



**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, MAKHANDA**

**CASE NO: 864/2020**

In the matter between:

**ON FARM HOLDINGS (PTY) LTD**

**Plaintiff**

**and**

**ARNOLDUS JACOBUS VAN DEN HEEVER N.O.**

**First Defendant**

**LITA VAN DEN HEEVER N.O.**

**Second Defendant**

**ANDRE DAVID PRETORIUS N.O.**

**Third Defendant**

**ARNOLDUS JACOBUS VAN DEN HEEVER N.O.**

**Fourth Defendant**

**LITA VAN DEN HEEVER N.O.**

**Fifth Defendant**

**ANDRE DAVID PRETORIUS N.O.**

**Sixth Defendant**

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**JUDGMENT: ABSOLUTION**

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**LOWE J:**

**Introduction**

- [1] This matter came before me on trial, proceeding on a special plea only. There was a dispute as to the duty to begin and in this regard I produced a full ex tempore judgment dealing with the various issues and ordering that for the purposes of the separated issue the plaintiff bore the onus of adducing evidence and had the duty to begin in respect thereof, reserving the costs. Plaintiff, commenced leading evidence and having done so closed its case.

Defendants then applied for an order of absolution from the instance. It is to this aspect of the matter that this judgment is directed.

- [2] The plaintiff's case proceeds on the basis that it accrued various rights and entitlements in terms of a written agreement and that it has suffered damages in consequence of the defendants', who are the trustees of the AJ van den Heever Familie Trust ("Familie Trust") and the Van den Heever Dogters Familie Trust ("Dogters Trust"), having unlawfully repudiated their agreement.
- [3] The matter is complex in some respects and my interim ruling on the duty to being was provisional, raising issues of interpretation of both legislation and contract, the full context and purpose not being fully elucidated at the time of that ruling.
- [4] The issue of the lawfulness and validity of the management and share milking agreement ("MSMA"), relied upon by the plaintiff as the basis for its claim, having regard to the provisions of the Sub-Division of Agricultural Land Act 70 of 1970 ("SALA"), was separated relevant to the issues arising out of paragraphs 1.4.13 and 1.4.14 of the defendants' amended special plea and the relevant annexures annexed to the plaintiff's amended particulars of claim, together with paragraph 17 to 23 of the plaintiff's replication.
- [5] Defendants plead that the MSMA relied upon by the plaintiff is a lease of agricultural land for ten years, and as it excluded the use of an undivided portion of one of the farm properties subject to the MSMA, gave rise to a contravention

of section 3(d) of SALA and as a consequence the MSMA is void being unlawful.

- [6] The replication takes issue with the contention that the MSMA was in contravention of SALA and pleads that the exclusion of what is described as the excluded improvements for use by Mr. van den Heever does not give rise to a contravention of SALA (properly interpreted).

### **Absolution at the end of the plaintiff's case**

- [7] The term "*absolution from the instance*" is used to describe two concepts relevant to a finding that may be made at either of two distinct stages of the trial. In both cases this conveys that the evidence is insufficient for a finding to be made against the defendant if the argument is successful.
- [8] Absolution may be granted at the end of the plaintiff's case if at that stage there is no evidence to support the plaintiff's claim, or insufficient evidence upon which a court acting reasonably might find for the plaintiff. There is then no prospect that the plaintiff's claim might succeed and in those circumstances the defendant should be spared the trouble and expense of continuing to mount a defence to a hopeless claim.
- [9] The test for determining absolution at the close of the plaintiff's case was dealt with in **Claude Neon Lights SA (Pty) Ltd v Daniel**<sup>1</sup> as follows:

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<sup>1</sup> 1976 (4) SA 403 (A) at 409 G – H.

“... [W]hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence lead by the plaintiff eestablsihes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.”

[10] In **Gordon Lloyd Page and Associates v Rivera and Another**<sup>2</sup> it was held that this requires the court to find that there is evidence relating to all the elements of the claim. Harms JA stressed that the court ought not to be concerned with what someone else might think but rather with its own judgment and not that of another “*reasonable*” person or court.<sup>3</sup> The test was put slightly differently in **De Klerk v Absa Bank Ltd and others**<sup>4</sup> (*supra*) as being whether a court, if no further evidence were led, and after a reasonable application of its mind, might find in favour of the plaintiff.

[11] Of course, in this matter, and as I will deal with more fully hereafter, the principal issues relate to the interpretation of contract and statute, this being a matter of law for the court to decide, but nevertheless taking into account the context thereof in a unitary exercise, the issue of onus being substantially less relevant.

[12] One must bear in mind that the courts have frequently emphasized that absolution should not be granted at the end of the plaintiff’s evidence except in very clear cases, and that questions of credibility should not normally be

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<sup>2</sup> 2001 (1) SA 88 (SCA).

<sup>3</sup> At 921 I – J. This was confirmed in *De Klerk v Absa Bank Ltd and Others* 2003 (4) SA 215 (SCA) at [10].

<sup>4</sup> See footnote 3.

investigated until a court has heard all the evidence which both sides have to offer.

[13] In matters of interpretation, the authorities hold that the trial court should normally refuse absolution unless the proper interpretation appears to be beyond question.<sup>5</sup>

[14] In **Rosherville Vehicle Services vs BFM Plaaslike Oorgangsraad**<sup>6</sup> Olivier AJ makes it clear that where a plaintiff's case depends on a document, and its interpretation is in issue, the interpretation upon which the defendant relies must be beyond doubt before an absolution application can succeed. The court set out that the interpretation of the document should preferably in fact be determined at the end of the case. As authority herefor the court referred to **Gafoor v Unie Versekerings Adveseurs (Edms) Bpk**<sup>7</sup>.

[15] The challenge which defendants must mount requires to meet the test of establishing the interpretation for which they contend, upon a proper interpretation of the document in the manner set out hereafter, to the extent that the interpretation contended for must be beyond question. This is not an onus issue but one of law.

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<sup>5</sup> **Gafoor v Unie Versekerings adverseurs (Edms) Bpk** 1961 (1) SA 335 (A) at 340 C; **Botha v Minister van Lande** 1967 (1) SA 72 (A) at 76 E – G; **Marine and Trade Insurance Company Ltd v Van Der Schyff** 1972 (1) SA 26 (A) at 38 H – 39 A; **Malcolm v Cooper** 1974 (4) SA 52 (C) at 59 D – E; **Rosherville Vehicle Services (Edms) Bpk v Bloemfontein se Plaaslike Oorgangsraad** 1998 (2) SA 289 (O) at 293 B – I.

