REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE:
CASE NO: A264/2014

10/3/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES/NO~~
(2) OF INTEREST TO OTHERS JUDGES: ~~YES/NO~~
(3) REVISED

10/3/16.

DATE SIGNATURE

In the matter between:

SENTINEL TRUST N.O	FIRSTAPPELLANT
DENNIS NICOLAS GALATIS	SECOND APPELLANT
NADIA GALATIS N.O	THIRD APPELLANT
And	
THERESA ROSE BARNS N.O	FIRST RESPONDENT
STANLEY PRESTON BARNES NO	SECOND RESPONDENT
BRICK EMPORIUM (PTY) LTD	THIRD RESPONDENT

JUDGMENT

Heard on: 28 October 2015

Date of Judgment: 10/3/16

LEGODI J

[1] This is an appeal against the decision of the court a quo (as per Nkosi AJ) in terms of which the appellants' claim was dismissed with costs and the respondents' claim in reconvention upheld. The appeal is with the leave of the Supreme Court of Appeal granted on 11 March 2014.

[2] The parties in this appeal will be referred to as in the court a quo. The appellants were the plaintiffs in the court a quo and had sued in their representative capacity as the trustees of Tideland Trust (Tideland). The first and second respondents on the other hand were the defendants who were sued in their capacity as the trustees of Sugar Plum Trust (Sugar Plum).

[3] On 6 February 2009 Tideland duly represented by Dennis Galatis (Galatis) and Sugar Plum duly represented by Rose Barnes (Barnes) entered into a written sale agreement (the agreement) in terms of which Tideland sold its 100 shares in and claims against Brick Emporium (Pty) Ltd (third defendant) to Sugar Plum at a purchase price of R 3 000 000.00.

[4] Clause 6.3 of the agreement became the subject of a dispute in the court a quo. It reads as follows;

"6.3 That, unless otherwise provided in this agreement, at the date of signature and until completion date, the Company would be the owner of the fixed property, fixtures and fittings, plant and equipment as set out in annexure "C", thereto, as well as the mineral rights and old order Mining Rights attaching to the fixed property as set out in annexure "D".

[5] The Company referred to in the quotation is the third defendant. I deal later in this judgment with clause 6.3. Annexure "D" is a mining licence issued on 12 December 2002 to the third defendant trading as Ratanda Bricks and of relevance it reads:

"*Unless this licence is suspended, cancelled or abandoned or lapses it shall be valid for a period (more than two years), which shall extend from the date of issuing until 2008\12\12 or until the mineral the mining of which is hereby authorised can no longer be mined economically of the holder on the land concerned."*

[6] The agreement was preceded by the following events:

6.1 On 9 September 2008 an offer to purchase was accepted and signed by Barnes and Galatis on behalf of Sugar Plum and Tideland respectively.

6.2 On 29 September 2008 an addendum to the offer to purchase was concluded and signed by the parties. In the addendum it was recorded that a deposit of R500 000.00 will be paid to the plaintiffs by not later than 3 October 2008. Furthermore, it was recorded:

"This deposit has been agreed upon by both parties during a meeting held in Heidelberg on Friday, 26th September 2008 and has been done in good faith to allow the Purchaser the necessary time in obtaining the full documentations for the application required for submission to the Department of Mineral and Energy (DME) for the purpose of conversion from the Old Mining Order to the New Mining Rights License".

6.3 The underlining is my emphasis as it would appear later in this judgment when dealing with who of the parties was responsible to lodge the request for conversion. Barnes had sight of the mining licence at least by 12 September 2008 and was also aware at all times that the licence was to expire on 12 December 2008

6.4 During or about 12 October 2008 Barnes instructed JJP Mining Consultants (a professional mining firm) to lodge a request for conversion of the old order mining licence with the Department of Mineral and Energy (Department) and paid an amount of R71 250,00 being the usual 50% deposit required by the said professional firm for such an application.

