

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
(MPUMALANGA DIVISION, MBOMBELA)**

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: YES  
REVISED: YES  
27/09/2021

**CASE NO: 2862/2018**

In the matter between:

**NGHWAZI TT INVESTMENTS (PTY) LTD**

Plaintiff

and

**LOWVELD SHOW SOCIETY**

Defendant

**JUDGMENT**

**MASHILE J:**

**INTRODUCTION**

[1] In this judgment the following words will have the meaning ascribed to them and appearing next to each:

- 1.1 “Nghwazi” shall mean the Plaintiff;
- 1.2 “LSS” shall mean the Defendant;
- 1.3 “Vans Auctioneers” shall mean Spring Green Trading 258 CC t/a Vans Auctioneers;
- 1.4 “The agreement” shall mean the deed of sale of the immovable property concluded between Nghwazi, LSS and Vans Auctioneers;
- 1.4.1.1 “The property” shall mean Portion [...] of the Farm Nelspruit [...] Registration Division J.T., Mpumalanga;
- 1.5 “the parties” shall mean Nghwazi and LSS, including Vanns Auctioneers depending on the context;
- 1.6 “Du Toit” shall mean Mr Petrus Lodewiekus Du Toit;
- 1.7 “Du Preez” shall mean Mr P J Du Preez;
- 1.8 “Smuts” shall mean Mr Adriaan Smuts;
- 1.9 “Saleh” shall mean Mr Mohamed Saleh.

[2] The interpretation of an indemnity clause in the agreement is central to what led the parties to approach this Court for adjudication of their dispute. The claim of Nghwazi against LSS is for payment of damages in the amount of R3 192 000.00 ostensibly sustained in consequence of LSS’ infringement of the agreement. To justify its refusal for payment of the amount claimed against it, LSS relies on the indemnity clause contending that determination of risk of Nghwazi is not dependent on occurrence of registration of transfer of ownership of the property to Nghwazi.

[3] Evidentiary material levied before this Court comprised discovered documents consisting of correspondence exchanged between the parties, pleadings in Case Numbers 405/2017 and 47407/2015, documentary material concerning the sale of the property at the auction on 26 February 2015 and oral evidence per Messrs Du Toit and Du Preez, attorneys of Nghwazi and LSS respectively. All the discovered documents of the respective parties form part of the evidentiary material before this Court regardless that they might not have been specifically mentioned during the trial or proven in terms of the rules of evidence.

### **FACTUAL MATRIX**

[4] The facts that gave rise to this action are largely common cause. That said, what the parties make of them, especially the interpretation of the indemnity clause in the agreement, is radically different. Tersely, on 2 March 2015, Nghwazi, LSS and Van's Auctioneers concluded the agreement. In terms of the agreement LSS sold the property to Nghwazi for an amount of R28 000 000.00 Value Added Tax excluded. The recordal part of the agreement provides:

4.1 LSS is the registered owner of the Property;

4.2 The Property had previously been auctioned to a previous purchaser, Saleh, on 26 February 2015 subject to confirmation by LSS within 7 days of the date of the auction;

4.3 The Property was sold subject to a condition precedent that the Property shall be transferred to the purchaser free of the encumbrance imposed by the restrictive condition B(ix) contained in the Title Deed;

4.4 Subsequently, LSS caught wind that -

4.4.1 Mbombela Local Municipality (*“the Municipality”*) was in the process of challenging the validity of the Proclamation of 16 February 1983 abrogating certain restrictive conditions from the Title Deed of the property;

4.4.2 The Municipality was proceeding with a second urgent attempt to expropriate the Property before registration of transfer into the name of Saleh;

4.4.3 The Municipality was applying for a caveat to be registered over the Property pending the outcome of possible litigation resulting from 1 or 2 above.

4.5 LSS only foresaw a dispute with the Municipality in respect of the title condition and not a total onslaught on ownership alternatively the title of LSS;

4.6 LSS was not prepared to enter into extended litigation with the Municipality in consequence of which LSS withdrew the Property from the auction prior to acceptance by Saleh;

4.7 Vans Auctioneers advised Nghwazi that the Property has been withdrawn from the auction due to the actions of the Municipality;

4.8 Notwithstanding all the attendant risks and perils brought about by the actions of the Municipality, Nghwazi nonetheless decided to proceed with the purchase of the property at a reduced price.

[5] The pertinent terms of the agreement are the following:

***“PURCHASE PRICE***

*The Purchase price shall be an amount of R28 000 000.00 (TWENTY-EIGHT MILLION RAND) exclusive of VAT for the properties mentioned above on the same terms and conditions as per the conditions of sale applicable to the auction of 26<sup>th</sup> of February 2015 annexed hereto as annexure "A", except that Paragraphs 1 and 2 of annexure "A" shall not be applicable*

2.

### **RESTRICTIVE TITLE CONDITIONS**

*This sale is not subject to the suspensive condition that the Seller undertakes to remove the restrictive condition referred to in paragraph B(ix) of the Title Deed of Portion [...]. Portion [...] will accordingly be transferred to the Purchaser subject to the restrictive condition referred to above;*

3.

