IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (LOCAL SEAT)

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

__/__/_____ _____

DATE **SIGNATURE**

CASE NUMBER 4080/2018

PINE GLOW INVESTMENTS (PTY) LTD t/a
CALTEX MPUMALANGA NORTH BRANDED MARKETER **APPLICANT**

And

MACHADO RAINBOW TROUT CC **1ST RESPONDENT**
MILLY'S PROPERTIES CC **2ND RESPONDENT**
MILLY'S N4 FUEL (PTY) LTD **3RD RESPONDENT**

JUDGMENT

LEGODI JP

[1] An agreement of sale, head lease agreement and second sale agreement concluded on 14 December 1996, 22 May 1997 and during 2017 respectively, became the subject of a dispute in these proceedings. The dispute includes other agreements which I will refer to later in this judgment.

[2] At the heart of the dispute, the question is whether the land forming the subject of the dispute is an agricultural land requiring the permission or consent of the Minister for sub-division. The other issue which in my view was raised more pertinently during oral argument, is whether the first respondent, namely, Machado Rainbow Trout (Pty) Ltd (Machado Rainbow) had the intention to sell the property at the time when the 1996 sale agreement was concluded.

[3] A brief background to the dispute is necessary, but, I do not have to piece through every aspect of the background unless it becomes necessary and relevant to the issues at hand: On 14 December 1996 Machado Rainbow sold to Glen Anil Development Corporation (Pty) Ltd (Glen Anil) immovable property described as Portion 11 of the Farm De Kroon Registration Division 363 J.T District of Belfast. On 1 August 1997 the said property was registered and transferred to Glen Anil. The registration and transfer were facilitated by Machado Rainbow's attorneys at the time, as its conveyancers.

[4] On 1 June 1997 Glen Anil as the landlord and Caltex Oil SA Pty Ltd (Chevron) as the tenant, concluded a written lease agreement (1997 head-lease agreement) in terms of which Glen Anil let to Chevron a portion of the property in question now referred to as (Portion 14) for a period of 30 years' expiring in 2027.

[5] On 19 December 2002 Chevron as a franchisor for petroleum products concluded a franchise agreement with Star Stop Milly's (Pty) Ltd as a franchisee. The agreement had retrospective effect from 1 July 2002. An operating lease agreement in terms of which Chevron granted Star Stop a licence to operate Caltex Service station for a period of 15 years from the commencement date was concluded. Portion of the property in question from which Star Stop operates, consists of Convenience Stop Shop and a Caltex Service Station. The franchise agreement and or an operating lease agreement aforesaid expired on 31 July 2017.

[6] In an agreement referred to as a retailer or assignment agreement dated 21 December 2011, Chevron assigned all its rights and obligations under the 2002 franchise agreement referred to in the preceding paragraph to Pine Glow Investments (Pty) Ltd (Pine Glow), as the applicant. Effectively therefore, Pine Glow substituted Chevron in the franchise agreement.

[7] At the same time during December 2011, Pine Glow and Chevron and with reference to the 30 years' head lease agreement of 1997, concluded a sub-lease agreement. In terms of the sub-lease agreement Pine Glow was granted and took possession of Portion 14, that is, the property forming the subject of dispute in these proceedings.

[8] In what is referred to as Cession and Assignment of Franchise Agreement, Star Stop as a franchisee and with effect from 7 November 2014 ceded and assigned all its rights and obligations under the 2002 Franchise Agreement referred to in paragraph [5] above to the third respondent, Milly's N4 Fuel (Pty) Ltd, (Milly's N4). Therefore, Milly's N4 substituted Star Stop in the 2002 Franchise Agreement. Milly's N4 is owned by and is a nominated subsidiary of the first respondent (Machado Rainbow).

[9] On the other hand and in what is referred to as Deed of Lease and Deed of Right of Servitude, Pine Glow and Machado Rainbow concluded a written agreement to wit Deed of Lease on 25 March 2015. On the same date the second respondent, Milly's Properties (Pty) Ltd as the registered owner of separate property portion 11, that is, the remaining extent of Portion 11 and Pine Glow concluded written Deed of Right of Servitude.

[10] On 18 August 2017 the property forming the subject of the dispute was transferred by Glen Anil to and registered in the names of Pine Glow after the two had concluded a sale agreement in respect of the subject property. It is on the basis of this that Pine Glow as the registered owner of the property in question, seeks for the eviction of Machado Rainbow and Milly's N4. It was also contended that the

eviction is justified as the franchise agreement and / or lease agreement referred to in paragraph [5] of this judgment, has expired.

Pine Glow cause of action

[11] At the risk of repetition, Pine Glow cause of action for eviction and authority to launch the present application is premised in brief on the following set of facts: Pine Glow became the registered owner of the property. It is therefore entitled to occupation. Despite the expiration of the lease agreement and or franchise agreement, both Machado Rainbow and its nominee, Milly's N4, remain and insist to occupy the property in question.