[7] The application was however only lodged on 30 April 2009. On 20 May 2009 the defendants were advised that the application was unsuccessful as the mining licence expired on 12 December 2008. The process of applying for the mining licence is regulated in the Minerals and Petroleum Resources Development of Act 28 of 2002. This Act came into operation on 1 May 2004 and item 7 of Schedule II thereof provides as follows:

"(1) Subject to sub-items (2) and (8), any old order mining rights in force immediately before this Act took effect continues to be in force for a period not exceeding five years from the date on which this Act took effect subject to the

terms and conditions under which it was granted or issued or was deemed to have been granted or issued."

(2) A holder of a Mineral Mining right must lodge the right for conversion within the period referred to in sub-item (1) at the office of the Regional Manager in whose region the land in question is situated..."

[8] The mining licence issued on 12 December 2002 was subject to the terms and conditions that it will expire on 12 December 2008. In other words, any application for conversion was to be lodged before the expiry of the licence as any right in force in terms of the licence aforesaid immediately before the Act came into effect, terminated on 12 December 2008.

[9] In terms of item 1 of Schedule II of the Act, 'old order mining right,' means, 'any mining lease, mynpachten, consent to mine, permission to mine, claim licence, mining authorisation or right listed in table 2 to this Schedule in force immediately before the date on which this Act took effect and in respect of which mining operation are being conducted'.

[10] The balance of the purchase price in the amount of R2 500 000.00 was in terms of clause 4.2, supposed to be paid on completion date and was to be secured by means of bankers guarantee within 30 days from date of signature and by means a mortgage bond referred to in clause 5 being granted.

[11] The defendants failed to comply with any of the terms of the agreement relating to payment of the purchase price and also failed to provide the guarantee as was required in terms clause 4.2 of the agreement referred to in paragraph 10 above. The plaintiffs regarded such a failure to be a material breach of the agreement entitling them to terminate the agreement and as a result, issued summons against the defendants and asked for relief as follows:

"(a) An order rectifying the agreement, annexure "POC1", by the insertion of words "per day" between the figure "R612.00" and the words "or part thereof", in clause 18 of the agreement.

(b) A declarator that the agreement was validly cancelled by the Plaintiffs on 19 November 2009;

(c) *Payment of the amount of R1 316 712.33;*

(d) *Payment of a further amount in damages representing the continuing damages suffered by the plaintiffs, calculating in accordance with the formula in the table at paragraph 20 above, from 26 February 2010 to date of judgment;*

(e) *Interest on the amounts in prayers (b) and (c) above at the prescribed rate of 15,5 % per annum a tempore mora;*

(f) *An order directing that the first and second Defendants and all those holding title under them are to be evicted from the property;*

(g) *An order directing restitution by the First and Second Defendants to the Plaintiffs of all performances made by the plaintiffs to the First and second defendants in terms of the agreement."*

[12] In paragraph 20 of the particulars of claim, it was pleaded:

"*The first and Second Defendants are accordingly also liable to the plaintiffs in the sum of R1 316 712.33 in damages to date, being the value of the merx sold in terms of the agreement prior to the breach of the agreement, less the value of the merx at present, alternatively loss of profits, which value is presented by the net profit with the plaintiff could reasonably have realised as sole shareholders of the Third Defendant operating the mine on the property from the date the Defendant took occupation on 10 September 2008 to the current date, calculated on the basis of annual net profit of R900,000.00 or R 30.00 per cubic metre of clay mined, at a reasonable mining rate of 30,000m³ of clay per annum. The calculation of this amount is set out in the following table:*"

Net profit per m³ of clay mined	*R30.00*
Reasonable production of clay per annum	*30 000.00m³*
Profit per annum	*R900 000.00*
Occupation start	*10 September 2010*
Current date	*26 February 2010*

Period in days	*534*
Period in years	*1.463*
Loss	*R1 316 712.33*

[13] The Defendants' main defence was pleaded as follows:

"11.

The Defendants plead that the agreement contains, inter alia, the following express warranty, that is relevant for purposes hereof:

11.1 that unless otherwise provided or in the agreement, at the date of signature and until the completion date, the Third Defendant would be the owner of the fixed property, fixtures and fitting, plant and equipment as set out in Annexure "C" thereto, as well as the mineral rights and old order mining rights attaching to the fixed property as set out in Annexure "D" to the agreement (Clause 6.3).

12.