### **INDEMNITY AND RISK**

*3.1 The purchaser hereby indemnifies and hold the Seller harmless against any claim of whatsoever nature by the Mbombela Local Municipality or any other party against the Seller arising from or in connection with the withdrawal of the properties from the auction and or the sale of the properties to the Purchaser;*

*3.2 The Purchaser hereby takes full risk for, and accepts all or any negative consequences, including but not limited to expropriation, restrictive title conditions, caveats etc. that may result from the actions of the Mbombela Local Municipality and will have no claim again the Seller*

*emanating from the above;*

*3.3 The Purchaser shall have no right of recourse against the Seller resulting from any claim of whatsoever nature instituted by the Nelspruit Local Municipality.*

### **AUCTIONEERS COMMISSION**

*The purchaser shall be liable for Auctioneers commission at the rate of 10% (ten) percent on the purchase price payable to the Auctioneer on signature.*

### **PAYMENT**

*The Purchaser shall on signature pay:*

*3.1 a deposit of 5% (Five percent) of the purchase price; and,*

*3.2 the Auctioneers commission plus VAT*

*The balance of the purchase consideration shall be paid as per Annexure "A"*

[6] The agreement proceeds to deal with particulars of the parties to the agreement and concludes with a clause pertaining to confidentiality. The Conditions of Sale that were initially meant for the auction of the 26<sup>th</sup> of February 2015 continue to be relevant because its terms, with the exception of Clauses 1 and 2, are specifically stated to be applicable to the agreement.

[7] Nghwazi, as it was obliged to do in terms of the agreement, paid LSS a deposit of R4 592 000.00, which amount represented 5% of the purchase price, transfer costs in

the amount of R233 458.00 and commission of Vans Auctioneers in the amount of R3 192 000.00. Additionally, Nghwazi delivered a Standard Bank Guarantee as an undertaking that the balance of the purchase price in the amount of R26 600 000.00 has been secured and that it would be paid.

[8] During 2015, the Municipality launched an application against the Premier of Mpumalanga Province, Registrar of Deeds: Mpumalanga, LSS and Nghwazi for an order interdicting the transfer of the Property to Nghwazi. On 28 July 2016, Kollapen J granted the order in the following terms:

*“i. That portion of Proclamation No. 80 of 1983 that effects the removal of Condition B(viii) from Deed of Transfer No 12164/1953 is hereby reviewed and set aside;*

*ii The second respondent is interdicted from transferring Portion [...] of the Farm Nelspruit [...] JT held by Title Deed T12164/1953 from the third respondent to the fourth respondent”*

[9] LSS argued that the interdict as aforesaid barred registration of transfer of ownership of the property to Nghwazi making performance impossible. As a result, and almost a year following the court order *supra*, on 9 June 2017, Nghwazi cancelled the Contract as it was entitled to do. In the letter of cancelation, Nghwazi demanded LSS to return:

9.1 The agent's commission;

9.2 The deposit amount;

9.3 The transfer costs;

9.4 The guarantee issued by Standard Bank in the amount of R26 600 000.00.

[10] In response to the cancellation and demand, LSS paid back to Nghwazi the deposit of R4 592 000.00, transfer costs in the sum of R233 458.00, and returned the Standard Bank guarantee in the amount of R26 600 000.00 but failed to reimburse the amount of R3 192 000.00 representing the commission of Vans Auctioneers.

[11] The restrictive conditions mentioned under Clause 2 of the agreement to which the property was subjected when it was sold stipulate that:

*“The land hereby transferred shall be subject to the conditions and stipulations contained in Notarial Deed of Servitude No. 97/19258 dated the 10<sup>th</sup> day of February 1925, in favour of the South African Prudential Limited.*

*B.*

*(I) The property shall be used by the transferee for the sole purpose of conducting thereupon Agricultural shows.*

*(ii) No trade or business for which any license shall be required shall be conducted upon the said property nor shall any Co-operative Society as visualised by the Co-Operative Societies Act No. 28 of 1922, or any amendment thereof, in any manner whatsoever, function upon the said property.*

*(iii) The property shall be used for Agricultural Show purposes only.*

*(iv) The property shall not be leased, except for sporting purposes, to any person or concern without the consent in writing of the Town Council of the Municipality of Nelspruit (hereinafter referred to as “the Council”), which said consent shall not be withheld unreasonably.*



(v) *No residence, except such as may be required for the occupation by the Supervisor employed by the transferee shall be erected upon the property.*

(vi) *No sale of intoxicating liquor of any description whatsoever, shall be permitted upon the property.*

(vii) *The foregoing condition (ii) – (vi) inclusive shall not apply during the period when any Agricultural Show is being held or conducted by the transferee upon the property.*

(viii) *The transferee shall not be permitted in any manner whatsoever to alienate the said property to any person or organisation, save for the purpose of conducting thereon of Agricultural Shows and further subject to the conditions foregoing.*

