean an administrative action as contemplated by the Promotion of Administrative Justice Act[6] ('PAJA')), which remains valid until set aside and the first declaratory order is accordingly a necessary precursor for the transfer orders because that declaratory order does not seek to set aside the notice, and/or because the present proceedings are not pleaded as review proceedings in terms of PAJA, and/or if the present proceedings are review proceedings under PAJA, the plaintiff has failed, within the statutory 180 day period after becoming aware of the notice, to institute such proceedings, the plaintiff should be non-suited.

The plaintiff's replication to the special plea

[34] Plaintiff pleaded that prescription has not begun to run because of reciprocity between his right/obligation to claim and take transfer as against the first defendant's

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[6] 3 of 2000

right/obligation to give transfer and receive payment therefor. Plaintiff further pleaded that prescription commenced to run only on 27 November 2003 when he furnished the guarantee, and that in terms of clause 6.2 transfer was to be effected within a reasonable time thereafter. Plaintiff also pleaded that he had not been requested to make payment of the costs of transfer or been called upon to sign transfer documents, and that under clause 6.2 transfer is to be effected within a reasonable time thereafter. Finally plaintiff pleaded that the notice is an administrative action, setting it aside is accordingly a necessary precursor to his claims for transfer, and that prescription only began to run from 17 December 2003, being the date of receipt of the notice.

History of the proceedings

[35] The plaintiff instituted the present action in October 2006. In March 2007, prior to delivery of the first defendant's plea, the plaintiff sought to and did in fact amend his particulars of claim. The first defendant's plea to the amended particulars of claim was delivered in June 2007. The plaintiff made discovery in September 2007. On 5 August 2008 the plaintiff removed the matter from the trial roll, the trial of which had been set down for 12 August 2008. Thereafter the matter was removed from the trial roll in March 2010 and again in April 2011. In June of 2015, the plaintiff amended his particulars of claim for a second time. The first defendant's adjusted plea to this second iteration of the plaintiff's particulars of claim was delivered on 7 August 2015. The trial, which was due to commence on 11 August 2015, was removed from the trial roll as a result of the second to fourth defendant's seeking a postponement. In February 2019, the plaintiff amended his particulars of claim for a third time. The first defendant's amended and adjusted plea to this third iteration was

delivered thereafter. The trial eventually commenced before this court on 22 May 2019. Evidence was presented over 2 days, being 22 and 23 May 2019.

[36] The only witness called by the plaintiff was his attorney at the time Mr. van Velden of Crawford Attorneys[7]. The plaintiff then closed his case. The first defendant called two witnesses, Ms Petra Heidenrych and Ms Jeannie van der Merwe (now Pelser), and closed its case.

[37] At the end of both parties' evidence on 23 May 2019, the trial was stood down for argument to take place on Monday 27 May 2019, and to allow the first defendant to finalise its heads of argument. At that stage the plaintiff delivered his heads of argument.

[38] The first defendant delivered its heads of argument around midday on Sunday 26 May 2019. In the first defendant's heads of argument, the first defendant submitted that the plaintiff had failed to prove the fulfilment of the second suspensive condition, and that in consequence, the plaintiff's claim was to be dismissed on that ground alone.

[39] At the commencement of closing argument the next day (27 May 2019), plaintiff's counsel, categorizing the first defendant's submission that the plaintiff had not proved the fulfillment of the second suspensive condition as a 'point', informed the court that the first opportunity the plaintiff's legal team had to look at the first defendant's heads of argument was on the plane the night before. In continuing to submit, argue and close the plaintiff's case on the basis that the second suspensive condition was fulfilled, plaintiff's counsel sought leave to hand up extracts of affidavits exchanged between the parties in 2008 in relation to an interdict sought by the plaintiff. Plaintiff's counsel then submitted that these affidavits had the effect of

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[7] Crawford Attorneys were the plaintiff's attorney of record for the action from its inception up until around June 2015.

removing the issue as to whether the second suspensive condition was fulfilled - i.e. that the fulfillment of the condition was common cause, not disputed and therefore not required to be proved by the plaintiff. The plaintiff then ended his closing argument.

[40] At the commencement of the first defendant's closing argument, the first defendant addressed the issue of the non-fulfilment of the second suspensive condition and more particularly the plaintiff's reliance on the affidavits in support of his pleaded case that the second suspensive condition was fulfilled, submitting that the affidavits did not have the effect contended for by the plaintiff and that in any event they had not been put to the witnesses. The court then indicated that heads of argument would be required on this issue, and first defendant then proceeded to address the court on the remaining issues.

[41] At the recommencement of first defendant's closing argument after lunch, plaintiff's counsel advised the court that the plaintiff's legal representatives had assessed the court's preliminary view on the effect of the affidavits as being against the plaintiff's argument in relation to the fulfilment of the second suspensive condition being common cause.[8] In consequence, plaintiff's counsel advised the court that the plaintiff now wished to amend his particulars of claim so as to deal with the issue relating to the fulfilment of the second suspensive condition, in particular by pleading abandonment by the plaintiff of the said condition, and possibly pleading that the clause is *pro-non scripto*. Plaintiff's counsel then informed the court that at that point the plaintiff was unable to formulate his amendment, and sought an indulgence to deliver the intended amendment by 31 May 2019. The first defendant did not object

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[8] Transcript 27 May 2019: 52-53; see for example *Firstrand Bank Ltd v Venter* [2012] JOL 29436 (SCA) in relation to the principle that pleadings define the issues between the parties; see also section 15 of the Civil Proceedings Evidence Act 25 of 1965 read with Uniform rule 22(2)

to the plaintiff making an application to amend, and the court ruled that the plaintiff must do so by 31 May 2019.

