Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 1275/2008
Heard on: 20-21/06/2011;
10-11/12/2013; 02/05/2014
Delivered on: 29-08-2014

In the matter:

FRANCINA ELIZABETH KELBRICK **PLAINTIFF**

And

JOHANNES CHRISTIAAN NEL **FIRST DEFENDANT**
ELLA DORATHEA MARIA NEL **SECOND DEFENDANT**

JUDGMENT

Phatshoane J:

1. Ms Francina Elizabeth Kelbrick, the plaintiff, claims an amount of R315 000.00 from Mr Johannes Christiaan Nel and Ms Ella Dorathea Maria Nel, the first and second defendants, together with interest and costs. This claim flows from an agreement of sale of a certain property known as Erf 491, 27 Church Street, Colesburg, on which a licensed restaurant business called JC Restaurant was conducted; the sale of the business rights in respect of this property and movable assets. The Nels filed a provisional counterclaim.
2. The sale of the restaurant and its concomitants was for an amount of R815 000.00. According to the plaintiff Mr Fourie of Döhne & Fourie Attorneys, acting on behalf of the Nels, suggested that two agreements of sale be drafted.

One for the sale of immovable property at the purchase price of R500 000.00 (annexure “A” to the plaintiff’s Particulars of Claim) and the other for the sale of business rights in the restaurant and movable assets for the amount of R315 000.00 (annexure “B” to the plaintiff’s particulars of claim). This proposal was made in order for the transaction not to attract the payment of transfer duty. The plaintiff agreed to pay an initial deposit of R200 000.00 for the transaction which she borrowed from her bond account and the additional R115 000.00 which she borrowed from her son. She paid these amounts electronically into the Nels’ bank account.

3. The agreements of sale referred to were concluded on 24 September 2007. Their effect is the same and each has a suspensive condition which is crucial to the issues in dispute between the parties. The conditions are contained in clauses 18.2 and 16.1 of annexure “A” and “B”, respectively. Clause 18.2 reads:

> “Hierdie transaksie is onderhewig aan die suksesvolle verkoop van koper se eiendom geleë te Jeffreysbaai en word die opbrengs daarvan gebruik om die koopsom soos in paragraaf 4.1 genoem te betaal en die registrasie van transport van die eiendom geleë Jeffreysbaai, moet dus gelyktydig geregistreer word met hierdie registrasie van transport.”

Clause 16.1 stipulates:

> “Die geldigheid van hierdie ooreenkoms sal onderhewig wees aan die verkoping van die Koper se eiendom geleë te Jeffreysbaai asook die suksesvolle oordrag van die onroerende eiendom waarop die besigheid bedryf word in Koper se naam.”

4. The agreements are silent on the date on which the aforesaid suspensive conditions would be regarded as having been unfulfilled. Put differently, they do not stipulate the date in respect of which the sale of the restaurant business would be regarded as having lapsed due to the nonfulfillment of the conditions of the sale.
5. In her Particulars of Claim the plaintiff pleaded, *inter alia*, that it was an expressed, alternatively tacit, further alternatively implied term of the agreements that the suspensive condition would be fulfilled within a reasonable time. That such a reasonable time lapsed at the end of February 2008, in other words, approximately six months after she had placed her property in Jeffreys

Bay on the market. The contracts had therefore come to an end and that each party is entitled to restitution in respect of its performance.