As pleaded herein above the agreement was signed on 6 February 2009.

13.

The applicable mineral rights and\or old order mining rights, allegedly, attaching to the property, however, had lapsed on 12 December 2008 and, as no extension period existed, a new application for mineral rights and\or mining right would have to be lodged by the Sugar Plum Trust, as

opposed to a conversation of an old order mineral right and\or mining right to a new one.

14.

When making the representation that the Third defendant was the owner of the old order mineral and mining rights attaching to the property, the Plaintiff knew it to be false as it knew that same had lapsed, alternatively the plaintiff, though exercising a reasonable degree of care and skill, should have known that the mining rights and mining rights had lapsed.

15.

When the Plaintiff made the representation, as aforesaid, it intended the Sugar Plum Trust to act thereon and pay it the purchase price of R3 000 000.00 for the Plaintiff's shares in the Third Defendant.

16.

Said purchase price was substantially in excess of the true value of the shares.

17.

The Sugar Plum Trust was induced by the representation to purchase the shares at the price of R3 000.000.00, whereas had it known the true facts it would not have been agreed to pay said purchase price for the shares.

18.

Specifically, the true value of the shares amounts to R500 000.00, only"

[14] The underlining is my emphasis as it is in paragraph 33 below. The court a quo in finding for the defendants on the issue of misrepresentation expressed itself as follows;

"[103] The defendants have succeeded to prove on a balance of probabilities that clause 6.3 constituted an intentional or negligent misrepresentation that an extension period applied to the rights in annexure "D". The defendants did not

and could not dispute that the wording of clause 6.3 and annexure "D" contained no such representation. Instead they sought to establish that Galatis' had advised Ms Barnes that there was an extension applicable to the conversation of the mining licence. In contrast Galatis's version was that he had been informed by Ms Barnes, on the advice of the professional mining consultants appointed by her that the mining licence attached as annexure "D" could be converted to a new order mineral right was set out in the Plaintiffs' plea to the defendants' counterclaim.

[104] Ms Barnes' evidence in this regard was unreliable and contradictory and wholly inconsistent with the probabilities that she was made to believe that there was an extension. The defendants have therefore established that representation was made by Galatis, or with his implied knowledge.

[105] Further, Ms Barnes's evidence was that she was at all times well aware of the expiry date on Annexure "D". It was therefore anything but a latent defect. The defendants have therefore succeeded to prove that they were entitled to a price reduction. This was supported by evidence that she had to secure clay from other service providers at a cost instead of mining itself. Signing of the agreement on 6 February 2009 long after the expiry of the licence should have prompted the plaintiff to enquire as the licence holder but chose not to."

[15] Before I deal with the findings as quoted above, I find it necessary to deal with the principle relating to misrepresentation. An innocent misrepresentation, which induced a party to agree to be bound by a contract, may be relied on by that party to avoid the contract. It does not however, give rise to a claim for damages because it is not a delict. (See **Fitt v Louw (1970) 2 ALL SA 542 (T) 1970 (3) SA 73 (T)**. If the contract is one of sale, a price reduction or cancellation and restitution can be claimed. (See **Phame (Pty) Ltd v Paizes 1973 (3) ALL SA 501(A), 1973 (3) SA 39 A)**.The essential allegations for avoiding a contract on the ground of innocent misrepresentation are:

(a) a representation;

(b) which was false;

(c) which was made by the defendant or defendant's agent;

(d) which is material;

(e) which was intended to induce the person to whom it was made to enter into the transaction: and

(f) that the representation did in fact induce the contract.

(See Novick and Another v **Comair Holdings and Others Ltd 1979 (3) ALL SA 73 (W), 1979 (2) SA 116 (W).**

[16] The other issue relevant to representation is an element of latent defect as mentioned by the court a quo in paragraph 105 of its judgment. The purchaser must allege and prove not only that the object had a defect that was latent but also, inter alia, that the seller concealed the defects of which he or she, or knowingly represented their absence. This is said to be simply fraud in another form. (See **Glaston House (Pty) Ltd v Inag (Pty) Ltd 1977 (3) ALL SA 88 (A) 1977 (2) SA 846 (A).**

[17] Where a price reduction is claimed based on latent defect, a purchaser has to allege and prove the following:

(a) a defect in the article sold, rendering it ineffective for the purpose acquired;

(b) that the defect existed at the time of the sale;

(c) that it was latent; and

(d) that he or she was unaware of its existence.