[42] On 30 May 2019, the plaintiff delivered his notice of amendment - a fourth amendment to his particulars of claim.

[43] On 13 June 2019, the first defendant served its conditional notice of objection.

[44] The plaintiff launched the present amendment application on 24 June 2019, the first defendant delivered its answering affidavit to the amendment application in mid July 2019, and the plaintiff delivered his replying affidavit at the end of July 2019. On the same day as delivering his replying affidavit, the plaintiff also furnished a document titled 'PLAINTIFF'S AMENDED NOTICE OF AMENDMENT' as the replying affidavit contained a further notice of amendment.

[45] The Plaintiff filed his heads of argument on 15 November 2019 and the first defendant on 5 February 2020. The hearing of the application for the amendment was scheduled for 25 March 2020 falling in the last week of the first term, the week available for the conclusion of partly heard matters in this Division. Level 5 Covid-19 restrictions kicked in at midnight on 26 March 2020. In the run up thereto and certainly on 25 March 2020, the possibility of a virtual hearing was not available as a hearing option and the parties accordingly agreed to postpone the matter *sine die*. The first time all were again available was 16 September 2020 falling within the last week of the 3rd term of 2020.

[46] An amendment to the amendment was mailed through during the course of the morning of the hearing of 16 September 2020. It bears mentioning that the argument was commenced without the final version available to the court or to the first defendant. During the hearing the amended amendment was again amended.

The final amendment moved seeks the insertion of further sub-paragraphs numbered 29bis, ter, (quod was abandoned during the hearing) and quintus, it reads as follows:

'29bis Plaintiff pleads that clauses 22.3 and 22.4 of the deed of sale should be treated as *pro non scripto* because:

29bis.1 Clauses 22.3 and 22.4 are void for vagueness in that the words *"raising sufficient funds for the development of the property ....."* are vague, meaningless and unenforceable. The treatment of the clause as *pro non scripto* will not render it impossible to achieve the real object of the contract;

29bis.2 In any event, clause 5.2 thereof provides that transfer of the property sold in terms of the deed of sale shall be passed within 14 days of the fulfilment of the condition mentioned in clause 22.1. No further condition was therefore envisaged by the parties;

29bis.3 In any event further, the parties, as at the conclusion of the deed of sale, were aware that Sanparks was the lessee of the property and that it would occupy the premises for a further 18 years. The fulfilment of the condition in clause 22.3 was accordingly objectively impossible.

29ter Alternatively and in any event the Plaintiff, for whose sole benefit clause 22.3 was inserted, has expressly, alternatively tacitly waived his right to rely thereon prior to the lapse of the time period provided for therein by delivering a guarantee to the First Defendant on 26 November 2003 and by, through his attorney's letter of 1 December 2003 (annexed hereto as "A"), requesting that transfer be passed to him against payment of the purchase price, without the purported condition having been fulfilled, against payment of the sum of R3 million.

29quintus Further and in any event, the First Defendant waived and abandoned any right it may have had to rely on the non-fulfilment of the purported condition in that:

29quintus.1 The First Defendant's attorney, in a letter dated 1 December 2003 indicated that, subject only to a formal amendment to the guarantee, transfer would be passed despite the non-fulfilment of the purported condition as at that date.

> 29quintus.2 In the letter of 8 December 2005, and after the date stipulated for the fulfilment of the clause, the First Defendant's legal advisor, in a letter to Ratkitzis attorneys, stated that a valid sale agreement had been concluded between Plaintiff and First Defendant;
> 29quintus.3 During or about October 2008 the First Defendant, under oath, in an application for interdictory relief, expressly admitted that all conditions of the deed of sale had been met."[9]

[47] The amendment attached to the replying affidavit was also moved being the deletion of the words '*All conditions in the deed of sale*' where they appear in paragraph 24 of the Particulars of Claim and the substitution thereof with the words: '*The condition precedent referred to in clauses 22.1 and 22.2 of the deed of sale...*'[10]

The essence of the amendment

[48] The plaintiff's amendment application seeks to change that element of the plaintiff's pleaded case in relation to the fulfilment of the second suspensive condition set out in clause 22 of the deed of sale, more particularly clauses 22.3 and 22.4 ('*the second suspensive condition*'). Instead of alleging the fulfillment of the second suspensive condition, the plaintiff now seeks to plead a contrary position which negates requiring the fulfillment of the second suspensive condition as a pre-requisite for the agreement becoming final and binding. The proposed pleaded basis for negating fulfillment of the second suspensive condition include allegations that the second suspensive condition is *pro-non scripto*, was waived by the plaintiff, and that the first defendant waived its right to rely on its non-fulfillment.