[12] Pine Glow had cancelled a month-to-month lease agreement that was extended as an indulgence in a *bona fide* to afford Machado Rainbow time to comply with its contractual obligations. On 30 April 2018, Pine Glow withdrew the indulgence to continue with rental agreement on a month to month and cancelled the lease agreement. It is on this basis that Pine Glow is asking for the relief to confirm cancellation. In the main, Pine Glow is applying for the eviction of Machado Rainbow and Milly's N4 from the property in question on the basis that it is the registered owner of the property in question. This is an issue that is disputed by both Machado Rainbow and Milly's N4. I now turn to deal with the basis for such a dispute.

Alleged intention not to sell the property in question

[13] During oral argument, counsel for the respondents contended that it was never the intention of Machado Rainbow to sell the property in question when it concluded sale agreement with Glen Anil in 1996. This was branded by Advocate Subel SC on behalf of Pine Glow as an absurd argument and an afterthought. I tend to agree.

[14] Look at it this way: The property was sold for R2 600 000.00 which Machado Rainbow probably pocketed as contemplated in clauses 3 and 4 of the sale agreement in question. Transfer of the property into the names of Glen Anil was to

be executed by Machado Rainbow as the seller of the property in terms of clause 6. This, Machado Rainbow did and therefore heeded to clause 6.

[15] This absurd argument as so contended by counsel on behalf of Pine Glow, must also be seen in context: In the supplementary written heads, which the court advised the parties to file if they so wished, Pine Glow contends that this court '*needs look no further than the agreement of sale from which MRT as seller's intention to pass transfer, is self-evident'.* I cannot agree more.

[16] But most importantly, the contention of lack of intention to forsake the property through sale agreement should be seen as an afterthought. In my view, it is driven by the difficulty the respondents find themselves in. Lack of intention to dispose of the property was argued as being founded on the following averments made in the respondents' supplementary affidavit:

40. On a proper interpretation of the Sale Agreement and the Head lease:

40.1 regardless of their form, actually constituted one indivisible transaction;

40.2 the true substance, essence and commercial purpose of which was for MRT to lease Portion 14 (the CALTEX Area) to Chevron, for a period of 30 years, for the purpose of Chevron or its nominee to develop a CALTEX fuel filing station on the said premises ("the Transaction")

41. The Transaction aforesaid was concluded in conflict with the statutory prohibition contained in section 3(d) read with section 4(2) of the Subdivision of Agricultural Land Act, 70 of 1970, in that the Transaction in substance, constituted a lease of an undivided portion of agricultural land for a period of 30 years concluded in the absence of the statutorily required ministerial consent.

[17] "MRT" is with reference to Machado Rainbow. The quotation above is preceded by a heading "THE ACTUAL TRANSACTION BROUGHT ABOUT BY THE

SALE AGREEMENT AND THE HEAD LEASE IS VOID". Because of the 30 years' lease, '*it was never the intention to loose ownership – it was never the intention not to be the owner. This was a scheme to try circumvent the prohibition of the sub-division of the agricultural land',(sic)* so was the argument by Mr De Koning on behalf of the respondents.

[18] What is stated in paragraph 41 of the quotation in paragraph [16] above, in my view, is a clarification of the statement made in paragraph 40.2 of the quotation. Therefore, to seek to raise lack of intention to sell the property is not what is pleaded by the respondents. Clearly paragraph 40.2 of the quotation is grounded on the fact that the sale agreement is in conflict with the statutory prohibition contained in section 3(d) read with section 4(2) of the Subdivision of Agricultural Land Act No (70 of 1970). This has got nothing to do with the intention to conclude or not to conclude the sale agreement bearing in mind that Machado Rainbow is not a party to the head lease agreement in question. The head lease agreement was concluded between Glen Anil as the landlord and Caltex Oil SA (Pty) Ltd as the tenant. Seeking to brand the agreement as '*a scheme to try to circumvent the prohibition of the sub-division of the agricultural land'*, has no basis.

[19] An attempt to find the 'scheme' on clause 3 of the head lease agreement dealing with "*condition precedent*" and thus seek to suggest that there was never intention to lose ownership of the property in question, is not convincing. Clause 3 of the head lease agreement reads:

CONDITION PRECEDENT

"This entire agreement, save for the provisions of this clause 3 and clauses 27,28 and 30 which shall be of immediate effect force and effect, is subject to fulfilment of the following suspensive condition, namely that the sale of property agreement becomes unconditional and is duly implemented in accordance with its terms, including in particular but without limitation, that the property is transferred in the name of the landlord. Should the aforesaid suspensive condition not be fulfilled, this agreement save for the provisions of clause hereof shall be of no force or effect whatsoever".

[20] The sale of the property was unconditional to the head-lease agreement and without any limitation that the property is transferred in the name of the landlord being the purchaser, Glen-Anil as can be gleaned from clause 3. Subdivision condition precedent in clause 3 of the head-lease agreement did not have a bearing on the validity or otherwise of the 1996 sale agreement. Therefore, the defence of lack of intention even if it was properly pleaded in the opposing affidavit, would not have been easy for the respondents. They would still have had difficulty in their defence being sustained. Parties to the head lease agreement are not raising the defence as the respondents now do despite the fact that they are not parties to the head-lease agreement.