6. In the alternative, the plaintiff pleaded that during October 2007 the parties entered into an oral agreement the term whereof was that the reasonable period which would constitute the end or expiry date for due performance was the end of February 2008. That this oral addendum to the agreement was confirmed by the Nels. She further states that as her property was not sold by the end of February 2008 the contract came to an end.
7. In the further alternative, the plaintiff pleaded rectification. She stated that around September 2007 the parties entered into a written agreement which does not record the full terms contemplated by the parties. That the suspensive condition should have included the following term: "Die suksesvolle verkoop van die koper se eiendom geleë te Jeffreysbaai moet plaasvind voor of op einde Februarie 2008." That the error in the formulation of the contract was occasioned by a mutual mistake of the parties and that the contract was signed in the *bona fide* but mistaken believe that a complete version and true meaning of the parties' intention was recorded therein. The plaintiff pleads therefore that the dispute between the parties be determined on the basis of the proposed rectified agreement.
8. Lastly, the plaintiff pleaded enrichment. She contended that the two contracts are composite and indivisible. That she considered the offers made by the Nels and was not amenable to accepting them unqualified. As a result, she amended the terms of the offer by hand, signed next to these amendments and forwarded the amended contracts to the Nels' attorneys. It was argued on her behalf that by so doing the plaintiff made a counter-offer to the Nels. They did not accept same by countersigning next to the amendments and therefore no agreements were reached. She says that in the *bona fide* believe that the counter-offer was accepted by the Nels she made payment to them in the amount of R315 000.00 on the basis of the ostensible agreements thereby enriching them by that amount and was impoverished by the same amount.
9. The Nels on the other hand pleaded that the end of February 2008 does not amount to a reasonable time within which the suspensive condition could be regarded as unfulfilled regard being had to the country's economic slump during the months that the property in Jeffreys Bay was placed on the market.

That the high interest rates and the downturn in the real estate industry at that stage were adverse factors. They pleaded further that the suspensive conditions should be deemed to have been fictionally fulfilled due to the deliberate and intentional actions on the part of the plaintiff to prevent fulfilment in that, despite the unfavourable market conditions, she still claimed an unreasonable purchase price for her property; that she did not market the property as she should have and/or did not proceed with the sale; that she prematurely removed the property from the market and the "For sale" or advertisement boards in respect of the sale.

10. The Nels contended further that when the business was delivered to the plaintiff on 01 November 2007 its goodwill was valued at R360 000.00. They pleaded that the plaintiff abandoned the restaurant on 29 February 2008 and removed the antique water tank valued at R8000.00 from the premises. That the business was not returned or delivered because what was restored was: an entity with a different name and without goodwill; a completely altered menu; and an insufficient staff composition. They state that the business premises was broken into in April 2008 and the equipment to the value of R12 000.00 was stolen. Following this incident and in mitigating their loss they continued with the business in May 2008 albeit under protest.

11. The Nels went on to plead that the plaintiff received and possessed the business rights, the goodwill, and the movable assets against a payment of an amount of R315 000.00. That she conducted the restaurant business for her own account, profit and loss for the period 01 November 2007 to February 2008. That the goodwill, the historic water tank and their net income were received or taken or used by the plaintiff or that she had the value and use thereof which she did not deliver or restore to the Nels and therefore they (the Nels) were not enriched at her expense nor was she impoverished in the process.

12. Halfway through the plaintiff's testimony the Nels requested a postponement to amend their plea. In its original form the plea read as follows:

> "Behalwe om te ontken dat die handgeskrewe verandering aan klousules 9.3, 10.1, 14.1, 14.1.1 en 15 van aanhangsel A en 4.1, 5.1, 8.1, 8.1.1., 15.6 en 15.8 deel vorm van die ooreenkoms tussen die partye, word die res van die beweringe erken.

Verweerders pleit dat die handgeskrewe veranderinge by bovermelde klousules eensydiglik deur Eiseres ingeskryf is (en sy alleen daarby parafeer het) nadat die kontrakte eerste deur verweerders onderteken is, en dat verweerders nie ingestem het tot en/of parafeer het by die veranderings (teenaanbod) deur die eiseres nie."