<sup>6</sup> 1998 (2) 289 (OPD) at 293 B – I.

<sup>7</sup> At 340 C; **Botha v Minister van Lande** (*supra*); **Marine and Trade Insurance** (*supra*) at 38H – 39B; **Build-A-Brick BK en n Ander v Eskom** 1996 (1) SA 115 (O) at 123 E.

## **The pleadings**

- [16] Plaintiff pleads that the MSMA concluded in May 2018, annexure A to the particulars of claim, provided that the Familie Trust and the Dogters Trust would make available to Bridge Farm Dairy (Pty ) Ltd ("Bridge farm") for its use, in order to conduct a dairy farming enterprise on their farming properties, 3 in number, being separate portions of the farm Tark Bridge, together with water and all dairy farming infrastructure, in terms of which the plaintiff ("On farm") would pay to the two trusts collectively the sum of R1 million per annum annually.
- [17] The two trusts were to jointly pay to Bridge Farm the sum of R200 000,00, and plaintiff ("On farm") would make available to Bridge Farm for its use various cows, tractors, and equipment, On Farm to pay Bridge Farm R200 000,00.
- [18] Plaintiff alleges that Bridge Farm would be utilised as a "*vehicle for the conduct of the dairy farming enterprise as a joint venture*" between the two trusts on the one hand and plaintiff (On farm) on the other. Plaintiff alleges further that Bridge Farm appointed On Farm as its sole and exclusive manager of the dairy farming enterprise.
- [19] Defendants deny that the material terms of the MSMA were correctly summarised by the plaintiff pleading its understanding thereof, and in the special plea, that if the MSMA and its addendum in fact constituted a binding agreement between the parties, this constituted an agreement in terms of which defendants undertook to lease the farm properties to Bridge Farm for a period

of not less than 10 years, but pertinently excluded portions of the farm properties from the operation of the lease; the addendum recording that the amount payable to defendants as an “*annual rental*” was an amount of R1 million per annum. Defendants then plead that the farm properties are agricultural properties as defined in SALA leased for 10 years, and accordingly in accordance with section 3(d) of SALA, such lease (and MSMA) is unlawful and void.

[20] The replication denies these allegations alleging that a joint venture was established, conducted between the two trusts and On Farm and Bridge Farm, which was the vehicle from which a joint venture was to be conducted.

[21] It is particularly pleaded that with that purpose in mind, the MSMA, was not, as to content or substance, in the nature of a lease, and thus avoids SALA.

[22] Plaintiff further pleaded in its replication that the exclusion of certain of the improvements did not constitute an undivided portion of agricultural land on a proper interpretation of SALA, and that the purpose of the introduction of clause 36 to the MSMA, in the addendum, was to increase the benefit to be received by the two trusts from the joint venture.

[23] The MSMA itself is lengthy, clause 2 thereof referring to a joint venture dairy enterprise conducted by the two trusts and plaintiff (rendering available the livestock and implements) which granted the management of the joint venture to Bridge Farm. The improvements excluded in clause 2.1.9, as defined, relate to several improvements of the properties excluded from the transaction which the family trust would retain for the sole use of Mr. van den Heever including

sheds, housing and buildings (being a private dwelling and an auction complex and feed lots) – necessarily situated on the property and including at least a portion of the property.

- [24] The addendum introduced a new paragraph 36 into the MSMA headed “*Rental in respect of infrastructure and properties*” and provided that plaintiff would pay to the trusts R1 million annual rental, this to be a joint venture expenditure.
- [25] Defendant argues that the pleading in paragraph 10 of the particulars of claim provides clearly that the two trust made available to Bridge Farm various farming properties, excluding the farming infrastructure identified, for which On Farm would pay R1 million per annum this being no more nor less than the lease of properties for a rental sum.
- [26] That this was a lease is fully pleaded (in the plea) and, argues defendants, is not adequately met in the replication, on the face of it, against the MSMA with its addendum.
- [27] Defendants argue that if this is a lease, and that it is, this is for a period of ten years, and, were it a lease, it is common cause that section 3(d) of SALA would render this unlawful and void, as the MSMA pertinently excluded portions of the farm properties from operation of the lease, as more fully referred to above.
- [28] Defendant points out that in the further particulars for trial, plaintiff alleges that the instruction given to attorney de Jager as regards the addendum related to an annual rental to be paid to the trusts in the sum of R1 million. It is further argued that it is said in the further particulars that clause 36 of the MSMA was introduced by the addendum –making clear that this was a lease with a rental.



[29] Plaintiff's argument is two-fold the crucial issue in fact being:

29.1 That defendant alleges that the MSMA is a lease plaintiff stating the contrary;

29.2 That defendant says if it was a lease, it is in breach of SALA, plaintiff denying this and saying it is not, on the basis of SALA properly interpreted.

[30] In amplification, plaintiff argues that the MSMA is a joint venture agreement, not a lease, in terms of which the trusts made available farming property to Bridge Farm in order to conduct a dairy business with the herd and equipment referred to in the MSMA, provided by the trusts. Plaintiff argues that, in consideration therefor, Bridge Farm would pay plaintiff management fees, being 50% of the annual net profit of Bridge Farm (put simply), which was a reward in respect of management services rendered and the livestock and tractor and implement contribution.

[31] Plaintiff also argues that if it was a lease, it did not breach SALA referring to the matter **MPR De Villiers v Elspiek Boerdery (Pty) Ltd and another**<sup>8</sup>.

[32] It contends that this authority supports its argument that defendant sought to escape liability, relying on a breach of SALA, and bore the onus in that regard, carrying a duty to satisfy the court that it ought to succeed on the issue, and also having to adduce evidence in regard to the factual background relevant to the defence.<sup>9</sup>

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<sup>8</sup> 2015 JDR 2195 (WCC) particularly paragraph [21] and [29].

<sup>9</sup> **Diners Club SA (Pty) Ltd v Singh** 2004 (3) SA 630 (D) at 645 F – G.

[33] I have already set out the defendants' main contention relevant to the above, save that defendant argues that the question of illegality in respect of SALA is an illegality not based on an agreement being contrary to public policy, but relevant to compliance or noncompliance with SALA, properly interpreted. This argument is fundamental to defendant's position. The effect on a contract of a contravention of a statute is determined with reference to the specific statute contravened, properly interpreted, in this matter, it being common cause that if this is so this would render the contract unlawful and void.