Remedy on an invalid agreement

[21] I elect to deal with this aspect before I deal with the question whether or not the 1996 sale agreement was linked to the head-lease agreement and that it was concluded in conflict with the statutory prohibition contained in section 3(d) read with section 4(2) of the subdivision of Agricultural Land Act, (70 of 1970). Section 3(d) provides that *'no lease in respect of a portion of agricultural land of which the period is 10 years or longer shall be entered into*'. On the other hand, section 4(2) provides that '*the Minister may in his discretion refuse or-*

(a) on such conditions, including conditions as to the purpose for or manner in which the land in question may be used, as he deem fit, grant any such application;

(b) if he is satisfied that the land in question is not to be used for agricultural purpose and after consultation with the Administrator of the province in which such land is situated, on such conditions as such Administrator may determine in regard to the purpose for or manner in which such land may be used, grant any such application'.

[22] Section 4(1)(a) provides that *'any application for the consent of the Minister for the purpose of section 3 should-*

(i) In the case where any act referred to in paragraphs (a) to (e) of that section is contemplated, be made by the owner of the land concerned;

(ii) Be lodged in such place and be in such form and be accompanied by such plans, documents and information as may be determined by the Minister'.

[23] Turning back to the topic under discussion, '*it by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would therefore be bound to upset the result of which a contract which the parties had carried through in accordance with its terms. Suppose, for example, an (oral) agreement of sale of fixed property, a payment of the purchase price and due transfer of the land. Neither party would be able to upset the concluded transaction on the mere ground that … in reality an agreement to sell, is invalid and unenforceable in law, but which both seller and purchaser proposed to carry out*[1]*'. (My emphasis).*

[24] In Wilken's case cited in footnote 1, Innes JA was dealing with performance under sales of land that were invalid for want of compliance with a statute requiring the contract to be in writing. The principle in Wilken's although *obiter* was referred to with apparent approval by the SCA in **Wilken No and Ander v Bester 1997(3) 347 (SCA); [1997] 2 ALL SA 386 at 362 F** and endorsed by the Legislative, specifically with reference to contracts of sale of land, invalid for non-compliance with formality in s28(2) of the Alienation of Land Act 68 of 1981.

[25] **In Legator Mackenna Inc and Another v Shea and Other** 2010(1) SA 35 (SCA) Brand JA at para [28] held that:

"*Those who support the rule in Wilken v Kohler find justification for its existence in the consideration that, while both parties have performed in accordance with the provisions of an agreement, albeit unenforceable, the purpose of the transaction has been achieved and that there is therefore no reason to interfere with the existing state of affairs. The underlying consideration of policy seems to be that those who*

[1] Wilken v Kohler 1913 AD 135 at 144

received exactly what they bargained for, should not be allowed to escape consequences of a bad bargain by means of an enrichment action which is intended to be equitable remedy".

[26] Having said this, Brand JA proceeded at para [28]:

"*In the light of this explanation, which I find persuasive, I believe the time has come for this court to express its unequivocal approval of the Wilken v Kohler rule… I can see no reason why the rule should not apply in a case where, despite the non-existence of any agreement, the parties' intention has been achieved. In both case the condictio indebiti would normally be available because the transfer was motivated by a mistaken belief relating to the validity or the existence of the underlying agreement and in both cases* ***Wilken v Kohler*** *would constitute an exception to the condictio indebiti for the same reason, ie that the purpose of the transaction has been achieved".*

[27] A *curator bonis in Legator's case* sold fixed property in that capacity before letters of executorship were issued by the Master of the High Court in terms of the provisions of section 72(1)(d) of the Administration of Estates Act (No 66 0f 1965) which required letters of tutorship before conclusion of the agreement. In the high court, it was held by virtue of non-compliance with section 72(1)(d) the sale agreement was invalid and that the patient who was then capable of managing his own affairs was entitled to have the immovable property restored to him. On appeal as indicated above, the decision of the high court granting judgment in favour of the plaintiff (patient) was set aside and thus accordingly dismissed the action based on the principle initiated in **Wilken's case**.

[28] Similarly, in the matter of Fisher v Ubomi Trading cc and Others 2019 (2) SA 117 SCA, the court of appeal had an occasion to deal with an agreement of sale of property concluded and resulted in registration thereof without complying with the provisions of 45bis of Deed Registries Act 47 of 1937 which deals with endorsement of deeds on divorce, division of joint estate or change of matrimonial property system.

[29] Section 45*bis* (1) (a) provides that *'if immovable property or a lease under any law relating to land settlement or a bond is registered in the deeds registry and it-*

(a) formed an asset in a joint estate of spouses who have been divorced, and one of them has lawfully acquired the share of his or her former spouse in the property, lease or bond
(b)…

the registrar may on written application by the spouse concerned and accompanied by such documents as the registrar deem necessary, endorse on the title deeds of the property, or lease or bond, and thereupon such spouse shall be entitled to deal therewith as if he or she had taken formal transfer or cession into his or her name of the share of the former spouse or his or her spouse as the case may be, in the property lease or bond'
Despite lack of endorsement as contemplated in section 45*bis* of the Deeds Registries Act, the SCA found the agreement was enforceable on other grounds.