13. In their latest amended plea, about the sixth amendment, the Nels state, *inter alia*, that the handwritten amendments effected on the contracts by the plaintiff were accepted by them by countersigning next to the alterations. To this end they attached annexure "K1" and "K2" to the amended plea being the contracts countersigned by them. Alternatively, should the Court find that the handwritten counter-offer made by the plaintiff was not accepted by them, they pleaded that the amendments were not material and/or were severable from the material terms, with the resultant effect that the remainder of the agreement is valid and enforceable. Counsel for the Nels contended that the plaintiff was alerted to the acceptance of her counter-offer tacitly and/or by conduct in that following the conclusion of the contracts the plaintiff paid the purchase price for the restaurant and the *merx* was delivered to her.
14. On closer examination, the move for an amendment referred to in the preceding two paragraphs is destructive of the plaintiff's enrichment claim referred to in para 8 above. Mr Nel testified that upon the plaintiff having effected the amendments to the contracts they also countersigned next to those amendments and their legal representatives were aware that they had done so. Adv Claasen SC, for the plaintiff, argued that if it is true that the Nels' legal representatives knew that they (the Nels) countersigned the amended agreements when they (the legal representatives) initially settled the plea then they misled the plaintiff and the Court that the amendments to the contracts were not countersigned by the Nels.

SOME BACKGROUND INFORMATION:

15. Following her retrenchment in Johannesburg the plaintiff learned of a restaurant that was on sale in Colesburg. She received two signed agreements from the Nels and took them with so as to scrutinise them. She effected certain amendments to the contracts and called Mr Fourie, the Nels' attorney, to inform him of her discontentment with certain clauses. Mr Fourie requested her to

effect changes to the clauses and initial next to them which she did and faxed the contracts back to him. Not much turns on most of the alterations she made to the contracts.

16. The plaintiff deleted, *inter alia*, clause 14.1.1 and 8.1.1 of the contracts at annexure A and annexure B of the Particulars of Claim, respectively. These clauses stipulated that in the event of the breach, i.e where the purchaser failed to comply with any of the terms or the conditions of the sale, the seller or his agent would have a right to cancel the agreement after seven days written notice to the purchaser to remedy the breach. She deleted a term to the effect that on this cancellation she stood to forfeit all the amounts paid to the Nels or their agent without prejudice to any of their rights and remedies including their right to claim damages.
17. The plaintiff testified that there was no discussion with her that the amount of R315 000.00 that she paid would be kept in trust until there was certainty on the fulfilment of the condition. She took occupation of the restaurant on 01 November 2007 and effected many improvements on it. The list of the improvements is quite lengthy. By way of an example, she says she painted the front burglar bars; she installed an advertisement light box to the value of R4000.00 to advertise the restaurant because it had no name written on its outside wall; she cleaned the footpath near the building and the pizza oven area; she installed a double washbasin worth R1800.00 near the pizza oven area; she fixed the leaking kitchen roof; she replaced the window panes that were broken; she introduced more tables to the sales area, and so forth.
18. The plaintiff testified further that she understood that the “cut-off date” for the fulfilment of the condition was the end of February 2008. This is so because when she called Mr Fourie about the amendments she needed to effect on the contracts he told her that she must not think that she had until December 2008 to sell her house in Jeffreys Bay. She then told Mr Fourie that December to February was the best time to sell her house and if she had not sold it by the end of February 2008 it may take some time before the property was sold. She also accepted that the Nels knew of this date because in a meeting she had with Mr Nel early in January 2008 she told him that she had not received any offers yet. Nel responded by saying “we will see what happens in February”.

19. With the end of February 2008 fast approaching the plaintiff directed a letter to the Nels' attorney on 18 February 2008 which reads:

"Meneer Fourie

I/s: KONTRAK TUSSEN JC EN EDM NEL & FE KELBRICK – 27 KERKSTRAAT

In klousule 18.2 van ons kontrak is die koop van 27 Kerkstraat onderhewig aan die verkoop van my eiendom in Jeffreysbaai.

Volgens my telefoniese gesprek met u in Oktober 2007, het ons ooreengekom dat Februarie 'n redelike afsnydatum vir die 'nie-verkoop' van my eiendom sal wees.

Ek het met Chris en Ella in die begin van Januarie daaroor gepraat en Chris het bevestig dat ons vir Februarie wag.