[34] Having regard to my ruling on the duty to begin relevant to the above it would be supererogation to repeat what I said but this remains relevant as it impacts on my judgment on the separated issue to the extent quoted below:

"[43] Christie the Law of Contract in South Africa 8<sup>th</sup> Ed page 421 says that the onus of proving compliance or non-compliance with the statutory requirement will depend upon a proper construction of the statute. The work suggests that a plaintiff seeking to enforce a contract of that kind must therefor allege and prove compliance with statutory requirements referring to **Noffke v Credit Corporation of SA Ltd**<sup>10</sup>. This applying to a statute which provides that no contract of a particular type shall be of any force or effect unless a certain requirement has been complied with.

[44] It would be the reverse if the statute assumes that the contracts are valid but provides that they shall be of no force or effect in certain specified circumstances in which event a plaintiff seeking to enforce that kind of contract was not required to allege and prove that the circumstances do not exist in relation to the contract. It would then be for the defendant relying on statutory illegality as a defence to allege and prove the existence of the circumstances.<sup>11</sup>

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<sup>10</sup> 1964 (3) SA 451 (T).

<sup>11</sup> **P Trimborn Agency CC v Grace Trucking CC** 2006 (1) SA 427 (N) at 430 – 1.

[45] Where an agreement is contrary to legislation, its validity must be sought primarily in the wording of the legislation itself. An agreement may be declared invalid or unenforceable expressly or by implication. In this matter there are two issues, firstly the agreement must be a lease to potentially be struck by SALA in this instance, and secondly the question is whether or not if it is a lease, it is in fact struck by SALA.

[46] As to interpretation, it is now trite both as to statute and documents that *“the interpretation of language, including statutory language, is a unitary endeavour requiring consideration of text, context and purpose”*.<sup>12</sup>

[47] In SALA section 3(d) provides that no lease in respect of a portion of agricultural land of which the period is 10 years or longer (inter alia) “shall be entered into” unless the Minister has consented in writing. It is common cause that there has been no consent.

[48] On the appropriate approach to interpretation in the context applicable at least at this stage of the matter before me, it is more than clear that the provisions of SALA render such a lease agreement as being unlawful and void ab initio if in contravention thereof – indeed the contrary was not contended. Such a lease is simply prohibited.

[49] Put otherwise, having regard to the reasons for holding statutory provisions void as set out in **De Fari v Sheriff, High Court, Witbank**<sup>13</sup> - it is impossible to escape the conclusion that the legislature intended the general rule to apply that is that non-compliance with the prescriptions of SALA result in nullity. The provision is couched in peremptory language, as well as negative language and a criminal sanction is imposed if the provisions are not complied with.

[50] It follows, in my view, that a plaintiff seeking to enforce a contract subject to SALA must allege and prove compliance with the statutory requirements in the event of the contract being subject thereto.

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<sup>12</sup> **Better Bridge Pty Ltd v Masilo and Others** NNO 2015 (2) SA 396 (GNP) [8]; **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) [20] – [24]; **Cool Ideas 1186 CC v Hubbard** 2014 (4) SA 474 (CC) [28].

<sup>13</sup> 2005 (3) SA 372 (T)

[51] That defendant has raised non-compliance, assuming that the agreement as a lease and is struck by the provisions of section 3(d) of SALA, the necessary onus falls upon the plaintiff as a matter of law to allege and prove compliance with those statutory requirements.

[52] It does not seem to me to vary the position that plaintiff alleges that the agreement which on the face of it, refers to rental, is in fact not a lease agreement, and thereby not subject to SALA, alternatively that in its terms it is not struck by SALA.

[53] In that sense, it seems to me that this is not a “*special defence*” as set out in the authorities.”

### **The trial on the special plea referred to above**

[35] Plaintiff called the evidence of Pierre Scheepers, who is a director of plaintiff (On Farm) as is his wife, Ronelda. Having done so, plaintiff then closed its case and defendants applied for absolution.

[36] He explained in his evidence that On Farm is a dairy business which commenced in 1994, now running some 5000 cows, milked on different farms.

[37] He sketched the background to his having come into contact with first defendant, Arnoldus van den Heever, an adult male farmer of the farm Tarka Bridge in the Cradock district, who is also a trustee of the Familie Trust and the Dogters Familie Trust

[38] In short, the evidence was that Mr. A van den Heever had indicated to him in a phone call that he was “*in trouble*” and needed Mr. Scheepers’ assistance in

this regard. Apparently, a discussion was had briefly relevant to “*sharemilking*”, that is a situation where a farmer, supplies land (usually already developed) to someone else who has the relevant cows – the management of the cows on the farmer’s land is left to those with the necessary management knowledge, the income to be shared this being negotiated, but usually on a fifty-fifty basis.

[39] This was followed by a meeting on the intended farm, where the general ideas were discussed, and the farm examined – this having a half finished milking parlour with no machinery. This contemplated something in the region of a thousand head of stock, which was described as “*no joke*”, the question was whether it would work on the property offered.

[40] In summary, the farm comprised certain centre pivot irrigation machinery on a number of areas, which would be planted with an appropriate selection of feed bearing crops suitable to a dairy herd, the pivots being sixteen in number. Lucerne was present on some of the pivot areas and was not entirely suitable and had to be changed to a mixed feeding crop, some of which would be suitable for winter grazing, it being clear that the dairy cattle would graze on the crops themselves in the irrigated pastures.

[41] He described the operation of a rotary milking parlour, with appropriate machinery, holding tanks, and the like, the animals requiring to be brought into the parlour from holding pens outside and then released into the pastures to feed for the next rotation twelve hours later.

[42] He explained that attorney De Jager was engaged by the parties to draft an agreement appropriate to the situation, resulting in the MSMA relevant to this matter.

[43] Much of Mr. Scheepers' evidence comprised his reading through various clauses in the contract, or having these read to him, confirming same for whatever purpose that was intended to achieve.

[44] I will refer to such evidence as was given in addition hereto, where appropriate.

[45] Paragraph 2.1.8 of the agreement reads as follows:

“‘Bridge Farm’ means Bridge Farm Dairy (Proprietary) Limited, (Registration Number 2017/526198/07) a private company registered, incorporated and existing in accordance with the laws of South Africa, herein represented by Koot van den Heever in his capacity as director, duly authorized thereto, its successors in title and/or assigns, which Joint Venture Dairy Enterprise shall be conducted by the Trust and the Van den Heever Trust (rendering available the Properties and dairy infrastructure to Bridge Farm) and On Farm (rendering available the Livestock Contribution and the Tractors and Implements, as set out on Annexure “D” to Bridge Farm) and providing the management for the Joint Venture Dairy Enterprise trading as Bridge Farm Dairy.”

[46] In this regard he commented simply that this was the purpose of the agreement.