[49] Since institution of the action in 2006, and despite several amendments to the particulars of claim since then, the plaintiff's pleaded case and cause of action has

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[9] Mr Van Riet conceded that if the court found against the Plaintiff in respect of 29quintus.1, then 29quintus.2 and 29quintus.3 should fail.

[10] The amendment attached to the Plaintiff's replying affidavit at p73

been that both suspensive conditions were fulfilled. In turn the first defendant's pleaded case, since the delivery of its plea in 2007, placed the fulfilment of the second suspensive condition in dispute[11].

The amendments summarized

[50] In the proposed paragraph 29bis, plaintiff seeks to plead that the second suspensive condition should be treated as *pro-non scripto*. The basis for this is that (a) clauses 22.3 and 22.4 are void for vagueness on the basis that the words "*...sufficient funds for the development of the property...*" are vague, meaningless and unenforceable; (b) the parties envisaged that there would be only one suspensive condition, that being the condition formulated in clause 22.1 since clause 6.1 provided that the transfer of the property would be passed within 14 days of fulfilment of the condition in clause 22.1; and (c) the fulfilment of the second suspensive condition was objectively impossible since both parties were, at the time of the conclusion of the deed of sale, aware that SANPARKS would be the lessee of the properties for a further 18 years.

[51] In proposed paragraph 29ter, plaintiff seeks to plead that clause 22.3 was enacted for the plaintiff's sole benefit, and that he waived his right to rely on clause 22.3 prior to the lapse of the period provided for in that clause for its fulfilment. According to the proposed pleading, this waiver arose through (1) the delivery of a guarantee to the first defendant on 26 November 2003, and (2) the plaintiff's attorney's letter of 1 December 2003, which requested that "*transfer be passed to*

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[11] Action was instituted in October 2006 when the plaintiff pleaded in paragraphs 24 and 25 that the second condition had been fulfilled. The first defendant denied this. The particulars of claim were again amended on 4 June 2007, again the first defendant denied the fulfillment. There was an amendment in June of 2015, again the fulfillment was denied. There was an amendment in February 2019 and again the fulfillment was denied.

him, without the purported condition having been fulfilled, against payment of the sum of R3 million."

[52] In proposed paragraph 29quintus, the plaintiff seeks to plead that the first defendant waived and abandoned its right to rely on the non-fulfilment of the "*purported condition*" when: in a letter dated 1 December 2003 from its attorney, the first defendant "*indicated that, subject only to a formal amendment to the guarantee, transfer would be passed despite the non-fulfilment of the purported condition as at that date*"; in the first defendant's letter to Ratkitzis attorneys of 8 December 2005, a date after the date by which the second suspensive condition ought to have been fulfilled, the first defendant stated that a valid sale agreement had been concluded between the parties; in October 2008, the first defendant had, under oath, admitted that all conditions in the deed of sale had been met.

The objections raised

[53] The first defendant raised the following objections: the extremely late stage of the proceedings at which the amendment was being sought; the proposed amendment raising issues not foreshadowed in the pleadings; the proposed amendment raising issues in contradiction to the basis on which the plaintiff's case was conducted; the proposed amendment raising issues not canvassed in evidence and/or which cannot be allowed on the basis of evidence already led; the proposed amendment would render the particulars of claim vague and embarrassing giving rise to mutually contradictory and destructive versions, and would also in itself be vague and embarrassing giving rise to mutually contradictory and destructive versions; the proposed amendment was excipiable as lacking averments necessary to sustain an action and/or disclosing no cause of action.

Relevant principles

[54] The amendment application has been instituted at a very advanced stage of the proceedings. In addition to those principles applicable to amendments in general, additional considerations apply in cases where the amendment is sought at an advanced stage of the proceedings.

[55] The court hearing an application for an amendment has wide powers to allow a change to pleadings at any stage, even after argument and before judgment.[12] Whether or not to grant the amendment is a matter for the discretion of the court, which discretion is to be judicially exercised.[13]

[56] The aim of the courts is to do justice between the parties. In the context of amendments, mistake or neglect on the part of one of the parties ought not to stand in the way of ventilating and deciding the real issues between the parties,[14] necessity for the amendment having arisen through some reasonable cause.[15] Nevertheless, all amendments must be *bona fide,*[16] and the court will, always, as a further essential consideration in the exercise of its discretion, examine any prejudice or injustice that the other party may suffer if the amendment is granted, which prejudice cannot be

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[12] *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640A

[13] Erasmus *Superior Court Practice* (RS6-2018, D1-331): Commentary on rule 28(4) and authorities cited at note 15

[14] *Trans-Drakensberg Bank Ltd (Under Judicial Management)* supra at 640F; *Kasper v André Kemp Boerdery CC* 2012 (3) SA 20 (WCC)

[15] *Zarug v Parvathie, N.O* 1962 (3) SA 872 (D) at 876

[16] *President Versekeringsmaatskappy v Moodley* 1964 (4) SA 109 (T); Schwikkard et al *Principles of Evidence* 3ed at 471-472

compensated for by a suitable order as to costs, and, where appropriate, a postponement.[17]