Hiermee wil ek graag aan u rapporteer dat tot op datum ek nog nie een skriftelike aanbod op my eiendom, 18 St Francisstraat Jeffreysbaai, te koop, ontvang het nie.

Indien dit lei tot kontrakbreuk voel ek dat ek 'n redelike tyd nodig het om die eiendom, 27 Kerkstraat, te ontruim. Daarom die brief.

Ek berei my voor om die eiendom teen die einde van Februarie te ontruim indien nodig.

Sal u asseblief ontvangs van my skrywe erken."

20. On 25 of February 2008 the plaintiff wrote a further letter to Mr Fourie which states:

I/s: KONTRAKTE TUSSEN JC EN EDM NEL & FE KELBRICK – 27 KERKSTRAAT

Ek verwys na bogenoemde en my brief gedateer 18 Februarie 2008.

Ek het nog nie van u gehoor nie. Mnr en Mev Nel het met my afgespreek om my Saterdagaand by die restaurant te kom sien maar hulle het nie vir die afspraak opgedaag nie.

Na die beste van my wete is alle bepalings en verpligtinge deur beide partye nagekom, behalwe die dranklisensie is op Mnr Nel se naam hernu en deur my betaal. Die opskortende voorwaarde is egter nie binne 'n redelike tyd vervul nie.

Ek vra hiermee 'n vergadering aan waar almal teenwoordig sal wees sodat ons die effek daarvan op die partye, synde die terugbetaling van deposito en die her-inbesitneem van die restaurant en inhoud daarvan kan bespreek.

My gedagte is dat alles voor of op 29 Februarie 2008 moet geskied.

Ek verneem dringend van u."

21. The plaintiff received no response from Mr Fourie in respect of the above two letters. From what one gathers from a letter addressed by the plaintiff to Mr Fourie dated 28 February 2008 below is that around 27 February 2008 a meeting was held between the parties and Mr Fourie but yielded no positive results. This letter reads:

"Meneer Fourie

I/s: KONTRAKTE TUSSEN JC en EDM NEL & FE KELBRICK – 27 KERKSTRAAT

Met verwysing na ons gesprek gister in u kantoor. Ek het aangedring tot 'n vergadering met u mnr en mev Nel en myself aangesien mnr en mev Nel nou wil afwyk omtrent die 'redelike' tyd wat ek en u (namens u kliënt) telefonies in Oktober 2007 ooreengekom het en waarmee mnr Nel toegestem het.

Aangesien ek bewus was dat mnr en mev Nel haastig was met die verkoop van die restaurant (hulle het 'n huis in gedagte gehad) en u woorde, "moenie verwag dat 'n redelike tyd Desember 2008 beteken nie", het u en ek mondelings, telefonies, ooreengekom dat Februarie 2008 'n redelike tyd is. Mnr en mev Nel het ook goedkeuring aan die datum verleen deurdat mnr Nel vroeg in Januarie 2008 vir my gesê het dat, "ons wag vir Februarie", nadat ek hom meegedeel het dat ek nog nie 'n koper vir my huis het nie. Ek wil met hierdie skrywe aan u weereens bevestig dat my eiendom, ten spyte van verskeie agente wat dit probeer verkoop, tot op datum nie verkoop is nie, en ek nog nie 'n geskrewe offer ontvang het nie.

Dit is duidelik dat Februarie nie vir mnr en mev Nel 'n probleem is nie aangesien mnr Nel bereid is om die kontrak onmiddellik te kanselleer met die voorwaarde naamlik, om net R50 000,00 aan my terug te betaal, daaraan verbonde. Ek bevestig die ferme ooreenkoms dat Februarie 2008 die ongeskrewe datum vir die 'redelike' tyd, wat nie in die kontrak gespesifiseer was nie, is.

Ek bevestig dus hiermee dat die kontrak se voorwaarde nie realiseer het nie, op grond van my eiendom wat nie verkoop nie, en die verstryking van die redelike tyd wat deur albei partye bevestig is.