[30] '*Time has come for this court to add a stamp of approval to the view point that an abstract theory of transfer applies to immovable property as well*[2]*. In accordance with the abstract theory, requirements for the passing of ownership are twofold, namely, delivery-which in the case of immovable property is effected by registration of transfer in the deeds office – coupled with a so-called "real agreement". The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property*[3]*'.*

[31] In the context of the principle articulated in Legator's, it is important to have a look at the conduct of the Machado Rainbow as transferor to display the intention to transfer ownership of the property in question to Glen Anil as the transferee. Its intention, that is, that of Machado Rainbow to divest itself of ownership of the property is laid bare in the terms and conditions of the 1996 sale agreement. I allude to this at the risk of some repetition. That the sale agreement was concluded, is

[2] See Legato's case at para 22
[3] See further Legato's case at para 23

common cause. It is also not disputed that the purchase price was paid in accordance with the terms of the agreement and was accepted by Machado Rainbow. The registration of the property into the names of the Glen Anil took place on 1 August 1997. This could not have taken place without Machado Rainbow having signed the transfer documents and without having had the intention to transfer ownership thereof to Glen Anil. As indicated earlier in this judgment, Machado Rainbow also instructed its attorneys at the time to facilitate the transfer as conveyancers. The suggestion that there was no intention to sell the property should therefore be rejected.

Prescription response

[32] Pine Glow was prompted in its replying affidavit to raise a legal point after Machado Rainbow delivered its opposing affidavit. Legal point raised is that insofar as the respondents, namely, Machado Rainbow and Milly's N4 now want the property to be restored to its original registered owner (Machado Rainbow), such a cause of action is hit by prescription.

[33] As it was held: '*This court has repeatedly emphasised the vital role time limits play in brining certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, brings about prolonged uncertainty to the parties to the dispute. This quality of adjudication by courts is likely to suffer as time passes because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have fallen. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to the disputes and must follow from sound reasoning, based on the best available evidence*[4]*'.*

[34] What was said in Mdeyide's case should be seen in the context of the facts of the present case. Upon service of the present application on the respondents, they

[4] Road Accident Fund v Mdeyide 2011 (2) SA 26 CC para 4; see also Mtokonya v Minister of Police 2018 (5) SA 22 CC

instituted action proceedings in terms of which they pray for the sale agreement and head lease agreement to be declared void and that the sale of the property forming the subject of dispute in these proceedings be declared void, alternatively unlawful and that they be set aside and that the Deeds Registrar be ordered to correct its Deeds Registry to record Machado Rainbow as the lawful owner of the property in question. The particulars of claim have been attached to the opposing affidavit to be read as if specifically incorporated in the present motion proceedings.

[35] To this effect, Pine Glow in its replying affidavit asked this court to find that the relief which Machado Rainbow prayed for in the action proceedings have direct bearing on the present proceedings. This court is therefore asked to consider the issue of prescription which is also Pine Glow's defence or plea in action proceedings.

[36] I imagine the respondents cannot have a problem in this court considering such a special plea of prescription in the present motion proceedings because in paragraph 10.3 of their answering affidavit is stated:

"*The nature and extent of the legal relief sought by the plaintiff in the main action, shall have a significant influence on the nature and extent of the legal relief prayed for in its application and vice versa"*

[37] This court is therefore competent to deal with the prescription point raised in the present proceedings which point was prompted by the respondents' cause of action in the action proceedings and specifically incorporated in the answering affidavit to these proceedings.

[38] In Mtokonya case cited in footnote 4 above, Zondo J held that the fact that an agreement is invalid, is not a fact, but a legal conclusion[5]. That seems to be the same as to say that, that conduct is wrongful and actionable, is a legal conclusion and not a fact[6]. I deal more relevantly with this principle when dealing with the alleged dispute of facts as suggested by the respondents.

[5] Para 51 of Mtokonya *supra* at n4
[6] See further para [51] of Mtokonya *supra*

[39] For now, it suffices to deal with the topic under discussion. That is, whether registration of the property and return thereof to the Machado Rainbow as a cause of action based on the illegality of the 1996 sale agreement has prescribed. In their further answering affidavit said to have been prompted by special pleas raised in the replying affidavit, it is now contended by Adv LW De Koning SC on behalf of the respondents that prescription does not enter the fray in the present proceedings. The relief of the nature of the claim was held not be a debt for the purpose of prescription, so the contention. For this contention, he heavily relied on the following case law: eThekwini Municipality v Moutnhaven 2018 (1) SCA 384 (SCA) at paras [13] and [14]; Off-Beat Holiday Club and Another v Sanibonani Holiday Spar 2017(5) SA 9 CC at paras [31] and [32].