(ix) *In the event of the transferee failing, except due to circumstances beyond the control of the transferee and in regard to such circumstances the onus or responsibility of proving that such circumstances were beyond its control shall rest upon the transferee, to hold at least one Agricultural Show in any consecutive two years or committing a breach of the conditions foregoing then and in such event the Council shall be entitled, but not compelled, to retake possession of the property and demand re-transfer thereof. In such event a committee consisting of three (3) members nominated by the Chamber of Commerce in Nelspruit. One (1) member nominated by the Publicity Association in Nelspruit and One (1) member nominated by the Lowveld Farmers be appointed by the Administrator of the Transvaal, shall be formed to determine whether such ground shall be held in trust for future Show Societies or whether such ground shall be sold and the proceeds held in trust by the Council for*

*future Show Societies. The conditions set out under B(I) – (ix) are enforceable by the Transferor Municipality.”*

[12] On 4 May 2018, this Court per Strydom AJ in Case No: 405/2015 granted an order permitting expropriation of the property. The order is extant but the property has not yet been transferred into the name of the Municipality due to bond cancellation problems. The nature of this order means that the property cannot be transferred to any party whether that party is Nghwazi or not.

### **ORAL EVIDENCE OF THE PARTIES**

[13] Du Toit testified on behalf of Nghwazi. His evidence was that he is a practicing attorney and conveyancer with experience exceeding 40 years. He is a director of Wiekus Du Toit Attorneys (“WDT, which is the attorneys of record of Nghwazi). His credentials were not challenged. On 2 March 2015, he represented Nghwazi when it concluded the agreement with LSS and continued to be closely involved in the process thereafter.

[14] His association with the property goes back to 2014 to the date of the conclusion of the agreement, 2 March 2015. Throughout that period, Vans Auctioneers was represented by Smuts as its attorney. Vans Auctioneers, as the agent of LSS, was instructed to advertise and inform all prospective purchasers of the restrictive title conditions applicable to the Property. In doing so, Vans Auctioneers was directed to draw the attention of prospective purchasers to the provisions of (VIII) and (IX) in Clause B of the title deed, which I have cited in full at Paragraph 11 *supra*.

[15] In brief, the restrictive conditions provide that the transferee is not permitted to alienate the Property save for purposes of conducting agricultural shows and that should the transferee fail to hold at least one agricultural show biennially, the Municipality would be entitled to expropriate the Property. Vans Auctioneers advertised the auction for 26 February 2015. On that date, Saleh made an offer, which he

subsequently withdrew and cancelled. Following the cancellation and/or withdrawal of the offer, the parties concluded the agreement on 2 March 2015. I need to point out that according to the recordals of the agreement, it was LSS that withdrew the property from the auction. As is evident, that is materially different from the testimony of Du Toit. That said, it should suffice to state that it is common cause that the auction did not go ahead.

[16] Du Toit confirmed that during the 7-day period mentioned in Paragraph 4.2 *supra*, LSS heard that the Municipality was in the process of challenging the validity of the 1983 Proclamation rescinding certain restrictive conditions from the title deed. It also became aware that the Municipality was proceeding with a second attempt to expropriate the Property before registration of transfer to Saleh. LSS had anticipated a dispute with the Municipality on the title condition and not a total onslaught on the ownership, alternatively on its title.

[17] In consequence of the actions of the Municipality as aforesaid, Saleh withdrew his offer to purchase the Property, which led to the cancellation of the transaction. Conscious of the risks associated with the threatened actions of the Municipality, Nghwazi purchased the property at a reduced price. Du Toit alleged that when purchasing the property, Nghwazi was mindful that risk would pass to it once registration of transfer of ownership into its name has occurred. The risks notwithstanding, neither party predicted a problem with registration of transfer of ownership into the name of Nghwazi

[18] Du Toit stated that the objective of the indemnity and risk clause, Clause 3, of the agreement was that:

18.1 Nghwazi would accept full risk and accept all/or any negative consequences including but not limited to expropriation, restrictive title conditions, *caveats* etc. that could result from the actions of the Municipality, and would have no claim against LSS emanating from the above;

18.2 Clause 3.2 would only find application post registration of transfer of ownership into the name of Nghwazi. It was never the intention of the parties that LSS would be excused from liability in circumstances where registration of transfer of ownership had not happened;

18.3 The risk could not be entertained until transfer had occurred. Transfer has always been possible otherwise Nghwazi would not have concluded the agreement. Besides, LSS would have misrepresented to Nghwazi that it could pass ownership of the property when it could not.

[19] Du toit confirmed that Nghwazi proceeded to perform in terms of the agreement. Clause 2 of the agreement that is headed: RESTRICTIVE TITLE CONDITIONS, specially provides that Nghwazi would accept transfer with the restrictive conditions described in the title deed, threat of expropriation or any risk regarding ownership included. He stated further that this was the essence of the protection inherent in Clause 3.2 of the agreement.