Ek sal die bestekopname van die toerusting en die gebou gereed hê op 29 Februarie 2008, 15:00 vir inspeksie en die sleutels dan oorhandig. Die inventaris van die inhoud en toerusting sal saam met my swaer Anton du Plessis opgestel word.

Mnr en mev Nel of uself moet tussen 15:00 en 16:00 teenwoordig wees vir die oorname en oorhandiging van die sleutels by die restaurant te Kerkstraat 27, Colesberg. Ek ontvang ook terselfdertyd die terugbetaling van die bedrag van R315 000,00, Drie Honderd en Vyftienduisendrand, in kontant.

Ek het reeds reëlings getref vir die verwydering van al my meubels en persoonlike goed en sal gevolglik nie, nadat ek die sleutels oorhandig het, op die perseel wees nie.

Bevestig asseblief dringend die reëling."

22. The plaintiff says that she also did not receive a response to the above letter. Nevertheless, she returned the *merx* at end February 2008. She denied having abandoned the restaurant. She further says that she told the Nels that she was prepared to help them out with the business after February 2008 until they were ready to run it again. The Nels declined her offer for help.
23. The plaintiff went on to explain that on 20 May 2008, two months later, she received a letter dated 06 March 2008 from Mr Fourie which appeared to have been backdated, because from the postal stamp it was sent on 07 May 2008. She responded to the letter. In his letter Mr Fourie refers to various letters

written to him by the plaintiff and the meeting of February 2008. What is sketched out in this letter is largely disputed by the plaintiff in her replication.

24. The plaintiff also testified that there is no term in the agreement stipulating that she could not use a different name for the restaurant or that restricted how she had to conduct the business. She says that she discussed the name change from “JC Restaurant” to “Devine Restaurant” with Ms Nel and her two daughters. Ms Nel was not averse to the change and commended this as a good idea. The plaintiff denies that she completely altered the restaurant menu but confirmed having changed certain of the dishes because there were no trained chefs. During her evidence she painstakingly went through the menu to point out the difference between her menu and the Nels’ menu. These differences are of no moment and neither was there any profound contrast shown between them.

25. Insofar as the Nels pleaded that the staff composition was different at the time of handing over, the plaintiff maintains that nothing in the contract precluded her from bringing in her own staff. Nevertheless, she testified that when she took over the restaurant there were four employees from the Nels stable. One employee resigned shortly thereafter. She also appointed a barman as there was none in her staff complement.

26. The plaintiff explained that she put her house on the market for an amount of R1.4 Million rand from September 2007. She arrived at this amount based on information she received from various people. She has also worked in the property industry before. She says that the house situated next to hers was sold for R1.6 Million and was registered in January 2008. She requested Realnet Estate Agents, Seeff Properties and Pam Golding to market her property. It was also put on the internet for sale. At no stage did she withdraw the house from the market until 01 February 2011. She did not receive any offers to buy the house for the period September 2007 to end February 2008. During this period she had decided not to lease her property in an attempt to have it sold. At the end of February 2008 she instructed the estate agents to remove the “For sale” signs that were hung on her gate because it is impossible to attract prospective tenants with the signs hanging on the property.