(See **Holmdene Brickwork (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A).**

[18] When a repayment of the purchase price is claimed, in addition to the allegations to be made and proved, the plaintiff has to allege and prove *inter alia*, that he or she would not have purchased, had he known of the defect and that he or she was not aware of the defect thereof (See Holmdene Brickworks (Pty) Ltd *supra*).

[19] The defendants in their claim in reconvention asked for relief, inter alia, as follows:

"(a) That it be declared that the First and Second defendants are entitled to reclaim the shares in the Third Respondent and that the value of said shares is

equal to the portion of the purchase price paid to the purchaser, being R500 000 00;

(b) Payment of R9 443 472.00;

(c) ...

(d) ..."

[20] The amount of R9 443 472.00 for damages were pleaded as follows:

"(a) As a result of the Plaintiff's misrepresentations, the Sugar Plum Trust suffered damages in the amount of R 9,443,472.00 made up as follows:

-Costs of EMP	*R300 000.00*
-Application for Mineral and \or mining rights	*R200 000.00*
-Rehabilitation funding	*R4,00 000.00*
-Clay purchased from outside sources	*R1,529,472,00*
-Loss of profit from occupation date until such	*R3,024,000.00*

Time as new mineral and \or mining rights are obtained

Total R9,443,472,00

Aforesaid damages were within the contemplation of the parties when the agreement was concluded alternatively it flows naturally from the Plaintiff's breach".

[21] Insofar as the defendants claimed for reduction of the price from R3 000 000.00 to R500 000.00 based on the alleged latent defect, they were also required to show on the balance of probabilities that they were unaware of the defect. That is, they should have shown that as they concluded the contract on 6 February 2009, they were unaware that the mining license and all rights in terms thereof had come to an end on 12 December 2008.

[22] The court a quo in paragraph 105 of its judgment found that the defendants 'succeeded to prove that they were entitled to a price reduction.' I cannot agree with this finding for the very reason mentioned by the trial court in paragraph 105

of its judgment when it stated that *"Ms Barnes evidence was that she was at all times well aware of the expiry date on annexure D". That it was "anything but a latent defect,"* cannot in my view be correct bearing in mind the fact that she knew or must have known that the mining license was to expire on 12 December 2008. Therefore when she signed the agreement on 6 February 2009 and agreed to Clause 6.3 of the agreement, she knew that the licence had expired. The court a quo also in paragraph 62.4 of its judgment found that "Ms Barnes had sight of the mining license from the beginning of the negotiations and by at least 12 September 2008 and was at all times aware of the fact that the licence expired on 12 December 2008". Therefore, there can be no question that the defendants were aware of the defect when they concluded the contract on 6 February 2009.

[23] The court a quo in paragraph 98 of its judgment found that "if there was no offer to purchase, the owner of the license would have taken active role to have the license renewed or converted to a new order one as required by the law. The decision to leave it on the lessee's or the prospective buyer's discretion to convert it could not be justified as ownership rested with him". Furthermore, in paragraph 99 of its judgment the court a quo took the view that "it is inconceivable that the plaintiff having an interest to sell the business to the defendant would not see to it that the mining licence which was going to expire sooner be properly transferred to the prospective buyer who had already paid him with a substantial deposit of R500 000.00" and that "the mining licence was not less important".

[24] I cannot with respect agree. The court a quo should have found otherwise. The addendum to the offer to purchase signed on 29 September 2009 and annexed to the written agreement of 6 February 2009, makes it quite clear that the defendants were to apply for the conversion. The payment of the deposit in the amount of R500 000.00 in terms of the addendum to the offer to purchase was meant "to allow the purchaser the necessary time in obtaining the full documentation for the application required for submission to the Department of Mineral and Energy for the purpose of conversion from the Old Mining order to the New Mining Rights Licence". That in my view should have put the issue to rest.