[47] I pause to say that Bridge Farm comprised the properties defined in the MSMA, three in number, together with their improvements and registered water entitlements, but excluding those described in clause 2.1.9, predominantly the private dwelling occupied by Koort van den Heever, with a guest house,

garages and outbuildings adjacent thereto, including significantly “*the auction complex and feedlots*”.

- [48] It was clear from Mr. Scheepers’ evidence that, at least in his mind initially, the parties would conduct a joint venture dairy enterprise, the property made available to Bridge Farm, van den Heever through the trusts providing the property, whilst On Farm would provide the cows and management.
- [49] There was reference to the need to secure a milk buyer to purchase the milk that was to be produced – this being accomplished early on, and thereafter he gave detailed evidence concerning the excluded improvements, as identified on various maps, diagrams, and Google Earth images.
- [50] It was more than apparent from the evidence in this regard that significant portions of land were utilised for farming purposes (surrounding the excluded auction complex and feedlots) in areas of, in one instance, 9 hectares and in another, 1,49 hectares, this land being within the boundary established by the witness Scheepers on the main plan relevant, in respect of the farming property utilized by Bridge Farm.
- [51] Whilst, in the context of the entire farming property it may seem that these particular areas were not enormously significant, they constitute together more than ten hectares of usable land, in this instance feedlots and holding pens relevant to the auction and feedlot enterprise conducted on the farming property by Mr. van den Heever, and not by On Farm or Bridge Farm.

[52] In my view, it is not necessary to set these out in any detail, save to say that this also included a significant number of buildings relevant to the enterprise conducted by van den Heever.

[53] Turning to the addendum to the MSMA this reads as follows as to its relevant portion:

“2. AMENDMENT

2.1 The Parties wish to include the following term in the Agreement, as if specifically incorporated therein:

36. RENTAL IN RESPECT OF INFRASTRUCTURE AND PROPERTIES

On Farm shall pay to the Trusts an annual rental, amounting to R1 000 000,00 (One Million Rand) per annum, payable annually in arrears. The aforesaid rental shall be a Joint Venture expenditure and, as agreed, there shall be no escalation.”

2.1 By amending clause 8.8.3 to read as follows:

8.8.3 The Parties record that the Trust has, irrespective of the Commencement Date as set out in this Agreement, planted pastures and the Trust’s expenditure with regard to seed and fertiliser, amounts to R1 984 000,00 (One million nine hundred and Eighty Four Thousand Rand), which shall be deemed to be Joint Venture expense, irrespective of the aforesaid costs having been incurred prior to the Commencement Date. The Trust shall provide all the supporting documentary vouchers, supporting the aforesaid expenditure to On Farm, prior to the Commencement Date. On Farm shall pay on the Commencement Date to the Trust, into the Trust’s nominated bank account, the amount of R992 000,00 (Nine Hundred and Ninety Two thousand Rand) (excluding VAT) being On Farm’s contribution towards the establishment of pasture costs on the Properties.”



[54] Mr. Scheepers was at pains to point out that the excluded assets were of no use of, or interest to, the dairy farming enterprise, which depended entirely on the sixteen pivot irrigable land areas and the milking parlour and holding pens, stating further that the existence of other cattle on the property was, in fact, dangerous or injurious potentially to the dairy herd, relevant to the transmission of communicable diseases.

[55] He also dealt with the background to the conclusion of the addendum to which I will refer hereafter.

[56] I will, where necessary, revert to the MSMA in due course in its relevant terms.

### **Interpretation as to Principles and their application**

[57] The decision which I must make in this matter involves both the issues of contractual interpretation relevant to the MSMA and its addendum, but also potentially the provisions of SALA, as relevant to the dispute plaintiff having a two phase argument in this respect.

[58] I have very briefly above referred to the general approach to the interpretation of contracts and legislation, this being a unitary endeavour requiring consideration of text, context, and purpose as set out in **Endumeni** (*supra*).

[59] This is easily said but not as easily applied and requires careful elucidation in order to inform the interpreter as to the proper approach to context, somewhat differently relevant to contract and statute.

[60] As much as the **Endumeni** approach to interpretation is trite, it is worthwhile further considering same as subsequently referred to in a number of decisions which I deal with below.

[61] In **Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others**<sup>14</sup> Unterhalter AJA said as follows:

“[25] .... The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*<sup>15</sup> offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, ‘[t]he inevitable point of departure is the language of the provision itself’.<sup>16</sup>

[26] None of this would require repetition but for the fact that the judgment of the high court failed to make its point of departure the relevant provisions of the subscription agreement. *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.<sup>17</sup>

[62] Perhaps what may be added to this is that as was said in **Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd**<sup>18</sup>, the conduct of the

<sup>14</sup> [2021] ZASCA 99 (9 July 2021)

<sup>15</sup> **Natal Joint Municipal Pension Fund v Endumeni Municipality** [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.

<sup>16</sup> *Endumeni* para 18.

<sup>17</sup> Para [25] and [26].

<sup>18</sup> 2012 [ZASCA] 126 paragraph 15.

parties in implementing an agreement may, even in the absence of ambiguity, provide clear evidence as to how reasonable persons of business construed a disputed provision in a contract.

[63] As further pointed out in **Capitec**, there is now an expansive approach to interpretation, as laid down in **Endumeni**, extrinsic evidence being admissible to understand the meaning of the words used in a written contract. Such evidence may be relevant, as it was said, to the context within which the contract was concluded and its purpose, and this is so whether or not the text of the contract is ambiguous, either patently or latently.<sup>19</sup>

[64] Unterhalter AJA also pointed out that the parol evidence rule is an important principle that remains part of our law, and at first blush may be at odds with the broad admission of intrinsic evidence to establish the context.

[65] Here, one must turn to the Constitutional Court decision in **University of Johannesburg v Auckland Park Theological Seminary and Another**<sup>20</sup>, where the Constitutional Court affirmed that an expansive approach should be taken to the admissibility of its intrinsic evidence of context and purpose, whether or not the words used were ambiguous, so as to determine what the parties of the contract intended.<sup>21</sup>

[66] Indeed, in **University of Johannesburg**<sup>22</sup> the following appears:

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<sup>19</sup> **Capitec** paragraph 38.

<sup>20</sup> 2021 [ZACC] 13.

<sup>21</sup> **Capitec** paragraph [39].

<sup>22</sup> Para 68.

“Let me clarify that what I say here does not mean that extrinsic evidence is *a/ways* admissible. It is true that a court’s recourse to extrinsic evidence is not limitless because “interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses”. It is also true that “to the extent that evidence may be admissible to contextualise the document (since “context is everything”) to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible”. I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.’<sup>23</sup>

[67] In summary then as pointed out by Unterhalter AJA in **Capitec**<sup>24</sup> this gives a very wide remit to the admissibility of extrinsic evidence of context and purpose.