[20] Regarding The advertisement, Vans Auctioneers warranted in a letter that registration of transfer of ownership would be effected subject to the restrictive conditions referred to in Clause 2 of the agreement. Du Toit emphasized that the parties did not intend LSS to be released from its obligations to effect transfer of the Property concerned merely because of the restrictive conditions. If that were the case, it would have been farcical to advise Nghwazi to enter into the agreement and expend large sums of money, which it was obliged to pay as per the agreement.

[21] Neither party expected that any other party, with the exception of the Municipality, could initiate legal proceedings which could affect transfer of the Property. If expropriation had become relevant, for example, in the sense that it was effected after transfer, Nghwazi would have assumed the risk. Thus, everyone understood that Nghwazi would subsequent to registration of transfer of ownership and title become the owner subject to the restrictive conditions.

[22] Du Toit maintained that LSS too had intended the property to be transferred and the following stand as confirmation of that allegation:

22.1 It issued an urgent application to obtain clearance certificates in respect of the Property to effect transfer;

22.2 It strenuously opposed two applications launched by the Municipality.

[23] Du Toit testified further that in the second application, the Municipality disputed the validity of the 1983 Proclamation. In this second application Nghwazi was cited as a Respondent because it was the Purchaser in terms of the agreement. Strangely, said Du Toit, LSS opposed the relief sought. This he regarded as preposterous because the removal of the 1983 Proclamation did not prevent transfer. The court in this second application reviewed and set aside the removal of title condition B (VIII). The court further interdicted the transfer of the Property to Nghwazi due to the opposition of LSS.

[24] The restrictive conditions on themselves did not make transfer of the property impossible. The interdict, on the other hand, prohibited transfer of the property to Nghwazi directly as a result of the opposition by LSS. The restrictive condition only limited how the owner could utilize the property but was not a bar to ownership in any manner. Du Toit remarked that LSS in another application in fact asserted in its heads and answering affidavit that the restrictive title condition did not proscribe transfer of the property.

[25] Du Toit testified that LSS was the author of its own misfortune. The court granted the interdict prohibiting transfer of the property at the instance of LSS. The interdict granted by the court must be understood in the context of title condition B (VIII), which merely entailed that LSS was not permitted to alienate the Property to Nghwazi except for purposes of conducting agricultural shows. Nghwazi was mindful of this condition

and had accepted that it would acquire ownership subject thereto. According to Du Toit there was no reason why transfer could not have been permitted to take place.

[26] Moreover, LSS failed to comply with title condition B (IX) by not holding an agricultural show once every second year. It was that failure that the court in Case No: 405/2017 ordered that the Municipality was entitled to expropriate the Property. In consequence of the inability of LSS to pass transfer of the property to Nghwazi, the latter cancelled the agreement. Following the cancellation, LSS returned the Standard Bank guarantee, deposit and transfer costs but would not refund the commission of Vans Auctioneer's.

[27] Cross-examination of Du Toit did not achieve much as he merely reiterated what I have already captured as his testimony above. That said, I need to point out that on being asked if Nghwazi intended to develop the property, he stated that it was not in its immediate plans but that the possibility could not be excluded. Du Toit emphasized that if Nghwazi embarked on that route, it would do so within the limitations of the restrictive conditions. To the suggestion that Nghwazi purchased the property not intending to observe the restrictive conditions, he was persistent that Nghwazi would have complied with the conditions as stipulated.

[28] To the proposition that the letter dated 12 December 2014 insisting on Vans Auctioneers disclosing the restrictive conditions and possible actions of the Municipality was meant to discourage potential purchasers, he stated that it is a matter of course that generally the attention of all potential buyers of immovable properties is drawn to the existence of restrictive conditions, if they are present. In this instance, Nghwazi concluded the agreement fully cognisant of the risks and was prepared for any eventuality post registration of transfer.

[29] Du Toit also said that the notice of expropriation might have meant to withdraw the property from the sale but it did not deter Nghwazi from concluding the agreement. Clause 3.2 indemnifies LSS in the event of expropriation materializing. So, for as long

as registration of transfer of ownership has been effected, Nghwazi would be prepared to bear the risks of which it had always been aware.

[30] Du Toit agreed that the commission of Vans Auctioneers became due by Nghwazi on the 'fall of the hammer'. If for any reason the transaction was stymied, as is the position here, LSS on whose behalf Vans Auctioneers conducted the auction, would be liable to reimburse Nghwazi. This was the essence of Du Toit's testimony.

[31] Like Du Toit, Du Preez who testified on behalf of LSS is an admitted attorney practicing commercial law for 39 years. He specializes in the drafting of commercial instruments. His credentials too were not questioned. He testified that he enjoyed a close relationship with LSS. He recalled that he was involved in its liquor act license problems and several other issues since approximately 1989. He also assisted LSS in the process that led to the conclusion of the agreement. He confirmed that while that is so, he was not part of the background negotiations of the agreement.