[57] An applicant seeking an amendment of its pleadings bears the onus of proving that the amendment is *bona fide*, and that the other party will not suffer prejudice as a result. Doubt as to whether the other party might suffer prejudice will result in the refusal of the application.[18]

[58] Where the applicant seeks to add new grounds for the relief claimed at an advanced stage of the proceedings, the applicant seeks an indulgence from the court, and is not entitled to the amendment as of right.[19] In addition to proving that the application is *bona fide*, and that the other party will not suffer prejudice, the applicant must then also (1) prove that he did not delay in making the application after becoming aware of the evidential material upon which reliance is now placed, (2) provide a reasonably satisfactory reason why the amendment was not sought at an earlier stage,[20] (3) explain the reasons for the amendment, and (4) show that there is *prima facie* something deserving of consideration, a triable issue.[21]

[59] In situations where an amendment is sought at an advanced stage of the proceedings, the applicant must further demonstrate his *bona fides* in the sense that material new factors have arisen or have come to the notice of the amending party making the application necessary.[22]

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[17] *Trans-Drakensberg Bank Ltd (Under Judicial Management)* supra at 638A; *Bulktrans (Pty) Ltd v Power Plus Performance (Pty) Ltd* [2003] JOL 11706 (ELC)

[18] *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 744; *Kali v Incorporated General Insurance* 1976 (2) SA 179 (D) at 182 A-C

[19] *Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A) at 512E; *Gollach v Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 928D

[20] *Bulktrans (Pty) Ltd v Power Plus Performance (Pty) Ltd* supra; *Trans-Drakensberg Bank Ltd (Under Judicial Management)* supra

[21] *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) at [34]-[36]

[22] *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 23 (C) at 36I-J

[60] The greater the disruption caused by the amendment, the greater the indulgence sought by the applicant and the greater the burden on the applicant to convince the court that it ought to accommodate him.[23]

[61] Prejudice will exist in circumstances where the parties cannot be put back for purposes of justice in the same position that they were in when the pleading, which is now sought to be amended, was originally filed.[24]

[62] Amendments sought after evidence and argument will generally only be allowed if evidence on the issues had been canvassed.[25] Amendments ought not to be allowed where the amendment would render the subject pleading (the particulars of claim in this case) excipiable.[26]

The amendment application

[63] The applicant must make out its case for amendment in his founding papers. This includes (1) providing reasonable and satisfactory explanations for the delay and lateness of the amendment; (2) demonstrating *bona fides;* (3) proving that the other party will not suffer prejudice or injustice as a result of the amendment, and that any prejudice that might be suffered can be compensated for by an appropriate order as to costs, and a postponement; (4) showing that the amendment, on its face, raises triable issues; (5) showing that the amendment is not excipiable.

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[23] *Ciba-Geigy (Pty) Ltd* supraat [42]

[24] *Moolman v Estate Moolman* 1927 CPD 27

[25] *Middelton v Carr* 1949 (2) SA 374 (A) at 385-386; *Pennefather v Gokul* 1960 (4) SA 42 (N); *Knightsbridge Investments (Pty) Ltd v Gurland* 1964 (4) SA 273 (SR) at 281; *Randa v Radopile Projects CC* supra at [4], [5]

[26] *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 746F-G

[64] The plaintiff's explanation for the extremely late amendment is set out in the founding and replying affidavits (both affidavits having been deposed to by the plaintiff's attorney):

> 'The reason for the late amendment is, as pointed out by counsel for the Plaintiff at the hearing, the fact that the Plaintiff's legal advisers had, in concentrating on the issues raised at the trial, lost sight of the First Defendant's reliance on the non-performance of the condition provided for in clauses 22.3 and 22.4 of the deed of sale.
>
> To the extent that the amendment raises issues which ought, strictly speaking, to have been included in the Plaintiff's Particulars of Claim at an earlier stage, I respectfully pray that the failure to do so earlier be condoned.
>
> First Defendant says that "Plaintiff has at all times accepted that the clause is capable of fulfilment" and has provided no explanation for the change of front. I respectfully point out that I have already, in the founding affidavit, which I reconfirm, stated that Plaintiff's legal advisers had, in concentrating on the issues raised at the trial, lost sight of this issue. The fulfillment of the conditions had, indeed, been pleaded by our predecessors and retained in the Particulars of Claim. As further pointed out, the issues raised by the amendments are essentially matters of interpretation and inference and are matters which were only focused upon after the First Defendant relied on the non-performance of the condition provided for. I have already sought condonation for our failure to raise same earlier.'

[65] In his founding affidavit, the plaintiff takes issue with the first defendant's conditional notice of objection asserting that the first defendant did not in its notice of objection raise any issue of prejudice which it may suffer as a result of the amendment and asserts that the first defendant would be entitled to recall its witnesses if the amendment was allowed (although this would be very unlikely he opined).

[66] The plaintiff fails to pertinently deal with the issue of prejudice in the founding affidavit. Instead he proceeds on the basis that the first defendant did not raise prejudice in its conditional notice of objection and that the onus is on the first defendant to demonstrate prejudice.

[67] In so far as the cogency of the amendment is concerned, the plaintiff adopts a similar approach, unjustifiably placing the burden on the first defendant to demonstrate excipiability.