[68] As regards the parol evidence rule the Constitutional Court in **University of Johannesburg** dealt with the tension between the historical exclusion of parol evidence and the concept that context is everything as follows:

“The integration facet of the parol evidence rule relied on by the Supreme Court of Appeal is relevant when a court is concerned with an attempted amendment of a contract. It does not prevent contextual evidence from being adduced. The rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement. . . .’<sup>25</sup>

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<sup>23</sup> **University of Johannesburg** para 68.

<sup>24</sup> Paragraph [40].

<sup>25</sup> **University of Johannesburg** para [68]; **Capitec** paragraph [41].

[69] Unterhalter AJA then considers the parol evidence issue – it is not relevant however to this matter and I leave it at what I have said above.

[70] In an illuminating passage, Unterhalter AJA states as follows:

“[50] Endumeni simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.<sup>26</sup>

[71] In this matter, it is clear that the evidence as to pre-contractual exchanges between the parties leading up to the conclusion of the contract and its drafting by attorney De Jager are relevant, as well as such additional evidence as there

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<sup>26</sup> **Capitec** para [50] and [51].

was relevant to the context in which the contract was concluded. At this stage of the enquiry, of course, I not having the benefit of defendants' evidence in this regard.

[72] The MSMA and its addendum in this matter must be interpreted in the light of its context, so as to ascertain the parties intention as a unitary consideration of text, context, and purpose, but as I have pointed out above, considering the text, its words and sentences as they fit into the larger structure of the MSMA, its context and purpose.

[73] In commercial contracts such as this, where the parties had a design in mind with words and concepts chosen to give effect to that design, as was pointed out in **Capitec**, the interpretation begins with the text and its structure, that being the gravitational pull referred to, the context and purpose then to elucidate the text.

[74] It is helpful to refer to an article in the PELJ 2019 (22) by Wallis JA concerning the issues relevant to interpretation.

[75] This bears upon both contractual and statutory interpretation and elucidates that approach in each instance.<sup>27</sup>

[76] Having commented extensively on the genesis of interpretation through to **Endumeni** the author referring to text and context states that:

“*Endumeni* does away with the idea in *Coopers & Lybrand* that interpretation is an exercise that occurs in stages. The starting point is the text, because as the

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<sup>27</sup> PER 2019 (22) page 1 Wallis JA.

writer Elena Ferrante expresses it: "The words, the grammar, the syntax are a chisel that shapes our thought." But from the outset that is viewed in context, so that the process is both textual and contextual.

There will be some cases, though they are likely to be few, where the language admits of only one meaning, in which event no amount of reliance on context can avoid that meaning. In my experience, the ingenuity of counsel can usually find arguments favouring an alternative meaning, however unlikely they might seem in the light of the grammar and syntax of the provision under consideration. Then context will come into play to a greater or lesser extent. The clearer the language used in the text and the more obvious its meaning in accordance with the ordinary understanding of language, the less the influence of context in arriving at a conclusion as to its meaning. The more possible meanings there are and the more finely balanced they are, the more powerful will be the influence of contextual factors in the ultimate decision. In construing legislation or developing the common law the influence of the spirit, purport and objects of the Bill of Rights is an essential part of the context. But there is a line to be drawn beyond which the interpreter cannot go. Context cannot be used to create a meaning that the language, when viewed in context, is incapable of bearing. That is not interpretation. It is contractual or legislative drafting."

- [77] The author refers to the fact that there is, from **Endumeni**, the notion that the process of interpretation is objective, simply indicating that one is not trying to go behind the contract to any unwritten or unexpressed intention formed by the legislature or parties.
  
- [78] Referring to context in contract, the author points to the fact that it is unlikely in large commercial organisations, such as banks and the like, that in interpreting such contracts, the role of external facts will provide context – or put differently that in these kind of "*take it or leave it*" contracts, the room for contextual interpretation is small.

[79] He continues, however, that in respect of contracts of individuals and small businesses the position is different as follows:

“The contracts of individuals and small businesses will often be different and less carefully formulated, especially where prepared by lay people. Here the likelihood of facts specific to the parties and their arrangements being relevant to the interpretation of the agreement is greater. Their contemplation will potentially have a greater impact. This emphasises the proposition that the more formal and careful the drafting, the less the need to look to extrinsic factors. Error is not lightly assumed, although that may not be the case where the evidence reveals that the contract was drafted in haste or by persons lacking legal training and drafting skills. Likewise superfluity is not assumed, but that is not to be confused with verbosity, which is ever present. Particular care must be taken by courts not to reverse the consequences of a hard-fought process of bargaining, or to relieve parties of risks that they decided to run in order to secure gains elsewhere.

In the result, in a detailed commercial contract the context will be provided largely by the nature and purpose of the transaction in question and the economic and commercial background to its conclusion. A loan from a bank is plainly different from a loan from a friend. Where there is disproportionate bargaining power, this must be recognised, as must the reasons for commercial organisations’ wishing to standardise the terms of their business dealings with the general public. And, curiously enough, judges are human and reluctant to impose burdens that seem harsh and unfair on the weaker and disadvantaged members of society. So fairness and equity is part of the context.”

[80] This latter quote is relevant to the matter before me.

[81] As to context in legislation, also relevant to this matter, the author points out that when dealing with a statute context does not involve guess work as to the



intention of the legislature but a reasoned assessment of the broader purpose underlying its enactment as follows:

“When dealing with a statute, context does not involve guesswork as to the intention of the legislature, but a reasoned assessment of the broad purpose underlying its enactment. Statutes directed at ameliorating a distinct social problem are entitled to a more generous construction, given that purpose, than a technical regulatory statute such as the *Companies Act*. Nor can it mean, for example, that in a taxing statute a construction favourable to the revenue must be given because the purpose of the statute is to raise revenue. But anti-avoidance measures may be entitled to more generous consideration than the provisions defining what is taxable.