27. Mr John Gordon Enslin Cooper was called as an expert witness in the property industry by the plaintiff. He is an experienced estate agent. He had conducted real estate business in various towns including Jeffreys Bay since 1984. He inspected the plaintiff's property and took photographs thereof. His company had a mandate to market it through independent listing services where the property would be put on the listing service so that other estate agents are able to market it as well. According to him the purchase price was fair and reasonable. The two nearest comparable properties were sold for R1.6 million and R1.3 million in January and February 2008 respectively.
28. Mr Cooper testified that during the boom period which includes the period in respect of which the property was in the market there are numerous investors who would purchase the property for rental purposes. He intimated that the property lends itself quite well to an investor but also to a country purchaser who possibly would let out the flat and lock up the balance of the house for his personal use. September to February is the best time for the estate agents to sell properties in Jeffreys Bay and other coastal areas. In his opinion the period September 2007 to February 2008 would be a reasonable period within which the plaintiff could sell her property. In his 27 years of experience December and January is the prime time to sell immovable properties.
29. Cooper testified that Kouga Municipality has very strict signage guidelines for the estate agents. The "For sale"; "On show" boards; and flags are only permitted on Friday afternoons and should be removed on Monday mornings before 10h00. He added that there are other marketing solutions that the estate agents can offer to a seller. Under cross-examination he testified that on average it would take three to nine months for a property placed on the market to sell, depending on the property markets. In boom times it will sell far much quicker than would be the case in tough economic circumstances. He intimated that the plaintiff's property was in a popular street and would always be in demand because of its proximity to the CBD, the beach, schools, police station and similar facilities and therefore six months was a reasonable period for the sale to be perfected.
30. Mr Nel, the first defendant, was a school teacher and a restaurateur at night. JC Restaurant was his family business which he operated from 2001 until October 2007. His average net profit was between R10 000.00 to R12 000.00 per

month. He says that during the festive season, particularly in December and January, the profit would escalate between R60 000.00 and R90 000.00 per month.

31. Mr Nel says that the purchase price of R815 000.00 was broken down as follows: R50 000.00 was for the movable assets, while the value of the business and the building was R265 000.00 and R500 000.00, respectively. He used the R315 000.00 paid by the plaintiff to discharge his other obligations and did not ring-fence it. He was aware that if the condition was not fulfilled restitution had to take place.
32. Mr Nel stated that there was a historical water tank which was brought onto the property in 1902 by a doctor who previously owed the building but could not recall if he informed the plaintiff to look after this tank. When this tank was showed to him as depicted on the photos, lying in the rubble, he was hesitant to identify it. However, he was unable to dispute the fact that the tank was exposed to the elements since 1902.
33. Mr Nel says that he informed the plaintiff to take her time to sell her house in Jeffreys Bay. He did not put any pressure on her to terminate the agreements. He further confirmed having told the plaintiff that they should wait until the end of February 2008 to see how things would develop with regard to the sale of her property. He testified that at the meeting held in February 2008 between the Nels, accompanied by their attorney on the one hand and the plaintiff on the other hand she told them that she wanted to end the contract at the end of February 2008 because she could not pay off her bond in Jeffreys Bay and also keep up with the R4000.00 occupational rent. They were supposed to meet a week later following the meeting of February 2008 but could not because Mr Fourie's secretary brought to him the restaurant keys and the inventory list. He intimated that it was never the parties' agreement that the end of February 2008 would be the date in respect of which the conditions would be regarded as unfulfilled. He says that it was not a mistake that the date was not specified in the agreement. He denied that the plaintiff offered to manage the restaurant after February 2008.
34. Mr Nel further testified that after the plaintiff had vacated the business premises it was not in operation in March and April 2008 because he had school commitments. The restaurant was broken into during that period and some of

the equipment had to be replaced. He testified that the restaurant that was handed over to him was not in the same condition. It had a name change; the menu was different and so was the staff composition. When he resumed with the business in May 2008 he noted that the guesthouses were not sending him customers as before. He had to market the business afresh. His testimony on the changes he says he disapproved of came to naught due to a number of material concessions he made under cross-examination: He said that he was not dissatisfied with the changes, particularly to the new name of the business and the menu. Not much need be said about the staff complement because the restaurant was not operational for two months after the plaintiff's departure. The laid off staff had to fend for themselves.