[32] He stated that LSS downgraded its business on the showgrounds due to problems concerning access road. The difficulty led to loss of parking at the venue. Membership contributions declined resulting in the decision to obtain alternative land to which to move the business of LSS. The access challenges notwithstanding, the land remains valuable and its location too is good.

[33] Regarding the expropriation application of 2017 bearing Case No: 405/2017, he said that the land was still in the name of LSS despite the order of the court directing that it be transferred to the Municipality. He testified that this was as a result of a 1973 transfer problem of a bond. Du Preez confirmed that he was aware of the content of the answering affidavit and other documents forming part of the application under Case No: 405/2017. It was indicated to Du Preez that the notice of expropriation made the sale impossible.

[34] Additionally, it was proposed that it was also the reason the Municipality was advised that LSS would not hold shows. These agricultural shows that were to be held every second year were those stipulated in restrictive title conditions B (ix). He stated that apart from the withdrawal of the notice of expropriation, the Municipality would not allow a sale. He agreed that the withdrawal of the expropriation notice by the Municipality meant that LSS could transfer the property to Nghwazi. That said, the continued threat of the Municipality to proceed with expropriation at a later stage constituted a clear intention not to transfer the property.

[35] Du Preez reiterated his evidence that it was Smuts who was closely involved with all aspects of the sale both prior and on the date of the sale itself, 2 March 2015. The obstructive measures of the Municipality aside, Du Preez agreed that he was still able to advise LSS to proceed with the sale of the property.

[36] Under cross-examination, Du Preez conceded that:

36.1 The order granted under Case No: 405/2017 directing that the property could be expropriated and registration of transfer of ownership could be effected in the name of the Municipality was prompted by LSS's failure to adhere to the Restrictive Title Condition B(ix) that required LSS to hold an agricultural show every second year;

36.2 Nghwazi, on the other hand, complied with all its contractual obligations entitling it to registration of transfer of ownership into its name;

36.3 His testimony that Nghwazi had refused to take transfer was incorrect;

36.4 Registration of transfer of ownership into the name of Nghwazi became impossible as a result of LSS's lack of compliance with Restrictive Title Condition B(ix);



36.5 Nghwazi complied with all the 4 obligatory payment conditions, which it could neither negotiate nor control.

[37] Du Preez did not contest that all the 4 payment requirements, the commission of Vans auctioneers, deposit of the purchase price, transfer costs and payment guarantee issued by Standard Bank, had to be effected simultaneously as part of Nghwazi's payment conditions and obligations without which the transfer would not happen. He agreed that 3 of the 4 payment obligations were reimbursed subsequent to the cancellation of the sale by Nghwazi on 9 June 2017

[38] The agreement was cancelled as it was not executed. He confirmed that the agreement was cancelled and not declared void and/or unlawful by a competent court. Du Preez agreed that the Property was not transferred to Nghwazi. However, he would not comment when it was put to him that failure to do so constituted a breach by LSS as a result of which Nghwazi was within its own right to cancel. He also acknowledged that in line with the heads of LSS in Case No: 405/2017 the restrictive title conditions did not prevent a transfer of the Property.

[39] Cross-examined further, he accepted that the agreement was somehow destined to come to an end. He also acknowledged that the cancellation of the agreement had to be accompanied with preservation of the *status quo ante*. Du Preez also agreed that contrary to LSS' professed wish, it subsequently became entangled in a long-drawn-out litigation with the Municipality. Incredibly, Du Preez confessed under cross-examination that LSS did not intend to pass ownership to Nghwazi even though he had advised it to conclude the agreement.

[40] Du Preez agreed that restitution would follow as a matter of course in circumstances where an agreement was lawfully terminated. However, he would not respond when it was put to him that the payment guarantees, transfer costs and deposit were returned as a result of the valid cancellation of the agreement by Nghwazi. This

brought to an end the evidence of Du Preez and also marked the culmination of the evidence part of the whole case.

## **ISSUES**

[41] Neither party disputed that key to the resolution of this controversy is the interpretation of clause 3.2 of the agreement. If the meaning attributed to Clause 3.2 of the agreement is that the risk includes payment of the commission of Vans Auctioneers regardless of any event such as transfer of the property, LSS will not be held liable for payment. The reverse will mean the opposite. For proper assessment of this matter, it is important to examine both the documentary evidence together with the oral evidence levied by the two witnesses of the parties, Messrs Du Toit and Du Preez on behalf of Nghwazi and LSS respectively.

[42] The interpretation of Clause 3.2 of the agreement, however, is not the sole determinant of the outcome of this matter. Other issues to be considered prior to examining the main issue are, for example, the role played by LSS in the court granting the order prohibiting registration of transfer of ownership and title to Nghwazi on 28 July 2016. Another issue concerns whether or not the presence of the Restrictive Title Condition B (VIII (and (IX) barred transfer to Nghwazi. Lastly, it must be determined whether or not Clause 3.2 survived cancellation of the agreement.