[82] I may add that in respect of the interpretation of statutes, this is no different from the approach to contract save that this must specifically comprise a purposive statutory interpretation, in context, consistent with the constitution.<sup>28</sup>

[83] The author continues to state that:

“Then there is the context provided by the content of the legislation as a whole. This is invariably relevant because of the provision in the definition section of all statutes that the definitions will apply “unless the context otherwise indicates”. This provision was considered by the SCA in *Hoban* where it was described in the following way:

‘Context’ includes the entire enactment in which the word or words in contention appear ... and in its widest sense would include enactments *in pari materia* and the situation, or ‘mischief’, sought to be remedied. ... That is the first point. The second is that there is no justification for the distinction, so heavily relied on by the learned Judge, between linguistic context and legislative intention. The moment one has to analyse context in order to determine whether a meaning is to be given which differs from the defined meaning one is immediately engaged in ascertaining legislative intention. One remains so engaged until the

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<sup>28</sup> Cool Ideas 1186 CC v Hubbard 2014 (4) SA 474 (CC) [28].

interpretation process is concluded. It is only concluded when legislative intention is established. As remarked by E Cameron in Joubert (ed) *The Law of South Africa* vol 27 at 207 para 229, '... context does no more than reflect legislative meaning which in turn is capable of being expressed only through words in context'.

Legislative history is another source of relevant context that can be of great assistance in resolving problems of interpretation and can on occasions prove decisive in clarifying what is otherwise obscure. The provisions of the *Interpretation Act* 33 of 1957 operate as interpretative guides in certain situations, and finally section 39(2) of the Constitution contains the injunction that legislation must be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. So, as with all law, the Constitution provides a context for its interpretation that cannot be avoided and will plainly affect the meaning of specific provisions, even though its terms may not specifically address the problem under consideration. It provides the norms by and through which the interpretative process is undertaken."

- [84] The author comments that the interpreter must escape from an approach to interpretation that involves an *a priori* assessment of the meaning of the document in issue and endeavour, by invoking whichever canons of interpretation suit, to justify the meaning. One must not reason backwards from a desired construction.
  
- [85] Put otherwise, a Judge must articulate and explain the contextual material upon which that Judge relies, providing a complete picture from which it is permissible to draw the conclusion reached.
  
- [86] In this particular matter, it is worth emphasising that there are facts specific to the parties and their arrangements which are relevant to the interpretation of the MSMA. Their contemplation is relevant, as also that conveyed to the attorney and then in the course of drafting by the attorney to the parties

themselves. That the parties contemplated a joint venture is perfectly clear as to context on what is presently before me.

[87] As this matter was a contract drafted by an experienced attorney, it is also true that the more formal and careful drafting the less need to look to intrinsic factors. As was pointed out, error is not lightly assumed, nor was the contract drafted in particular haste, but by an experienced attorney with legal training and drafting skills. In this matter, there was no disproportionate bargaining power, nor was there any wish to standardise the terms of the business dealings, as with banks, finance houses and the like.

[88] I will, in due course, turn back to the MSMA and the relevant legislation in order to finally answer the separated issue before me at the absolution stage, insofar as is relevant. This is obviously not the last word on the proper interpretation thereof, as the defendant may adduce evidence in this regard if the absolution argument fails.

### **The interpretation**

[89] As already set out above the question to be decided is whether, properly interpreted, the MSMA, which plaintiff's relies upon, is a lease of agricultural land, and as it excludes the use of an undivided portion of one of the farm properties subject to the agreement whether this gives rise to a contravention of section 3(d) of SALA, and as a consequence, the MSMA is void being unlawful.

[90] This requires me to revert to the MSMA itself.

[91] The fundamental structure of the MSMA was, says Pierre Scheepers, intended to create a joint venture farming enterprise, the property to be provided by the entities controlled by Mr. van den Heever, whilst the cows and farming implements, and expertise, were to be provided by On Farm. He described this as a milkshare enterprise, apparently not unusual in the industry.

[92] The MSMA itself, whilst having extensive definitions of various terms, read in context, was such as to establish:

- 92.1 That On Farm had expertise in the management of dairy farming operations;
- 92.2 That On Farm would own and contribute the livestock and implements relevant required for the dairy business to be conducted;
- 92.3 That Bridge Farm (being Bridge Farm Dairy (Pty) Ltd) was to conduct the dairy enterprise on the properties referred to hereafter during the agreement;
- 92.4 That On Farm, in addition to contributing the livestock and implements and equipment to the dairy business, would manage the business of Bridge Farm (the dairy business) this being outsourced exclusively to On Farm;
- 92.5 That the two trusts would make available the properties to which I refer hereafter to enable Bridge Farm to conduct the dairy enterprise;
- 92.6 That the properties to be provided were immovable properties registered in the name of the trusts together with their improvements and water entitlements being three properties portions of the farm Tarka Bridge, but by definition the *“excluded improvements were separated therefrom”*;
- 92.7 That the excluded improvements were to be retained for the sole use of Mr. van den Heever, including sheds housing and buildings, being as I have previously set out a particular private dwelling guest house, garage and outbuildings, and an *“auction complex and feedlots”*;

- 92.8 The nature and extent of the auction complex and feedlots, to which I have referred to briefly above, were various buildings and portions of the farming property at least 10.4 hectares in extent in total;
- 92.9 That the agreement was to commence on 1 July 2018 and had the term “*joint venture dairy enterprise*” defined as meaning “... *the Joint Venture by the Parties to this Agreement in order to conduct the Business through Bridge Farm as equal Shareholders*”;
- 92.10 The livestock contribution by On Farm was 1000 dairy livestock units (each unit a separate animal);
- 92.11 That in summary On Farm would provide the livestock, implements and equipment and expertise to run what was described as the “*joint venture dairy enterprise*”, which was separately defined as I have quoted above being the conduct of the “business” through Bridge Farm, the parties being equal shareholders therein;
- 92.12 That On Farm was appointed as the “*manager*” and would be responsible for all aspects of management relating to the business meaning the business of Bridge Farm being dairy farming as defined;
- 92.13 That On Farm was to purchase the tractors and implements set out in Annexure D to the agreement and at an agreed consideration of R5 414 200,00 (Five million four hundred and fourteen thousand two hundred rand) from the Familie Trust payable on or before commencement date;
- 92.14 That the Familie Trust had expended R992 000,00 (Nine hundred and ninety-two thousand rand) on planting pastures which was deemed to be a joint venture expense;
- 92.15 That the only obligation of the trusts was to provide the farming properties (excluding those portions excluded by the definition referred to above);
- 92.16 That as consideration for the “*services to be rendered as well as the livestock contribution, tractors and implements*” contributed by On Farm, Bridge Farm was, from the commencement date, to pay On Farm a management fee equal to 50% of the annual net profit of Bridge Farm before Tax, and would separately be entitled to “... *all the income*”

*received from all livestock sales that occur for the duration of the agreement*". (Exactly what livestock sales were envisaged is opaque);

92.17 That clause 15.4 provided that the Familie Trust would be entitled to certain draw downs but that thereafter the profit would be "*split equally ... as agreed by the parties*";

92.18 That the parties to the agreement each contributed R200 000,00 (Two hundred thousand rand) working capital into the nominated bank account of Bridge Farm at the commencement thereof;

92.19 That there was, irrespective of the above, a special arrangement as to year one financially, the Familie Trust being entitled to the first R3 500 000,00 profit earned by Bridge Farm, details of which are further not relevant hereto.