DETERMINATION OF THE ISSUES ARISING FOR CONSIDERATION:

35. The following dictum in *Haviland Estates (Pty) Ltd and Another v McMaster* 1969 (2) SA 312 (A) at 336B-G is instructive:

> "Where parties commit their agreement to writing, they intend that the writing should be the exclusive memorial of the reciprocal rights and obligations they intended creating by their agreement. The definition of the rights and obligations they intended creating is, therefore, in every case (rectification apart) governed by the meaning of the words used by them in the memorial of their agreement. (See Worman v Hughes and Others, 1948 (3) SA 495 (AD), per GREENBERG, J.A., at p. 505). If a party relies upon the memorial as the source of the right claimed by him, he must satisfy the Court that the right, to its full extent, is so defined in the memorial. The Court is not permitted to go beyond the definition included in the memorial by agreement between the parties. Not infrequently a party agrees to the definition of a right in his favour in terms which subsequently result in the right being inadequate in relation to his needs in the field in which he anticipated, at the time of contracting, that the right, as defined, would fully and effectively satisfy those needs. He may agree to this 'inadequate' right because, e.g. he lacks bargaining power or the ability to foresee correctly future developments or possibly because he unwisely relies upon the continuance of a state of things existing at the time he agreed to the terms defining his right. It not infrequently occurs that, where subsequent developments show that a party has contracted 'inadequately', equitable considerations may at times give rise to a natural desire to come to the aid of the party concerned, particularly so where the 'inadequacy' of his right virtually affects him. This feeling of sympathy should, however, not be permitted to blunt the Court's understanding of the meaning of the words. In this regard it is instructive to bear in mind the approach of this Court in cases such as *Lanfear v du Toit,* 1943 AD 59; *van der Merwe v Viljoen*, 1953 (1) SA 60 (AD) and what was said by Ogilvie Thompson J.A., in his judgment in the case of *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (AD) at p. 317E."

36. The issues largely turn on whether the period September 2007 to the end of February 2008 was a reasonable time for the conditions precedent to be regarded as unfulfilled thereby releasing the parties from their contractual obligations. There is also a dispute between the parties on whether they verbally agreed that February 2008 would be a date upon which the sale of the restaurant would lapse if the conditions were not fulfilled. I would commence the enquiry with the latter issue because if there was a verbal agreement it would put an end to most of the disputed issues raised in the papers.

37. Adv Claasen SC, for the plaintiff, argued that there was a verbal agreement between the parties to the effect that the end of February 2008 would be the expiry date for the plaintiff's due performance. In his countervailing argument Adv Benade, for the Nels, contended that the plaintiff's purported verbal agreement regarding the February 2008 deadline was seemingly agreed to between the plaintiff and the Nels' attorneys and was therefore not binding on the Nels.

38. The letters referred to earlier, which the plaintiff directed to the Nels' attorneys, repeatedly refers to the agreement reached between the parties on the so-called "cut-off date". It is disquieting that the attorney did not respond to any of these letters until late when the horse had already bolted. The period of two months that passed before the plaintiff could receive a response from her numerous letters directed to Mr Fourie is suspiciously long. In *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10 B-H the Court had the following to say regarding failure to answer letters particularly where issues pertaining to the contract between the parties are traversed therein:

> "I turn now to the letter of 21 April which the appellant received, no doubt shortly after that date, but to which he made no reply nor offered any protest. It appears to me that the appellant's silence in the face of that letter is of paramount importance in the decision of the case. The first paragraph of the letter announces in the clearest terms that an agreement was concluded on 5 April 'on the terms and conditions' set out in the memorandum, which was attached to the letter. Paragraph 2 expressly confirms that it had been agreed that the oral agreement referred to in paragraph 1 was binding even though no agreement was signed. And para 3 refers to a conversation between Schneider and the appellant in Port Elizabeth, when the appellant expressed the wish to have his attorney 'vet the written agreement' - it is repeated in this paragraph that the memorandum 'incorporates the terms upon which we agreed...'.
>
> I accept that 'quiescence is not necessarily acquiescence' (see *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not

always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion. (See *Benefit Cycle Works v Atmore* 1927 TPD 524 at 530 - 532; *Seedat v Tucker's Shoe Co*1952 (3) SA 513 (T) at 517 - 8; *Poort Sugar Planters (Pty) Ltd v Umfolozi Co-operative Sugar Planters Ltd*1960 (1) SA 531 (D) at 541; and of *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd*1963 (1) SA 632 (A) at 642A - G.) I have no doubt that appellant's silence and inaction after receipt of the letter justify an inference adverse to him."