[68] The plaintiff further alleges that the proposed pleaded basis for the grounds upon which the plaintiff seeks to plead that the second suspensive condition is to be ignored arises from the agreement and common cause documentation and facts, and that these grounds arise by way of *"interpretation and inference"*.

[69] The explanation for the lateness of the proposed amendment, and the about turn of the plaintiff's case is neither satisfactory nor reasonable.

[70] The supposed omission to make out a case on a completely different basis from that which had reflected in the particulars of claim for approximately 12 years, cannot reasonably be classified as a mistake or having been brought about through neglect: the amendment does not seek to clarify or improve the particulars of claim, rather the amendment seeks to change a material element and basis for the claim.

[71] None of the supposed facts and matters raised in the proposed amendment can be said to be new facts and matters not present when the particulars of claim was drafted in 2006, or when the various amendments to the particulars of claim were effected in 2007, or 2015 and 2019.

[72] At the time of institution of the action in 2006, the plaintiff was represented by Mr. Van Velden of Crawford Attorneys. Mr Van Velden, was the only witness called on behalf of the plaintiff. Sometime around June 2015, Crawford's Attorneys was

formally substituted by 3 sets of attorneys being Johan Rhoodie Attorneys, Kobus Boshoff Attorneys and the main instructing attorneys De Jager Du Plessis Attorneys. The plaintiff's June 2015 amendment to its particulars of claim was signed by the plaintiff's present senior counsel, as was the plaintiff's February 2019 amendment.

[73] The plaintiff's case has always been that fulfilment of the second suspensive condition was an essential and material element to his cause of action. This position was again confirmed at the beginning of plaintiff's closing argument, and the plaintiff's closing argument was completed on this basis. The plaintiff's 'position' only changed during the course of the first defendant's closing argument at which point the plaintiff's legal representatives made an assessment that the court might not accept the basis upon which the plaintiff had attempted, in argument, to assert fulfilment of the second suspensive condition.

Prejudice

[74] The plaintiff fails to deal with prejudice in any meaningful manner. The first defendant sets out several factors which may prejudice the first defendant: the amendment, if allowed, would reopen the entire matter. This includes the pleadings, pre-trial matters such as requests for further particulars and discovery. It is not inconceivable that witnesses, who have not already testified, might have to be called to deal with aspects of the amendment. These witnesses may include persons directly connected with the management of the nature reserves in question. The first defendant conducted its case on the basis that the plaintiff's case was that the second suspensive condition was fulfilled. None of this is disputed by the plaintiff in his replying affidavit, only a general submission is made that the first defendant will

not suffer any prejudice which cannot be cured by an order for costs. This is not sufficient.

[75] It is apparent that the amendment would result in the entire matter being reopened, with the continuation of the trial on a part-heard basis having to take place at a future uncertain date, and judgment on the remaining issues remaining outstanding. The notice of amendment, and subsequent amendment application has already delayed judgment. If the amendment is granted, judgment will continue to be delayed until such time as the trial on the issues raised in the notice of amendment have been dealt with.

[76] The matter concerns immovable properties measuring in excess of 24000 hectares. These properties form part of the Garden Route National Park. The lease on these properties, which is held by SANPARKS, expired on 30 September 2020. The plaintiff himself is largely responsible for the long delay in bringing the matter to trial. Further delays may prejudice the first defendant in how it deals with the properties.

[77] The plaintiff does not suggest an appropriate costs order which will cure any prejudice that the first defendant might suffer. Indeed it is difficult to conceive of an appropriate costs order which would cure any possible prejudice.[27]

Excipiability

[78] Mr Ossin, representing the first defendant, argued that each of the proposed paragraphs 29bis, 29ter and 29quintus rendered the particulars of claim excipiable as they are mutually destructive of and contradictory to the presently pleaded

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[27] See *Bulktrans (Pty) Ltd* supra at 5

paragraph 24. So much was conceded and hence the amendment attached to the replying affidavit.

[79] The response in the replying affidavit to this is the following:

> 'To the extent that First Defendant contends that the allegation, on the one hand, that the suspensive condition in question has been fulfilled, and the (new) allegation that it should be treated as pro non scripto are mutually destructive, this is not admitted (as the latter allegation is clearly made in the alternative) but, nevertheless, and in order to avoid any debate, the Notice of Amendment will be amended so as to apply for the deletion of paragraph 24 of the Particulars of Claim.'

[80] The case the plaintiff seeks to plead is fulfillment of the suspensive condition in the first instance, and in the alternative that the condition is *pro-non scripto*, and was waived etc. If this is the intention of the pleader, then it reveals a strategy of attempting to 'hedge ones bets', and to obfuscate the plaintiff's position. In the context of an amendment being sought after completion of evidence and closing argument, such a position cannot be regarded as *bona fide*, it being expected of a proposed pleading, tendered at such a late stage, to clearly set out the new case in such a way that would give the other side all the necessary facts to continue with the trial if so advised. A pleading tendered at an advanced stage of the proceedings ought to go further than what would ordinarily be acceptable for a pleading tendered prior to the hearing.