## **LEGAL FRAMEWORK**

[43] To the extent that LSS relies on impossibility of performance, it could be useful to reinstate the general principle regarding impossibility of performance as described in *Hersman v Shapiro and Co* **1926 TPD 367**:

*“Therefore, the rule that I propose to apply in the present case is the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and that we must*

*look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether that general rule ought, in the particular circumstances of the case, to be applied.”*

[44] Thus, impossibility of performance as a defence will not assist a party seeking to rely thereupon if he is found to have created it. In this regard Paragraph 28 of *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd (2013) 3 All SA 351 (SCA)* serves as confirmation:

*“[28]It will have become clear by now that in considering the question whether the impossibility was due to the Municipality's fault, the issue of Landmark's, or even the Municipality's, knowledge of the land claims does not feature at all. It would have if the question of the assumption of risk by either Landmark or the Municipality had to be considered. That has become unnecessary in view of the finding that the impossibility was self-created. It follows that the general rule that impossibility of performance brought about by vis major or casus fortuitous will excuse performance of a contract does not avail the Municipality in this case. The appeal against the finding of the court below relating to the defence of supervening impossibility must, accordingly, fail.” See also, FRAJENRON (PTY) LTD v METCASH TRADING LTD AND OTHERS 2020 (3) SA 210 (GJ).*

[45] Both parties have referred me to cases pertinent to the question of interpretation of agreements, documents, statutes and/or court orders. The Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA)* at para 18 said the following:

*“.... Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is*

*directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”*

[46] The SCA in *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* (Case no 183/2019) [2020] ZASCA 58 (3 June 2020) was following on the footsteps of *Endumeni supra* when it held that:

*“[6] It is trite law that the provisions of a Deed of Sale must be read and understood in the context within, and having regard to the purpose for which, the Deed of Sale was concluded. The point of departure is the language employed in the document. But the words must not be considered in isolation. A restrictive examination of words, without regard to the context or factual matrix, has to be avoided. Evidence of prior negotiations is inadmissible, but evidence relating to the surrounding circumstances and the meaning to be given to special words and phrases used by the parties, is admissible. No distinction is drawn between context and background circumstances. Words have to be interpreted sensibly so as to avoid unbusinesslike results.”*

## **ANALYSIS**

## **IMPOSSIBILITY OF PERFORMANCE**

[47] The case of LSS is partly anchored on the order granted by the court in Case No: 47407/2015. The court in that matter essentially set aside the removal of the Restrictive Title Condition B(viii). It would appear that LSS opposed the application on the fallacy that reinstatement of the restrictive title conditions would prohibit registration of transfer of ownership to Nghwazi.

[48] Nghwazi, on the other hand, has always stood firm that it was prepared to take transfer of the property with all the attendant restrictive title conditions including B(viii) and (ix). Given the risk that Nghwazi was ready to assume, it was preposterous for LSS to have opposed the application. In any event, it is clear that the restrictive title conditions pertained to use rather than divestment in ownership.

[49] It is manifest from the testimony of Du Preez that from the time LSS concluded the agreement with Nghwazi, it knew that registration of transfer of ownership was not dependent on the removal of the restrictive title conditions. The steps upon which LSS embarked subsequent to the conclusion of the agreement bear testimony to this. These consisted, among others, requesting clearance certificates and launching an application against the Municipality for the provision of the figures when it delayed to supply the figures.

[50] There is no other manner of reading the actions of LSS other than that it knew that the restrictive title conditions were not a proscription to registration of transfer of ownership. Understood in that context, LSS' opposition of the application by the Municipality is, to say the least, confounding. To the extent that the court barred registration of transfer of ownership and title to Nghwazi as a result of the opposition by LSS, the latter cannot turn around and seek to rely on an impossibility that it created. This is the essence of the decision in the King Sabata Dalindyebo Municipality *supra*. In the result and to the extent that LSS relies on impossibility of performance as a defence, it is rejected and dismissed as bereft of any merit.

[51] The above said, it would appear that a proper interpretation of the order in Case No: 47407/2015 is that the court was simply stating that no registration of transfer of ownership should take place from LSS to Nghwazi for as long as the Nghwazi was not prepared to observe Restrictive Title Condition B(ix). Nghwazi was prepared to acquire ownership subject to that condition but for some reason LSS believed that registration of transfer of ownership would not be possible. As will be seen, the actions of LSS following the order in Case No: 47407/2015 demonstrate that LSS did not regard Restrictive Title Condition B(ix) as a barrier.

### **DID THE RESTRICTIVE TITLE CONDITIONS PROHIBIT REGISTRATION OF TRANSFER OF OWNERSHIP?**

[52] The actions of LSS subsequent to entering into the agreement are reminiscent of a party that believed that the restrictive title conditions would not bar transfer of ownership from it to another party as long as the party acquiring ownership was not only aware of the limitations of use imposed by the restrictive title conditions but also prepared to comply therewith. The admission by Du Preez that although he had advised LSS to conclude the agreement, it did not want to see registration of transfer of ownership passed to Nghwazi is enigmatic.