[93] The MSMA drafted by attorney De Jager was signed by the parties at Grahamstown on 3 May 2018.

[94] Attorney De Jager drew an addendum to the MSMA which was apparently signed shortly thereafter in May 2018 which provided that (I repeat for convenience):

"2. AMENDMENT

2.1 The Parties wish to include the following term in the Agreement, as if specifically incorporated therein:

36. RENTAL IN RESPECT OF INFRASTRUCTURE AND PROPERTIES

On Farm shall pay to the Trusts an annual rental, amounting to R1 000 000,00 (One Million Rand) per annum, payable annually in arrears. The aforesaid rental shall be a Joint Venture expenditure and, as agreed, there shall be no escalation."

[95] He was taken to a letter from Mr. De Jager, addressed to Mr. van den Heever and himself, dated 20 April 2018, referring to the fact that attorney De Jager had drafted a provisional MSMA, the structure of which would be that the two trusts provided the immovable property relevant, whilst On Farm, described as “*Scheeper’s Newco*”, could provide one thousand dairy livestock. Clause 3.3 of the letter provides that:

“3.3 *Die grond word verhuur aan die nuwe entiteit wat die melkery sal bedryf synde die JV Newco. Die huurbedrag in terms van huur moet op ooreengekom word en die huurkontrakte moet onderteken word tesame met hierdie ooreenkoms.*

3.4 *Die vee en implemente en toerusting word verhuur deur Pierre se entiteit (Scheepers Newco) aan die JV Newco. Hierdie ooreenkoms moet onderteken word tesame met die Deelmelkooreenkoms.*

3.5 *Die melkery vind derhalwe plaas binne die Joint Venture Newco. Wins word verdeel voor belasting.”*

[96] The genesis of this addendum was referred to in the evidence and as relevant to certain correspondence emanating from attorney De Jager and, in particular, a letter dated 4 May 2018 (post signature) addressed to the various parties, in terms of which attorney De Jager referred to the signed MSMA and stated “*I have omitted to make reference in the Agreement to annual rental, payable by Pierre to Koot amounting to R1 million per annum*” and “*I have prepared an Addendum of which I enclose copy, including the rental payable to be incorporated into the Agreement*”.

- [97] There was reference in the letter to the fact that there would be no escalation to the “*rental*” and that the “*rental*” would be paid annually in arrears in the amount of R1 million per annum.
- [98] On 15 May 2018, attorney De Jager wrote to the various parties again, attaching the addendum, which he said made provision for rental to be paid by Bridge Farm Dairy to the “*trust*”.
- [99] It must be said immediately, that the introduction of this new clause 36 to the MSMA was, patently, the first reference that had been made in the agreement to “*rental*”, read together with the letters of attorney De Jager, that On Farm would pay to the trusts an annual rental of R1 million, which would be treated as joint venture expenditure as agreed.
- [100] In point of fact, it would seem that attorney De Jager’s letter of 15 May 2018, stating that the addendum made provision for payment of rental by Bridge Farm Dairy to the Familie Trust, was erroneous, the MSMA in fact providing that On Farm would pay the said “*annual rental*” of R1 million to the trusts.
- [101] When dealing with this aspect of the matter in his evidence, Mr. Scheepers said that the origin of the addendum creating clause 36 was that the original MSMA had been formulated in somewhat of a rush, and there were issues that still needed to be discussed, and that Mr. van den Heever felt that he had obligations to the trust, and that the 50-50 split was not sufficient, and he wanted to receive, or required, a further R1 million to pay to the trusts in respect of his obligations, to which On Farm agreed, represented by Pierre Scheepers.



[102] Mr. Scheepers did not explain the rental concept, and had some difficulty in cross-examination in dealing with the letters from Mr. De Jager to him, which foreshadowed clause 36 and the reference to “*rental*”.

[103] It would appear that the original intention in April 2018 was that the properties would be let in its entirety to the new entity (presumably Bridge Farm), and that a rental amount would have to be agreed, and a lease contract signed, together with the concept dairy business agreement, this also incorporating the lease of the equipment.

[104] On 2 May 2018 (the day prior to signature of the MSMA), attorney De Jager wrote a letter to the various parties as follows:

- “2. I enclose the draft Joint Venture agreement.
3. In due course, I will prepare a Shareholders’ Agreement reflecting the Trusts collectively as 50% shareholders in Bridge Farm (Pty) Ltd and furthermore reflecting On Farm Holdings (Pty) Ltd as a 50% shareholder in Bridge Farm (Pty) Ltd.
4. The directors will be, subject to your instructions, Koot and Pierre.
5. There are some issues on which I still need instructions, being the following:
  - 5.1 Koot wanted the Joint Venture to run for 9 years and Pierre requires same to continue operating for 10 years. I need final instructions on this after the parties have agreed.
  - 5.2 My instructions from Koot are that Pierre agreed to pay rental in respect of the farming properties, in the amount of R1 m per annum. I have not made provision for the aforesaid in the JV Agreement. If the aforesaid is agreed to by Pierre, then we should either introduce a clause stating that the farm will be leased or that the infrastructure will be leased at the aforesaid

rental. I also need to know what the escalation will be. Please let me have instructions in this regard.

6. Please peruse and let me have your further instructions.”

[105] It is to be noted (as I have said) that this letter is dated one day prior to the signature of the main MSMA, and it would appear that it was then envisaged by the parties as had previously been the case in April 2018, that to some extent or another lease agreements would be included relevant to the farming properties and equipment, although the parties had in mind a joint venture running for either nine or ten years, as reflected in this letter.

[106] The concept of a final rental in respect of the farming properties, as referred to in this letter of 2 May 2018, is most certainly not contained in the MSMA as originally drafted and, in fact, as signed. This, in my view, is significant. The reference by attorney De Jager to lease agreements in respect of the property, and then separately the equipment, was most certainly not carried forward into the agreement in those terms, nor was the original suggestion that these be signed as separate agreements together with the joint venture agreement ever carried forward. This indicates, clearly, in my view, that in context, there had been a re-think hereof, at the very least by Mr. De Jager, but as conveyed to his clients, this being omitted entirely, and there being no rental, so-called, included in the final signed agreement, the MSMA. It is simply not conceivable that if a lease or leases, were intended at that time, an experienced attorney could possibly have entirely omitted same, whether in the MSMA or by way of simultaneous agreements, as envisaged in April 2018.