Clauses 22.3 and 22.4 – *Pro non scripto*

[81] The plaintiff now seeks to plead that the second suspensive condition must be considered as if it was never written, and never formed part of the agreement.

[82] Clause 22.3 reads:

> 'The purchaser raising sufficient funds for the development of the property within 120 days from the date of fulfillment of the provisions of clause 22.1.'

[83] The plaintiff contends that '*sufficient funds for the development of the property*' are vague, meaningless and unenforceable. A court will always seek to uphold the terms of a contract concluded between parties.[28]

[84] The second ground, as formulated in the proposed paragraph 29bis.2, is to the effect that the parties never envisaged the second suspensive condition as clause 5.2 provides that transfer of the property sold in terms of the agreement shall be passed within 14 days of fulfillment of the condition mentioned in clause 22.1.

[85] Paragraph 29bis.2 misconstrues the contents of clause 5.2 of the agreement which provides:

> 'The purchase price shall be secured by the purchaser furnishing to the seller within 14 (fourteen) days of date of fulfilment of the condition precedent in clause 22.1. a letter of undertaking by a bank or other financial institution approved of by the seller providing for payment of the full purchase price to the seller free of bank charges at Johannesburg, against registration of transfer of the property into the name of the purchaser.'

[86] What 5.2 envisages is a letter by a bank given to the first defendant within 14 days of fulfillment of clause 22.1 which provides that the purchase price will be paid by the bank against registration. These clauses certainly don't support the conclusion drawn by the plaintiff.

[87] In regard to the proposed paragraph 29bis.3, it cannot reasonably be argued that the second suspensive condition is *pro non scripto* because fulfillment of the

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[28] *Hoffmann and Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T) at 860; *CTP Ltd v Argus Holdings Ltd* 1995 (4) SA 774 (A) at 787E-G

suspensive condition was objectively impossible as the parties were aware at the time of conclusion of the agreement that SANPARK's lease still had 18 years to run.

[88] The agreement required that sufficient funds for the development of the property be obtained, not that such development was to take place at that time. Moreover, the presence of the lessee does not preclude a development. Clause 8.1 of the lease agreement entitles the first defendant to construct wilderness hideaways and provides:

> 'The LESSOR shall be entitled to construct wilderness hideaways on the Property, if it so desires. The LESSOR shall have the right to construct suitable accommodation for the use of its invitees and staff, and to construct dams and to stock selected areas of the Property with game and/or fish, and to construct roads and paths to provide access and to construct any other infrastructure which the LESSOR may require from time to time, provided that the location, quality and appearance of such accommodation, roads, paths and other infrastructure and the location and types of game and fish to conform to and are compatible with the approved plans referred to in clause 4.....'

[89] The plaintiff's case appears to be that the second suspensive condition was objectively impossible of performance at the time of the conclusion of the agreement, not that there was supervening impossibility at some later stage. Notwithstanding, and in the full knowledge that the lease was to run for a further 18 years, the agreement expressly provided for the fulfillment of the second suspensive condition.[29]

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[29] *Bischofberger v Vaneyk* 1981 (2) SA 607 (W) at 611B-E

Plaintiff waived his right to rely on clause 22.3

[90] The test for waiver is that the plaintiff with full knowledge of his right (in this case, and on the assumption that the second suspensive condition was for the sole benefit of the plaintiff) requiring the fulfilment of the second suspensive condition decided to abandon such right, whether expressly or by conduct plainly inconsistent with an intention to enforce it.[30] The test is whether such conduct was plainly inconsistent with the continuation of that right, such being a matter to be inferred by the Court arising from the nature of the proved conduct.[31]

[91] Mere delivery of the guarantee on 26 November 2003 cannot objectively be construed as a waiver by the plaintiff of the second suspensive condition. In terms of clause 5.2, not only was the plaintiff contractually obliged to furnish a guarantee, 14 days from date of fulfillment of the first suspensive condition, but the contractual date by which same was to be furnished was a date prior to the date by which the second suspensive condition had to be fulfilled (5 December 2003).

Waiver by First Defendant – 29quintus

[92] Mr Ossin argued that the plaintiff does not plead whether his case is that the alleged conduct pleaded in the proposed paragraphs 29quintus.1 to 29quintus.3 is to be regarded as an express or tacit waiver by the first defendant of its right to rely on the non-fulfilment of the second suspensive condition. It is, accordingly, so the argument continues, not possible to discern from the proposed paragraph 29quintus.1, which portions thereof are intended to refer to the express wording of

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[30] *Laws V Rutherford* 1924 AD 261 at 263; also see *Thomas v Henry and Another* 1985 (3) SA 889 (A), *Martin v De Kock* 1948 (2) SA 719 (A)

[31] *Hepner v Roodepoort Maraisburg Town Council* 1962 (4) SA 772 (A) at 779; also see *Mahabeer v Sharma NO and Another* 1985 (3) SA 729 (A), *Tighy v Putter* 1949 (1) SA 1087 (T), *Palmer v Poulter* 1983 (4) SA 11 (T), *Botha v White* 2004 (3) SA 184 (T), *Gillon v Eppel* 1991 (4) SA 656 (BG)

the alleged letter of 1 December 2003, and/or which portions are intended to convey a conclusion drawn by the pleader. This is exacerbated by the plaintiff's failure to identify and attach the letter relied upon. He also criticizes the pleader for not having pleaded an allegation that in allegedly waiving fulfilment of the second suspensive condition, the first defendant's attorney had authority to do so. Mr Ossin further argues that if one assumed that the letter is the document appearing at page 43 of the trial bundle, that letter does not support the allegations and conclusions pleaded in the proposed paragraph 29quintus.1 as the contents of the letter do not state that transfer will be passed "*despite the non-fulfilment*" of the second suspensive condition as at that date.