[25] Insofar as Barnes wanted to suggest that it was the plaintiffs' obligation to lodge the application for conversion, and that the defendants were made to believe that

conversion existed or that any right under the mining licence issued on 12 December 2002 was still valid, that should be seen in the context of her evidence which the court a quo, in my view, correctly rejected and found her to be unreliable witness.

[26] Barnes in her evidence tried to put the blame on the plaintiffs in seeking to justify the alleged misrepresentation in clause 6.3. But, when she was asked what was conveyed to her on 9 September 2008, she answered:

"*In this regard, obviously, coming from a mining background myself, I do understand the full implications of a conversation from start and the time consumed to, to actually do this and or a new mining licence, and the cost involved of the new mining licence. But, at this point in time, what it was, is that Debbie Becker and Dennis Galatis, in the same meeting, actually told me that there was extension given to them to the end of April 2009, the 30th of April 2009. I requested a document from the DME actually stipulating this and Debbie Becker, in this meeting, referred me to the Government Gazette, which it was read there. But having already applied for conversion, three months, there, there should have been a licence in place, at this, it should have been already converted.*"

[27] Barnes denied the suggestion that it was her appointed Mining Consultants who wrongly advised her of the alleged extension of the mining licence until 30 April 2009 and gave an answer to the suggestion as follows:

"*That is not true. That is not true, whatsoever. After realising that Debbie Becker did not have any documentation, supporting a conversion, at this point in time, which only came to my knowledge, after I had paid her money, in November, I, October , I consulted with JJP Mining, but I did keep Mr Galatis informed at all times. I consulted with JJP mining and informed them that there was an extension for the 30th April and this extension, came to my knowledge through Dennis and Debbie Becker in this very same meeting, of 30th April.*

[28] Thus in a nutshell, the defendants' case took a turn in the course of the trial. That is, they were made to believe that there was an extension of a mining licence which expired on 12 December 2008 and that they were entitled to apply for conversion by not later than 30 April 2009. The onus was on the defendants to establish on the balance of probabilities that such a representation was made,

and if so by whom, but, most importantly, whether the alleged extension was pleaded.

[29] In paragraph 13 of the plea quoted in paragraph 13 of this judgment it was pleaded: "the mineral rights under old order mining rights, allegedly attaching to the property, however had lapsed on 12 December 2008 and as no extension period existed, a new application for mineral rights and or mining rights would have to be lodged by the Sugar Plum Trust, as opposed to a conversion of an old mineral right under mining right to a new one".

[30] The underlining is my emphasis. Clearly no allegation of representation regarding extension was made in paragraphs 13 to 17 of the plea quoted in paragraph 13 of this judgment. 'No extension period existed,' does not equate to the allegations which emerged for the first time during trial, that on 9 September 2008 Galatis and Debbie Bekker conveyed to Barnes that there was extension of the mining licence until 30 April 2009. The evidence to this effect was intended to have the purchase price reduced as claimed in reconvention and should have been found to be inadmissible for the reason that the alleged misrepresentation on extension of the licence to 30 April 2009, was not pleaded.

[31] The representation pleaded is amplified in paragraph 14 of the plea. That is, 'when making the representation that the third defendant was the owner of the old order mineral rights attaching to the property, the Plaintiff knew it to be false as it knew that same had lapsed.' Clearly the representation as pleaded was not that Barnes was told that there was an extension of the licence until 30 April 2009. Consequently evidence on the extension should have been disallowed.

[32] If I was to be wrong regarding the finding above, the next question is whether a representation about extension was made and if so, by whom and on behalf of whom. It was common cause that during September 2008 the defendants assumed the responsibility to lodge the application for conversion of the old order mineral rights to the new order mineral rights. It was also common cause that the defendants knew since the start of the negotiations in July 2008 that the mining licence would expire on 12 December 2008.

[33] What appears to have been a further critical issue raised for the first time during trial was the suggestion that representation about extension was made by the plaintiffs. Two witnesses testified in this regard. Galatis for the plaintiffs alluded

to the fact that it was in fact the mining consultants the defendants had engaged to apply for conversion who advised them that there was an extension up to 30 April 2009. While Barnes denied this, the trial court in its judgment found her to be unreliable witness, in my view, correctly so. The court a quo in dealing with Barnes's evidence, remarked as follows:

"[69] Ms Barnes' evidence did not accord in several material respects with what was put to Galatis and she was vague and evasive.