[53] If the parties believed that registration of transfer of ownership was not possible for as long as the restrictive title conditions were in place, the question is, why was the agreement not entered into subject to their removal or their non-reinstatement. It was vigorously argued on behalf of LSS that the order under Case No: 47407/2015 prevented registration of transfer. The events that unfolded subsequent to the granting of the order in that application, however, turn that assertion on its head.

[54] One profound and obvious question, for example, is why did Nghwazi adhere to the terms of the agreement by making payment if it knew that transfer would not be possible with the restrictive title conditions? The answer that the parties did not perceive

them as a barrier is inexorable. A further question that arises, is if it is right that the order handed down in Case No: 47407/2015 on 28 July 2016, prevented transfer of ownership, why did LSS wait for Nghwazi to cancel the agreement prior to reimbursement of the amounts that it had paid? The ineluctable answer is that both parties knew that it was still possible for transfer of ownership to be effected with all those restrictive title conditions still firmly in place.

[55] The obligations that ensued following the agreement between the parties that Nghwazi had to make payment of the deposit, transfer costs, commission of Vans Auctioneers and obtain a payment guarantee from Standard Bank had to be met prior to registration of transfer of ownership and were not part of the risk as intended in Clause 3.2. A concomitant obligation that was expected from LSS was to give ownership of the property to Nghwazi, which it failed to do.

[56] While the one party, Nghwazi, had observed the terms, LSS, by its failure to give transfer of ownership, as envisaged, contravened the terms of the agreement. This rendered the transaction susceptible to cancellation and restitution. It is common cause, if the evidence of Du Preez is anything to determine this, that Nghwazi cancelled the agreement as a result of the failure of LSS to give transfer of ownership.

[57] In the absence of a provision to the contrary in the agreement, the cancellation of the agreement due to the breach by LSS should have been complemented with the return of the payment guarantee, deposit, transfer costs and commission of Vans Auctioneers. Du Preez conceded that this would have been a natural consequence of the cancellation but could not explain LSS' failure to reimburse Nghwazi with the commission of Vans Auctioneers.

[58] One event that made any registration of transfer of ownership of the property to any party impossible was the order granted on 4 May 2018 under Case No: 405/2017. The court order permitting the Municipality to expropriate the property was inspired by LSS' failure to adhere to Restrictive Title Condition B(ix) requiring it to hold agricultural

show biennially. For what it is worth, Nghwazi was mindful of this condition and was prepared to comply with it prior to expropriation, it having understood that if the property was subsequently transferred into its name and then expropriated, Clause 3.2 would operate against it. As such, the restrictive title conditions never constituted a hindrance to registration of transfer of ownership.

### **DID CLAUSE 3.2 SURVIVE CANCELLATION OF THE AGREEMENT**

[59] Here I agree with Nghwazi that it is trite that generally, unless an agreement specifically provides otherwise or a contrary intention of the parties is evident from the agreement or the provision is of such a nature that it accommodates continued existence, a provision in a cancelled agreement cannot endure beyond the life of the agreement itself. Nothing in the agreement suggests the inapplicability of the general rule as described *supra*. As such, if it is accepted that Nghwazi cancelled the agreement, Clause 3.2 is inoperative and cannot be relied upon to excuse LSS from liability.

### **INTERPRETATION OF CLAUSE 3.2**

[60] Here it is important to emphasise that both the Indumeni and Iveco cases *supra* mention the language, context and purpose of the document to be interpreted as being vital. Accordingly, these are the three elements on which I will now focus in an endeavour to resolve this dispute.

### **CONTEXT AGAINST WHICH THE AGREEMENT WAS CONCLUDED**

[61] Nghwazi was desirous of purchasing the property, which it intended to use for whatever purpose but within the precincts of the restrictive title conditions. LSS was the owner of the property and it wished to dispose of it provided the purchaser would be willing to acquire it subject to the restrictive title conditions from which it suffered. In their wisdom, the parties prescribed certain condition precedents.



These were that Nghwazi would obtain a payment guarantee, pay the deposit, transfer costs and commission of Vans Auctioneers upon the fall of the hammer. Once this had been done, LSS on the other hand, was expected to obtain clearance certificates and cancel any encumbrances that could obstruct registration of transfer of ownership. LSS would have done these in preparation to passing ownership to Nghwazi.

[62] Clause 3.2 was conceived in circumstances where the Municipality was threatening to expropriate or reintroduce the restrictive title conditions or apply for the imposition of caveats on the property. This explains why Vans Auctioneers was instructed to warn potential purchasers of the risks and perils associated with the purchasing of the property. Nghwazi entered into the agreement mindful of all these and was prepared to confront whatever contingencies, negative or positive, that could be brought about by the actions of the Municipality. It was against this background that the parties concluded the agreement. The language used in the agreement must as such, be understood in this context.