[93] Mr Ossin drew attention to the fact that the alleged conduct in the proposed paragraph 29quintus.2 is that the first defendant communicated the alleged waiver to a third party. He submitted that such a communication cannot be regarded as a waiver, as it was not communicated to the plaintiff.[32] That notwithstanding, he argued that the letter, objectively construed, does not give rise to a finding of waiver.

[94] In so far as the proposed paragraph 29quintus.3 is concerned, Mr Ossin argued that, apart from the first defendant being incapable of taking an oath, the plaintiff failed to identify the source of the oath. He submitted that the allegation that the first defendant "*expressly admitted that all conditions of the deed of sale had been met*" did not support a waiver or abandonment of the right to rely on the non-fulfillment of the suspensive condition. This is so since the first defendant's plea both prior to and subsequent to October 2008 continued to deny the fulfillment of the

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[32] *Traub v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634H; *Regent Insurance Co Ltd v Maseko* 2000 (3) SA 983 (W) at 995; *Napier v Van Schalkwyk* 2004 (3) SA 425 (W); *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) at [41]

second suspensive condition, a position that is destructive of any objectively inferred waiver or abandonment. This argument is persuasive.

Summary on amendment

[95] It is quite clear that the issues raised by the amendment were not canvassed in evidence. Plaintiff's counsel, Mr Van Riet, suggested that the first defendant would be entitled to consider its position, to follow pre-trial steps, request further particulars, call for further discovery and re-open its case to name but a few of the remedies suggested to deal with the prejudice suffered by the first defendant. As pointed out in *Ciba-Geigy*[33] the burden, which rests on a plaintiff to persuade a court to come to his assistance, when an amendment is sought at this late stage is increased. I have highlighted the history of the pleadings and the consistent denial by the first defendant of the fulfillment of the second condition. In the face of this history one would have expected the plaintiff to bring an application dealing with the prejudice mentioned by the first defendant in its conditional notice of objection dated 13 June 2019. He did not. Instead, when the excipiability was raised in the answering affidavit to the application for an amendment, he sought to remedy some of the difficulties through referring to an amendment in his replying affidavit. The applicant was obliged to make out his case fully and extensively in his founding papers and not supplement or make out a new case in reply. This is particularly so in a matter with the procedural history of this one.

[96] The authorities are clear – if there is doubt whether the other party might suffer prejudice, the application to amend should be refused. I have no doubt

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[33] *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n ander* 2002 (2) SA 447 (SCA) at para [42]

whether the first defendant will be prejudiced should the amendment be allowed. The entire trial will effectively have to start *de novo*.

[97] I will accept without finding that the application is *bona fide*. I am, however, unable to find that the reason why the amendment was not sought at an earlier stage is satisfactory.

[98] I accept that the denial of the fulfillment of the second suspensive condition was overlooked. So much is clear from the opening statement in which Mr Van Riet stated that '*The first defendant admits the deed of sale and the validity thereof*' and that the first defendant relied on one defence '*essentially*' only.

[99] However, that is not what the pleadings show. That is not what the pre-trial minute shows. When preparing for a trial it is to the pleadings that one must look to determine what the issues of fact and the issues of law are which fall for determination.

[100] In *Gcaba*, the Constitutional Court[34] held:

> '74. The specific term "jurisdiction", which has resulted in some controversy, has been defined as the "**power or competence of a Court to hear and determine an issue between parties**". This Court regularly has to decide whether it has jurisdiction over a matter, because it may decide only constitutional matters and issues connected with decisions on constitutional matters. If a litigant raises a constitutional issue, this Court has jurisdiction, even though the issue may eventually be decided against the litigant.
>
> 75. **Jurisdiction is determined on the basis of the pleadings**, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (*in limine*), **the applicant's pleadings** are the determining factor. They contain the legal

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[34] *Gcaba v Minister for Safety & Security*, 2010 (1) SA 238 (CC)

basis of the claim under which the applicant has chosen to invoke the court's competence. .....'(emphasis added)

[101] A Court's mandate is determined by the *lis* between the parties.[35] The purpose of pleadings is to define the issues for the other party and the court. It is for the court to determine those disputes and those disputes alone, although the court may raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. As long as its consideration involves no unfairness against the party at whom it is directed.[36]

[102] In this Division and as from July 2019, no matter in which the defendant is the RAF, the MEC for Health or PRASA is certified trial ready unless a practice note is delivered identifying the issues in the case that are in dispute, and in which respect of which by reason thereof no evidence would be allowed at the trial; the issues in the case that are in dispute describing the exact nature of the disputes of fact and of law and the contentions of each party in respect of that issue. The descriptions are not to be vague generalities but shall be concrete and facilitate a clear grasp of the decisions a court shall be required to decide.[37] Admittedly this does not have application in this matter but it does provide a guideline of what is required of the majority of the matters which make up the litigation in our trial rolls.