[70] In her evidence in chief she stated that Bekker and Galatis had advised her that there was an extension. This, she said, occurred at meeting held in Zart's office in Johannesburg, where both the "rental Agreement take over" and the offer to purchase were signed. She testified that she has specifically asked for some form of confirmation from the DME that this was the case and that Bekker had referred her to the Government Gazette.

[71] She later said that the information regarding the extension "came from the likes of Debby Bekker with the knowledge of Dennis Galatis". However she again subsequently altered this and stated that Galatis told her that there was an extension.

[72] Under cross- examination she remained unsure who had allegedly advised her of the extension, saying first that both Bekker and Galatis had advised her and that Galatis had, by his mere presence at the meeting, merely agreed to this. She followed this by saying that this was her assumption that Galatis knew about the extension. This was not clarified in re-examination. Ms Barnes further conceded that she could not dispute that Galatis had never appointed mining consultants himself.

[73] It is submitted that this is determinative of the issue, as on her own version, Ms Barnes has indicated that the advice that there was an extension did not come from Galatis at all but rather from Bekker. The unreliability of Ms Barnes' testimony on this point is further apparent from the following:

[73.1] She conceded under cross-examination that as the "Rental Agreement take over" indicates that it was signed in Heidelberg, it could not have been signed by all parties at Zartz's office as she had stated previously in her evidence in chief. She was then clearly uncertain about who was allegedly present at this

meeting and where the two agreements had been signed and could not commit to an answer.

[73.2] Despite testifying in her evidence in chief that she had no reason to believe that there was not an extension, she quite correctly conceded under cross-examination that she was indeed concerned about the correctness of this information as she had specifically asked for some form of confirmation from the DME, despite Bekker failing to provide her with a copy of the relevant Government Gazette as she allegedly promised, Ms Barnes insisted that she still had no reason not to believe that there was an extension. She in fact testified that she would have ideally wanted a specific directive to this effect from the DME addressed to the company.

[73.3] She also testified that JJP were professionals whom she had hired specifically to prepare the application for the conversion and that she had not only consulted with them and provided them with the details of the licence which she required to be converted, but also specifically informed them that there was an extension period. Despite being professional mining consultants JJP did not advise her that there was no such extension. In her own words, JJP "took it for granted that therein was an extension". She nevertheless refused to concede that in doing so JJP had been negligent."

[34] The criticism quoted above has merit and I do not find it necessary to repeat same. It suffices to mention that I share the finding that no reliance can be placed on the evidence of Barnes. Insofar as she pointed at Debbie Bekker for the alleged representation regarding extension, that could not be attributable to and imputed to the plaintiffs.

[35] Debbie Bekker or her company was the third defendant's lessee. Having concluded the sale agreement and the first and second defendants having taken over the lease agreement during September 2008, certain amount of money was paid to Debbie Bekker by Barnes on behalf of Sugar Plum.

[36] Regarding the issue as to who made the representation, the suggestion that Galatis was the source, should be rejected. What the trial court said as quoted in paragraph 33 above, in my view, supports such rejection. If the alleged representation was made by Debbie Bekker the plaintiffs cannot be held liable for her actions as there was no evidence that she acted on behalf of or as an agent

of the plaintiffs. Accordingly, the claim in reconvention on this basis alone should have been dismissed.

[37] There is another basis on which the defendants sought to establish their claim in reconvention and this was by challenging the plaintiffs' claim. The main claim of the plaintiffs was for damages based on a breach of the written agreement concluded on 6 February 2009, which agreement the plaintiffs cancelled and offered to return the R500 000.00 to the defendants. The entire relief sought in main is quoted in paragraph 12 of this judgment. The alternative claim was for the enforcement of the agreement and for reasons mentioned earlier, the alternative claim cannot succeed as conditions mentioned in paragraphs 10 and 11 of this judgment were not met.