[40] In my view reliance on paras [31] and [32] in Off-Beat v Sanbonani is to be seen in context. The context is this: Unilateral amendment of Sanibonani's Articles of Association and certain shares being improperly issued, other holders of those shares were barred from voting on the affairs of the company even on those shares. In paragraph [32] it was held that the case concerns an entitlement to the making of an equitable judicial determination which in any event, considers delay.

[41] Paragraphs [31] and [32] of the judgment relied on by the respondents in Sanibonani's judgment must also be seen in the context of what was said in paragraph [45] of the same judgment. It was held:

"*The applicants aver that their claim has not prescribed on two bases. First, the claim is for relief that the articles of association be compliant with the law. Therefore, that relief cannot be construed as a "debt" for purposes of the Prescription Act and is therefore incapable of prescribing."*

[42] Compare the relief sought in Off-Beat Holiday Club and Another with the relief sought in the present case and the facts thereto. In the present case, the respondents are not asking for compliant with law being to obtain a consent from the Minister as contemplated in sections 3(d) and 4(2) of Act 70 of 1970 with regards to the 1996 sale agreement and the 1997 head lease agreement. Instead, they want

the agreements to be declared null and void and revert ownership of the property to Machado Rainbow.

[43] Continuation of the wrong must also be seen in context. The respondents have been in occupation of the property in question for many years. In a way had benefitted from such occupation. They operated the business to their advantage either through franchise agreement and or lease agreement. They actually facilitated the wrong if any. Now with imminent eviction, they claim to be the victims. In so doing want to reserve what they had been part of. That is being opportunistic.

[44] The case of eThekwini must also be seen in context insofar as is also sought to be relied upon to avert prescription. Reliance on paras [13] and [14] in eThekwini judgment must not be looked at in isolation. I find it necessary to quote what was said in paras [11] and [12] thereof:

*"[11] In reading the Constitutional Court decision in **Makate** one should not overlook what the court did not say. It did not say that **Desai** was incorrect in its finding that claim for transfer is a debt. It simply said **Desai** in the manner contended for by the Municipality, it could have said so explicitly. As the Constitutional Court said, it is inconceivable that every obligation to do or refrain from doing something can be described as a debt. The example of an interdict postulated by that court illustrates this absurdity.*

[12] Earlier, the Constitutional Court in Road Accident Fund & Another v Mdeyide 2011(2) SA 26 para [11] expressed doubt on whether an obligation is indeed a debt in terms of the Act. In Njongi v MEC, Department of Welfare, Eastern Cape [2008] ZACC 4; 2008 (4) SA 237 (CC) it raised, but left open, the question whether a constitutional obligation could be considered a debt. An interpretation that restricts the meaning of debt to delivery of goods, confines to the delivery of movable to the exclusion of all immovable property. This would create a baseless distinction between movable property and immovable property for the purpose of prescription. In case where the legislature has sought to make this distinction, i.e in cases of prescription of debts of mortgage bond, it has done so expressly'.

[45] Therefore, the respondents cannot truly rely on paras [13] and [14] referred to in para [39] above to find that prescription did not run in the instant case. To do so, will be to ignore the clear principle articulated above. In eThekwini Municipality, the Municipality sought to have the property it sold to Mounthhaven (Pty) Ltd re-transferred to it. It did so after Mounthaven as a purchaser failed to build a structure on the vacant stand it purchased from the Municipality. Plea of prescription filed by Mounthaven in the High Court was upheld. On appeal and arguing that re-transfer did not constitute a debt as contemplated in Chapter 111 of the Prescription Act, the SCA found that prescription affected the contractual right to claim re-transfer and the claim by the Municipality was found to have prescribed. Consequently, the Municipality appeal was dismissed.

[46] There is no reason why the principle cannot apply to the facts of the present case. Machado Rainbow sold the property to Glen Anil in 1996. Having caused the property to be transferred to the seller in 1997 and having been aware of the head-lease agreement or expected to have been so aware, only upon service of the present proceedings in 2018 did Machado Rainbow claim re-transfer of the property in question. Both Machado Rainbow and Milly's must be hit by prescription.

[47] Even if one was to find that the property in question is or was an agricultural land and that consent by the Minister was a requirement for a valid sale agreement, one would still find not everything arising from the invalid contract ought to be set aside. Secondly, that by virtue of prescription, the property cannot be restored to Machado Rainbow. I now turn to deal with another issue raised by the respondents.

Alleged dispute of facts

[48] In the notice of motion dated 9 September 2019 the respondents wanted the present proceedings to be referred to trial or oral evidence as contemplated by rule 6(5)(g) of the Uniform Rules of Court. The basis for this relief is articulated in the supplementary answering affidavit deposed to as follows:

"12. I am advised that the evidence, factual dispute between the parties relating to the true and lawful ownership of the subject immovable property (Portion 14) is not

able to be resolved on affidavit because the true intention of the parties who entered into the various historical contractual agreements must be obtained, determined and tested"

[49] The respondents cannot hide behind '*the intention of the parties'* to find dispute of fact. Nothing can go beyond the 1996 sale agreement which Machado Rainbow caused it be reduced to writing. The evidence by way of written agreements incorporated in the papers coupled with clear interpretation thereto is overwhelming. Machado Rainbow glaringly intended to divest itself of ownership of the property to Glen Anil. Machado Rainbow was not a party to the head-lease agreement and seeking to rely on its invalidity so many years after it was concluded, in my view, is simply opportunistic. But most importantly as restated in Mtokonya; '*that an agreement is invalid, is not fact, but a legal conclusion*…'

[50] That the conduct is wrongful and actionably, is a legal conclusion and not a fact. There is just no merit to the suggestion that there is a dispute of facts resolvable only by trial or oral evidence in the present motion proceedings. Most relevant facts insofar as they are relevant, are dispelled by the terms of the1996 sale agreement coupled with the activities of Machado Rainbow in execution thereof.