[103] In my view, by not embarking on the above process in preparation for the trial or, at the very least, by not providing an explanation why no attempt was made prior to the trial to distill the issues in dispute both factually and legally, substantially along the aforementioned lines (even if only to assist with the preparation of an advice on

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[35] *Eke v Parsons*, 2016 (3) SA 37 (CC) at para [17]

[36] *Molusi and Others v Voges N.O and Others*, 2016 (3) SA 370 (CC) para [28]; *Four Wheel Drive Accessory Distributors CC v Rettan N.O.* 2019 (3) SA 451 (SCA0 at paras [22] and [23]

[37] Paragraph 6 of the Judge President's Practice Directive 2 of 2019 dated 5 July 2019

evidence) falls short of what the explanation not to have brought the application for an amendment earlier, would have had to have dealt with to qualify as satisfactory.

[104] Having regard to all the facts set out herein including that the amendment would render the particulars of claim excipiable but primarily due to the lateness, the unsatisfactory nature of the explanation tendered and the prejudice the first defendant stands to suffer should the amendment be allowed, I exercise my discretion against allowing the amendments *in toto*.

Vaguenuess of the agreement to be raised by the court

[105] The issue which arose at the conclusion of the argument in respect of the amendment was whether, if this court were to find that the amendment should be refused, it should then dismiss the action – it being common cause then that the second suspension condition had not been fulfilled.

[106] Mr Van Riet argued that it did not follow that the action fell to be dismissed as this court should then *mero motu* raise the fact that clause 22.3 should be treated as *pro non scripto* by virtue of same being void for vagueness. To recap: clauses 22.3 and 22.4 provide that the plaintiff is to raise sufficient funds for the development of the properties within 120 days from the date of fulfillment of the first condition and unless the period of 120 days is extended in writing between the parties, the agreement shall lapse and the status *quo ante* is to be restored.

[107] I called for supplementary heads of argument in respect of this extraordinary submission ie that I should *mero motu* raise the fact that clause 22.3 of the agreement is void for vagueness in the event of the amendment being refused. Mr Van Riet in the supplementary heads of argument referred me to 3 cases. I deal

with them in turn: *Levenstein*[38] dealt with an application for an amendment to a counterclaim and an exception to the defendant's plea. The amendment was granted and the exception dismissed. The case is not relevant to the issue being whether a court can, and should, *mero motu* embark on this enquiry. Similarly, *Dijkstra*[39] does not shed light on this enquiry. It is clear that the interpretation of the terms of annexure 'B' were always in dispute both in the court *a quo* and in the court of appeal. That scenario is wholly distinguishable from the current set of facts where the case shifted from one in which fulfillment of the second suspensive condition was pleaded repeatedly (in every amendment) to it being argued that such clause is *pro non scripto* because it is void for vagueness. *Kingswood Golf Estate (Pty) Ltd*[40] also does not assist with answering the question whether a court is entitled, indeed obliged, to raise the issue of vagueness of a contract *mero motu*.

[108] It is not for the court to raise new issues not traversed in the pleadings[41]. I have been assigned the role of neutral arbiter of the case presented to me be by the parties and am confined to the issues distilled by the pleadings with limited exceptions available to me to deviate therefrom.[42]

[109] I thus decline to raise the issue *mero motu*.

Conclusion

[110] It was common cause between the parties that the second condition was not fulfilled. So unless the amendment was granted or the court *mero motu* raised the

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[38] *Levenstein v Levenstein*, 1955 (3) SA 615 (SR) at 619

[39] *Dijkstra v Yanovsky*, 1985 (3) SA 560 (C)

[40] *Kingswood Golf Estate (Pty) Ltd v Witts-Hewenson*, 2014 (2) ALL SA 35 (SCA) at paras [10] and [27]

[41] *Fischer and Another v Ramahlele and Others*, 2014 (4) SA 614 (SCA) at paras [13] and [14] and *Four Wheel Drive Accessory Distributors CC v Rattan NO*, 2019 (3) SA 451 (SCA)

[42] Discussed in paras [98] to [100] hereof

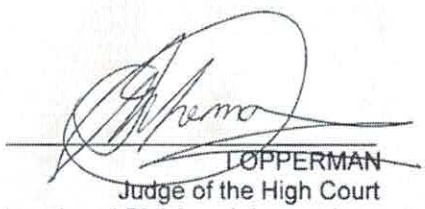
issue of vagueness, the plaintiff could not be successful. The plaintiff did not testify at all and from the evidence presented I can only conclude that no funds were raised for the development of the properties within the 120 day period.

Order

[111] I accordingly grant the following orders:

111.1. The application for the amendment is refused with costs.

111.2. The action is dismissed with costs.



LOPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

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Dates of hearing: 22, 23 and 27 May 2019 and 16 September 2020
Further heads of argument filed: 21 and 30 September 2020
Date of Judgment: 30 December 2020