[63] The context suggests that delivery (registration of transfer of ownership) of the property to Nghwazi would first happen prior to the passing of risk. Before registration of transfer of ownership there existed only obligations of the parties. On the one hand, Nghwazi had to pay the commission of Vans Auctioneers, deposit, transfer costs and obtain a payment guarantee from Standard Bank. Similarly, LSS had to adhere to its side of the bargain – apply for clearance certificates, remove all impediments such as, mortgage bond cancellation, etc. These obligations were not risks but were merely requirements, which once fully executed would have passed the risk to Nghwazi. The risk would not pass for as long as registration of transfer of ownership had not occurred.

### **LANGUAGE USED IN CLAUSE 3.2**

[64] The language employed to deliver the intended message in Clause 3.2 is plain. It

leaves no room for any other meaning other than that which is intended by the parties. The significance of the clause requires it to be fully cited once again at this point. It provides that:

*“The Purchaser hereby takes full risk for, and accepts all or any negative consequences, including but not limited to expropriation, restrictive title conditions, caveats etc. that may result from the actions of the Mbombela Local Municipality and will have no claim against the Seller emanating from the above.”*

[65] If at the time of the conclusion of the agreement it is accepted, as the parties do, that certain obligations were imposed on them, Nghwazi could not have taken any risks or attracted any negative consequences of the Municipality because there was only a threat of those happening. In any event, only one party to the agreement (Nghwazi) had performed whereas LSS had not. If the risks and/or negative consequences were assumed at the time of the conclusion of the agreement, the agreement would have been nonsensical.

[66] The above must be so because Nghwazi would be taking a risk in circumstances where LSS had not adhered to its side of the bargain. In fact, to employ the language used in the Indumeni case *supra*, it would be ‘unbusinesslike’ with preposterous consequences. Who in his right mind would risk his hard-earned assets in such a transaction? In my opinion, No one. Risk and/or the negative consequences would only creep into the arena once performance by both parties has been executed.

[67] I agree with Nghwazi that it undertook to accept full risk and all negative consequences including but not limited to expropriation, restrictive title conditions, *caveats* that could result from the actions of the Municipality. Clause 3.2 would only find application post registration of transfer of ownership into the name of Nghwazi. It was never the intention of the parties that LSS would be excused from liability in

circumstances where registration of transfer of ownership had not happened. Transfer has always been possible otherwise Nghwazi would not have concluded the agreement. Besides, LSS would have misrepresented to Nghwazi that it could pass ownership of the property when it could not.

### **PURPOSE OF THE TRANSACTION**

[68] The parties' objective when concluding the agreement was to ultimately pass ownership of the property from the one to the other. To accomplish their objective, the parties had certain obligations. Only Nghwazi fully discharged its obligations and had the right to demand registration of transfer of ownership into its name. When LSS could not perform, Nghwazi elected to cancel and demanded restitution as the purpose of the agreement could not be realized.

### **COSTS**

[69] There can be no doubt that LSS is liable for the costs of Nghwazi. However, it is another to expect LSS to pay such costs at the scale as between attorney and client. The opposition of the matter was not as vain that LSS should be mulcted with punitive costs. In my opinion normal party and party costs should suffice.

### **CONCLUSION**

[70] LSS cannot rely on impossibility of performance because subsequent to the conclusion of the agreement it opposed the reintroduction of the restrictive title condition when they had nothing to do with registration of transfer of ownership to Nghwazi. Thus, LSS contributed towards the court's order prohibiting transfer of the property from it to Nghwazi. In that sense, the impossibility was self-created. The restrictive title conditions did not bar registration of transfer of ownership to Nghwazi.

[71] Similarly, LSS cannot rely on the provisions of Clause 3.2 because it does so in circumstances where the agreement has been cancelled. In the absence of a specific provision that Clause 3.2 would survive the agreement, it is accepted to have stopped being of utility to either party by the cancellation. Clause 3.2 does not allow for an interpretation that contemplates risk passing to Nghwazi prior to registration of transfer of ownership to Nghwazi. On a balance of probabilities, I am satisfied that Nghwazi has demonstrated that it is entitled to be reimbursed in the amount claimed. In the result, the action against LSS succeeds.

## **ORDER**

[72] I make the following order:

1. LSS is directed to pay the amount of R3 192 000.00 to Nghwazi;
2. Interest on the aforesaid sum of R3 192 000.00 calculated at the rate of 10,25% per annum *a tempore morae*;
3. LSS is liable for the payment of the costs of Nghwazi.

**B A MASHILE**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**MPUMALANGA DIVISION, MBOMBELA**

*This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 27 September 2021 at 10:00.*

**APPEARANCES:**

**Counsel for the Plaintiff:**

**Instructed by:**

**Adv J De Beer**

**WDT Attorneys INC.**

**Counsel for the Defendant:**

**Instructed by:**

**Adv J H Roelofse**

**Kruger & Partners INC**

**Date of Hearing:**

**16 March 2021**

**Date of Judgment:**

**27 September 2021**