[107] It is here, that the evidence of Mr. Scheepers is highly significant, that the origin of the “*rental*” stems from Mr. van den Heever’s view that the trusts required an additional R1 million, as the fifty-fifty split was not sufficient – however this was to be accomplished. It was also to be a charge against the joint venture expenses.

[108] Indeed, it would seem that as late 2 May 2018 the parties themselves had not agreed finally hereon.

[109] There can be no doubt, however, that as late as 2 May 2018, in context, attorney De Jager (and presumably the parties) envisaged a “*rental*” being paid for the farming properties, alternatively that the infrastructure would be leased at that rental, seeing that the important thing was the additional R1 million per annum. This was, however, not carried forward into the MSMA, prior to or upon signature.

[110] It is implicit in the De Jager letter of 4 May 2018 referred to above that he must have received instructions relevant to the R1 million, he saying he had omitted to make reference in the MSMA to “*annual rental*” in the sum of R1 million per annum. He had thus prepared the addendum, which included, as he put it, “*rental*” payable to be incorporated into the agreement *ex post facto*.

[111] Clause 36, then, providing that On Farm would pay to the trusts a “*rental*” of R1 million per annum, which would be joint venture expenditure, fits in herewith. What this was for, the remaining terms relevant thereto, and the usual lease clauses, are not stipulated or catered for. In fact, it is not even clear in the clause itself that this would be rental for the immovable property, as

opposed to the equipment, as originally referred to in the letters from Mr. De Jager. The only reference in this regard is the heading to clause 36, not the clause itself – referring not to a lease but to “*Rental in respect of infrastructure and properties*”. This is most unsatisfactory, and lends the impression, in context, that this was simply an afterthought relevant to the need to produce a further R1 million rand payment, as discussed between Mr. van den Heever and Mr. Scheepers, and clearly then conveyed to Mr. De Jager hence the addendum.

[112] Again, in context, it is not by any means inevitable that this R1 million annual rental referred to was intended to relate only to the immovable property leased, indeed its genesis and ambit in the MSMA is opaque.

[113] This presents the interpreter with something of a conundrum.

[114] It cannot be wished away, however, as it seems that the parties contemplated and finally agreed that an “*annual rental*” would be paid by On Farm to the trusts, the owners of the property, but that this would be a joint venture expenditure, obviously impacting on the profits, which were to be split fifty-fifty. Seen in context, the parties clearly envisaging a joint venture, as set out in and upon the terms of the original signed MSMA, which had not a word in it relevant to lease, let alone rental.

[115] The conundrum, it seems to me, is provisionally potentially solved, once one accepts that the agreement, which clearly created a joint venture between the parties with a fifty-fifty profit share, put loosely, incorporated in it something that was intended originally to be an independent agreement, side by side with the

main MSMA, but which then, by addendum, incorporated only a “*rental*” clause 36. What this annual rental was in fact for is not stipulated (save in the heading), which in context – the need to produce an additional R1 million rand for the trusts, as required by Mr. van den Heever, is by no means certainly in any way the creation of a rental agreement relevant to the immovable properties concerned.

[116] In the context of the MSMA itself and the context set out above, that rental is not by any means clearly intended to refer to a rental only for the immovable property owned by the trust, payable by On Farm, that, in addition, provided the livestock and equipment, and which of itself was referred to in the De Jager letter already referred to, as being a lease in a separate agreement or agreements contemplated.

[117] It is also not beyond doubt, by any means, that the reference to an “*annual rental*” in clause 36 was anything more than language and a convenient vehicle used to describe an additional flow of funds to the trusts, as requested by Mr. van den Heever, beyond the fifty-fifty share envisaged, as against the context of the joint venture intention and the contributions thereto, as set out in the MSMA. Put otherwise, it is not beyond doubt, at this stage of the trial, that clause 36 was not such as to create a lease of immoveable property properly interpreted in context.

### **The result**

[118] In the result, and at this stage of the trial, absolution from the instance at the end of plaintiff’s case, and applying the tests already fully set out above, and

the proper approach to a contextual, unitary interpretative exercise, it cannot, by any means, be said to be beyond question, or put differently, beyond doubt, that the provisions relied upon by defendant in clause 36, in the context of the entire agreement, properly interpreted, did not create a lease of immovable property, bringing it within the ambit of SALA.

[119] Put differently, on the proper approach set out above, and at the absolution stage, it is certainly not beyond question that plaintiff's contention, that an interpretation, as a matter of law, against the context and purpose of the agreement, is such that a court, applying its mind reasonably to such issue could or might (not should, nor ought to) find for the plaintiff.

[120] The plaintiff has in other words crossed the relevant threshold, such as to put the defendants on their defence.

[121] As to costs, the parties were in agreement that costs should follow the result, accordingly, it must be ordered, as I do below, that the plaintiff's costs, in respect of the special plea, must be paid by the defendants, jointly and severally, the one paying the other to be absolved. The costs of two counsel, in this complicated matter, should be allowed, as their employment is a wise and reasonable precaution.

[122] It is also, in the circumstances, unnecessary for me to deal with, let alone decide, the second issue, that was raised by plaintiff, and that is, whether, upon a finding that clause 36 created a lease of immovable property, that lease was not struck by section 3(d) of SALA. This is a distinct and completely separate

enquiry. I have said sufficient in this regard already in my judgment on the duty to begin.

### **Order**

[123] In the result the following order issues:

1. The defendants' claim for absolution from the instance, at the end of the plaintiff's case, in respect of the separated issue arising from paragraph 1.4.13 and 1.4.14 of the defendants' amended special plea and the relevant annexures annexed to the plaintiff's amended particulars of claim together with paragraph 17 to 23 of the plaintiff's replication, is dismissed;
2. The defendants are to pay the plaintiff's costs, the one paying the other to be absolved, such costs to include the costs of two counsel, the scale of those costs to be reserved for the trial court in due course.

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**M.J. LOWE**  
**JUDGE OF THE HIGH COURT**

Appearing on behalf of the Plaintiff:

Adv. D. de la Harpe S.C. together with  
Adv. K. Watt, instructed by Carinus  
Jagga Attorneys, Ms. Jagga.

Appearing on behalf of the Defendants:

Adv. B. Ford S.C, instructed by  
Huxtable Attorneys, Mr. Huxtable.

Date heard:

6 – 9 May 2024.

Date delivered:

21 May 2024.