[51] In essence prescription principle laid down in **Mdeyide** case at para [4] thereof and referred to earlier in para [33] of this judgment should be found to apply to the facts of the present case. At the risk of repetition, '…*the quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded'*. That is what the respondents want to see happening by resorting to dispute of facts even where such a dispute does not exist. Dispute of facts point has to fail.

Is property in question agricultural land?

[52] I have deliberately decided to start at the tail bottom of the case than at the head. This is an issue that if found in favour of Pine Glow, that is, that the land in question is an agricultural land, the rest of the issues dealt with in the preceding

paragraphs, would not necessarily all become academic and moot. The question whether the land in question is an agricultural land was dealt with in some detail in the replying affidavit after the issue was introduced in the answering affidavit by the respondents.

[53] After the replying affidavit was delivered, the respondents proceeded to file supplementary affidavit alleging that new facts had been raised in the replying affidavit. The issue under discussion was preceded by reference to the arbitration proceedings in terms of section 12B (1) of the Petroleum Products Act, 120 of 1977. Section 12B (1) provides that the Controller of Petroleum Products may on request by a licence retailer alleging an unfair or unreasonable contractual practice by a licence wholesaler or *vice versa* require by notice in writing to parties concerned, that the parties submit the matter to arbitration.

[54] What was stated in the request by the respondents to the Controller of Petroleum Products is said to be different from what the respondents now seek to undo. In paragraphs 4, 5 and 10 of the request it was stated:

"4. Our client and its related entities have entered into various written agreements (herein referred to as "the contracts") relating to Milly's…

5. As a result of the conclusion of the contracts referred to herein above, Milly's N4 Fuel (Pty) Ltd acquired the right inter alia, *to operate as s franchise (and licenced fuel retailer) of Chevron at the current Milly's fuel station; as well as the right to potentially and in the future operate as a franchise (and licenced fuel retailer) of Chevron at a fuel station immediately adjacent to but on the opposite side of the N4 National Road from Milly's, which site is still to be developed'*

10. It is our client's contention that Chevron and or Pine Glow have perpetrated unfair and or unreasonable contractual practices against our client as contemplated in section 12B of the Act which practices are prejudicial to our client's rights"

[55] The statements above were made in a letter dated 31 May 2018. Based on the quotation above, it is concluded by Pine Glow that '*the contracts and or agreements in respect whereof the respondents allege factual disputes in their answering affidavit. (Which factual disputes the applicant denies exist), are the very same contracts and or agreements that the respondent claim to be void and or voidable in this application, and which the first respondent (*referring to Machado Rainbow*) as the plaintiff in the action claims to be void and or voidable'.*

In my view, it is a complete U-turn that few months after the statement was made that they wanted to enforce the contracts, they now brand those contracts as illegal and unenforceable and therefore entitling Machado Rainbow to demand the return of the property.

[56] Coming back to the question under discussion, that is, whether the land in question is an agricultural land or not, Pine Glow's contention that, it is not, can be summed up as follows: The subject properties came into existence during 2002 when Portion 11 (a portion of Portion 8) of the Farm De Kroon, was subdivided into two separate registered properties, namely the Remaining Extent of Portion 11 (a portion of Portion 8) of the farm De Kroon and Portion 14 (a portion of Portion 11) of the Farm De Kroon in the District Belfast, Registration Division 363 J.T, described as "Caltex Area" in the1996 sale agreement.

[57] The suggestion that since 1974 the subject properties were agricultural land, is denied by Pine Glow. According Pine Glow they were incorporated into the area of jurisdiction of the Transvaal Board for the Development of Peri-Urban Areas, formerly the Transvaal–Urban Health Board. Based on this, it is said, the subject properties were exempted from definition of "agricultural land" as contemplated in Act 70 of 1970.

[58] By way of further clarification to what is stated above, Pine Glow contends that the subject properties were incorporated into the area of jurisdiction of the Transvaal Board for the Development of Peri-Urban areas by amended scheme no 12 of the Scheme, 1975. This was published under Administrator Notice 1515 of 27

August 1975 in terms of section 36(1) of the Town-Planning and Township Ordinance 1965.