[38] In paragraph 11.1 of the plea, it was pleaded that the agreement contained an express warranty in clause 6.3. Clause 6.3 is quoted in paragraph 4 of this judgment. In cross-examination, Barnes was referred to clause 6.3 and her evidence unfolded as follows:

"Ms Barnes, does clause 6.3 gives the impression, in its wording that there was an extension applicable to the conversion? — In its wording here?

Yes, — No".

[39] Then in dealing with the request for admissions, the cross-examination proceeded:

"As we discussed, the representation was the same as clause 6.3 that is, that is what was meant by representation. Now, if you look at your response to that, page 97. Your response to paragraph 1.2.6 simply indicates "not applicable". So, despite being asked and given an opportunity to identify which portion of clause 6.3 constitutes a representation that opportunity was never taken up. — Well, that was our response at the time.

That was your response at the time. So, you were asked to identify which portion of that indicated that there was a representation of an extension and your response, at the time, was "not applicable". So, I put it to you, Ms Barnes that the reason your response was "not applicable" was, in fact, because there are no portions of clause 6.3, which indicates that there was an extension applicable to the conversion of the license. Do you want to comment on that? — No

And again, I refer you to your various responses there, at page 96 and 97 and all of those responses are marked "not applicable". So you have now indicated that you agree that clause 6.3, in its wording indicates nowhere in it that there was an extension and that that impression must have come from somewhere else. That is, that is what you have agreed with. --- No

You, you say you do not agree with that, --- I do agree with, that there, the extension existed and whether there is paperwork conflicting, I do not know.

But, Ms Barnes, you agree that, you said, I mean, quite clearly 6.3 does not give indication that there was an extension, not ... [intervene]--- You are reading it in isolation... [Intervene].

I am reading it in isolation. But in isolation, it does not indicate any --- [Intervene]--- Correct... [Intervene].

Alright. So, you would agree that, and as you said, the idea or the impression that there was an extension that applied, must have come from somewhere else.--- Yes.

Okay. Now when you were asked to provide information on where that representation may have come, if it did not come from clause 6.3, your response was, "not applicable". Do you agree with that? That, that is what we have just gone through. ---Well, ja."

[40] The quotation above in my view brought to an end any allegation of representation in the written agreement. The point is, the defendants undertook to apply for conversion in September 2008, knowing well that the licence was to expire on 12 December 2008. The deadline for conversion was not met and despite all of this the agreement was concluded on 6 February 2009. Extension of the mining licence to April 2009 was recorded nowhere in the agreement as clearly conceded by Barnes in cross-examination. Seemingly, the extension was an afterthought, the Department having declined the application for conversion on 20 May 2009. But what is striking is that 30 April 2009 was exactly five years from 1 May 2004 being the date on which the Act came into operation particularly taking into account the fact that in terms of item 7 (1) of the Act and subject to sub-items (1) and (8) thereof 'any old order mining right in force immediately before this Act took effect continues in force for a period not exceeding five years

from the date on which the Act took effect subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued.'

[41] Regarding damages, the parties at the start of the proceedings in the court a quo indicated that they agreed to have quantum be separated from liability and that only the issue of liability be determined. Therefore, while the court a quo in its judgment ruled that the defendants' claim in reconvention was upheld, this was in my view, with reference to liability only.

[42] Consequently, an order is hereby made as follows:

42.1 The appeal is upheld with costs.

42.2 The order by the court a quo is set aside and substituted as follows:

"***1. Cancellation by the plaintiffs of the written agreement concluded on 6 February 2009 is hereby confirmed.***

2. The first and second defendants are hereby held liable to pay to the plaintiffs any proven damages arising from the breach and cancellation of the written agreement referred to in 1 above.

3. The issue of damages is hereby postponed sine die.

4. The first and second defendants are ordered to pay costs of the action to date hereof jointly and severally, the one paying the other to be absolved."

MF LEGODI

JUDGE OF THE HIGH COURT

I AGREE,

LM SETHOSA-MOLOPA

JUDGE OF THE HIGH COURT

I AGREE,

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NB TUCHTEN

JUDGE OF THE HIGH COURT

For the Applicant:	Adv S Fergus
Instructed by:	Bridget Ellender Duster & Ass
For the First and Second Respondent:	Adv D Prinsloo
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