[59] Section 3 of the said Scheme provides: “The head authority should be the authority responsible for enforcing and carrying into effect the provisions of this Scheme”. On the other hand, section 12 of the Scheme provides that, ‘the definitions contained in section 1 of the Town Planning and Townships Ordinance, 1965 (Ordinance 25 of 1965) will *mutatis mutandis* apply to this scheme. The definition of local authority in section 1(xiii) Ordiance 1965 is said to include “…The Peri-Urban Health Board established in terms of the Peri-Urban Health Board Ordinance 1943 (Ordinance 20 of 1943).

[60] The Peri-Urban Health Board was established in terms of the Transvaal Peri Urban Areas Health Board Ordinance, 20 of 1943. By way of Administrator’s notice 523 of 20 July 1966, the name of Peri-Urban Health Board was changed to Transvaal Board for the Development of Peri-Urban Areas.

[61] Section 2(2) of 1966 Amended Ordinance provides that ‘a reference in any law or any document or writing of any nature whatsoever to the Peri-Urban Areas Health Board established in terms of section 2 of the principal ordinance 20 of 1943, shall be considered as reference to the Transvaal Board for Development of Peri-Urban Areas.

[62] Having sketched out these legislatives frame-work, Pine Glow states that the Transvaal Board for the Development of Peri-Urban Areas was initially established as a Health Board and that in terms of its constitutive legislation, as amended, remained such up to and including the dates when the 1996 sale agreement and the 1997 head-lease agreement were entered into on 14 December 1996 and 22 May 1997 / 1 June 1997 respectively.

[63] It is further contended that the subject properties were unaffiliated by the Abolition of Development Bodies Act 75 of 1986 in terms of which Peri-Urban Board was abolished effective from 1 July 1986 because from the latter date the assets, liabilities, rights, duties and obligations of the Peri-Urban Board as a development

body were transferred to the Administrator of the Transvaal in terms of section 3(1)(a) of that Act.

[64] Section 6(b) of the Abolition of Development Bodies Act 75 of 1986 provides that, '*unless it is clearly inappropriate in any particular case, any reference in any law or document to-*
(a)…
(b) the Transvaal Board for the Development of Peri-Urban Area established by section 2 of the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance No 20 of 1943) of the Transvaal, shall with effect from 1 July 1986, be construed as a reference to the Administrator of the Province of Transvaal'.

[65] The Local Government Transition Act 209 of 1993 is said to have commenced on 2 February 1994 and the purpose of the Act *inter alia*, is said to have provided for revised interim measures with a view to promote the restructuring of Local Government in respect of various Provinces and to provide for the recognition and establishment of forums for negotiating such restructuring of local government.

[66] Then in paragraph 34.12 of the Pine Glow's replying affidavit is stated that immediately prior to the commencement of the Local Government Transition Act 209 of 1993 on February 1994 and the establishment / election of the Machadodorp Transitional Council the subject properties were consequently not 'agricultural land' as defined in the sub-division of Agricultural Land Act 70 of 1970.

[67] The 1996 sale agreement and the 1997 head lease agreement were concluded while Portion 11 as a whole (which later became sub-divided into two separates registered properties, namely the Remaining Extent of Portion 11 and Portion 14 the Caltex Area), still fall under the jurisdiction of the Machadodorp Transvaal Council which became the Highlands Local Municipality in terms of the Local Government: Municipal Structures Act 117 of 1998 in October 2000, and eventually became the eMakhazeni Local Municipality, so was the conclusion by Pine Glow.

[68] For the contention, it was also stated that the subject property remains zoned by the eMakhazeni Local Municipality for “mixed use as reflected in the zoning certificate dated 14 August 2018, which is annexed to Pine Glow’s plea in the action proceedings. The Local Government Transition Act was amended by the Municipality Demarcation Act 27 of 1998 promulgated in terms of Government Gazette No 19020, published on 3 July 1998 commencing on 1 February 1999.

[69] The legal practical and other consequences resulting from the area of a municipality being wholly or partially incorporated in or combined with area of another municipality in terms of section 31 of Act 27 of 1998 referred to above, must be dealt with in terms of the Municipal Structures Act 117 of 1998, so was the contention on behalf of Pine Glow.

[70] Act 209 of 1993 was repealed by section 36 of the Local Government Laws Amendment Act 19 of 2008 with effect from 13 October 2001. However, as pleaded by Pine Glow, immediately before the commencement of Act 19 of 2008 and before the establishment or election of the Machadodorp Transvaal Council, on 14 June 1985 the Administrator of Transvaal approved the establishment of a public resort on the subject properties in terms of the Public Resorts Property Ordinance Act 18 of 1969. The resorts rights granted in respect of the subject property were extensive, so is the contention by Pine Glow. It included caravan park, single chalets, a picnic area, a shopping centre, a filling station and tennis courts.

[71] In conclusion, Pine Glow contended that section 3(g) of Act 70 of 1970 read together with section 3(6) of that Act, the incorporation of the subject property under the Peri-Urban Town Planning Scheme required the Minister’s consent and by granting consent, the Minister relinquished any control vested in the Minister of Act 70 of 1970 over the use of zoning of the land concerned. I tend to agree.

[72] The properties in question do not therefore fall within the ambit of definition of agricultural land as defined in section 1 of Act 70 of 1970, so is argument by Pine Glow. To all of the above, the respondents started by contending that the assertions by Pine Glow are the subject of a vehement dispute between the parties in the main

action. For this contention, the respondents rely on the report of Town Planning expert, Mr Saayman.

[73] Mr Saayman in his report contended that when the first election of Transitional Council on 1 November 1995 took place, the relevant land was not excluded from requirement of Act 70 of 1970 and therefore that the Transitional Local Council would not have resulted in the exclusion from the provisions of the said Act. Firstly, the issue raised herein cannot be regarded as a factual dispute. It is a legal dispute.

[74] The reasoning for the contention is that the relevant land was not excluded from the requirements of Act 70 of 1970. Pine Glow provided nothing to the contrary, so it was argued on behalf of the respondents. The coming into existence of Portion 14 with registration in the Deeds Office, by virtue of approval by Surveyor General Diagram SG No 8066/1998 insofar as it is meant to support the conclusion that the relevant land was not excluded from the requirements of Act 70 of 1970, in my view, does not support such a conclusion.

[75] The sub-division authorisation and consent thereto under number 27834, by virtue of approval document of the National Department of Agricultural Land similarly does not support conclusion that the 1996 agreement was void from the onset for lack of consent or authorisation for sub-division. The suggestion that the National Department of Agriculture could not have accepted and processed the application for sub-division following the 1996 sale agreement, has no legal basis. The statement: *'…in such hypothetical event, an application in terms of Ordinance 20 of 1986 would have been necessary, made to whoever the allegedly appropriate local authority was. This has not happened, and the Department proceeded to process and approve the applicant',* is somewhat confusing and lacks clarity. Firstly, one is not dealing "hypothetical event".

[76] Secondly, the statement: '*the application in terms of Ordinance 20 of 1986 would have been necessary',* seems to support the contention that the land in question was never an agricultural land. Lastly, even if it was so that the Department was wrong when it *'proceeded to process and approve the application',* it boggles one's mind if it is now an issue that is raised by Machado Rainbow. More so that

Machado Rainbow as the seller of the property and in terms of the 1996 sale agreement had to make such an application.

[77] Whichever way one looks at it, the respondents cannot succeed with any one of the challenges raised in the preceding paragraphs dealing with the topic under discussion. Even if one was to be wrong with regard to the land in question, the respondents are still hit by the alternative topics dealt with earlier in this judgment before coming to the topic under discussion. Pine Glow should be entitled to the relief sought except for punitive costs order as no such case has been made.

[78] Consequently an order is hereby made as follows:

78.1 The first and third respondents and all those occupying through or under the first and third respondents are hereby evicted from and ordered to vacate within 15 (FIFTEEN) days from the granting of the order, the applicant's property, described as:

> The Remaining Extent of Portion 14 (a portion of portion 11) of the Farm De Kroon 363, Registration Division J.T., Province of Mpumalanga, in extent 2,7480 hectares. Held by Deed of Transfer T90505/2002.

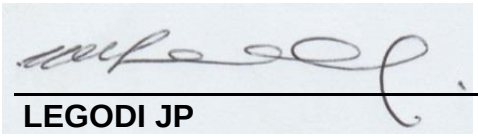
78.2 In the event that the first and third respondents fail to comply with the order sought in prayer 78.1 above, the Sheriff of this Honourable Court or his deputy is hereby authorized to evict the first and third respondents and all those occupying through or under the respondents from the Applicant's aforesaid property, and to secure the services of a locksmith and the assistance of the South African Police Services, to do so, if necessary.

78.3 The third respondent is hereby ordered to immediately surrender to the Controller of Petroleum Products the retail license issued to it in terms of the PPA for the said Portion 14.

78.4 The cancellation of the Deed of Lease concluded between the applicant and the first respondent on 25 March 2015 is hereby confirmed.

78.5 It is hereby ordered that the second respondent shall take all steps necessary, including but not limited to signing and execution of the Deeds of Servitude concluded on 25 March 2015**.**

78.6 The first, second and third respondents are hereby ordered jointly and severally, the one paying, the others to be absolved, to pay the costs including the costs of two Counsel on a party and party scale.



LEGODI JP

DATE OF HEARING: : 12 SEPTEMBER 2019
DATE OF JUDGMENT : 25 OCTOBER 2019

FOR THE APPLICANT ADV A SUBEL SC
ADV M C ERASMUS SC
ADV N KEKANA
INSTRUCTED BY : WDT ATTORNEYS
C/O STROH COETZEE INC
51 WALTER SISULU STREET
MIDDELBURG
MBOMBELA
TEL: 013 282 5733

FOR THE RESPONDENTS: ADV L W DE KONING SC
: C/O NATASHA AURET ATTORNEYS
WONDERPARK CENTRE, 2ND FLOOR
CNR WALTER SISULU & DR BEYERS NAUDE STRS
MIDDELBURG

TEL: 013 243 0284
REF: IZAK DU TOIT/rk/CIL2/0006