Compare *Sun Radio and Furnishers v Republic Timber & Hardware (Pty) Ltd* 1969 (4) SA 378 (T) at 381D-G where the following remarks were made by the learned Judge:

"Manifestly there is a clear and urgent duty to speak against an incorrect recording of the terms of a contract in the process of negotiation, failing which the recorded terms will bind the party who remained silent.

The principles enunciated in *Benefit Cycle Works v Atmore* [1927 T.P.D. 524], supra, dealing with a letter recording a telephonic conversation in which the defendant was said to have assumed liability, are more applicable to this case. DE WAAL, J.P., stated at p. 530:

> '. . . a letter which places on record something false does not necessarily call for a reply from the person to whom it is addressed',

and further:

> 'But where, as in this case, negotiations had taken place immediately preceding the writing of the letter, and the writer places on record his version of what had taken place during the negotiations, and there is no reply by the other side, then the Court is bound to attach the greatest importance to that fact.'

Quoting from the English case *Willeman v Walpole* (1891) 2 Q.B. 534, DE WAAL, J.P., at p. 531 confirms the relevant principle of law to be as follows:

> 'The only fair way of stating the rule of law is that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission.'"

See also *Hamilton v Van Zyl* 1983 (4) SA 379 (E) at 388E-H.

39. It is as well to remember that the plaintiff's testimony was to the effect that the agreement on the date in respect of which the sale would be regarded as

having lapsed did not end with the attorney but was confirmed by the Nels. To my mind there is some credence in the plaintiff's version regarding the confirmation of the oral agreement by the Nels. This is so because Mr Nel did not dispute the plaintiff's version that he advised her that they would have to wait until the end of February 2008 to see if her house in Jeffreys Bay would be sold. It may well be that he also understood the "cut-off date" for the nonfulfillment of the conditions to have been the end of February 2008 or acquiesced thereto. But this matter does not end here because Mr Benade's further argument is that the written agreements had a non-variation clause which stipulates:

"Uitsluiting van ander afsprake:

Die ooreenkoms kanselleer en vervang alle kontrakte aangegaan tussen die partye voor datum hiervan en geen wysigings, aanvullings of ooreegekome kansellasie van die ooreenkoms sal van krag wees tensy dit op skrif gestel en deur die partye onderteken is nie."

Mr Benade contended that the verbally agreed February 2008 end date was an addition to the contracts already concluded. For this addition to be valid and enforceable or binding on the parties it ought to have been reduced to writing and signed by them.

40. It is trite that a non-variation clause should be interpreted restrictively as it curtails the freedom of contract. See *Randcoal Services Ltd and Others v Randgold and Exploration Co Ltd* 1998 (4) SA 825 (SCA) at 841E-F. The history of this matter highlights some disparity of the bargaining power between the plaintiff and the Nels when they concluded the contracts. This is so because from the onset up to and including the time when the dispute arose between them the plaintiff was not legally represented whereas the Nels were assisted by an attorney, Mr Fourie. As alluded to, the plaintiff testified that she understood that February 2008 was the "cut-off date" following her discussion with Mr Fourie on the changes she wished to effect on the agreements before she could sign them. Whether Mr Fourie also understood that the sale of the restaurant would have lapsed at the end of February 2008 remains unexplained as he was not called to the stand. Nevertheless, the plaintiff's testimony to the

effect that she and the attorney, the agent of the Nels, agreed on the "cut-off date" remains uncontroverted.

41. From the plaintiff's own version the oral agreement with the Nels' attorneys came into being prior to her signing the agreements of sale. What runs counter to her account is that the agreements of sale she signed cancel all the agreements concluded prior to them. In the nature of things this would include the agreement she reported to have concluded with the attorney regarding the "cut-off date". However, sight should not be lost that her evidence suggests that the oral agreement in respect of the "cut-off date" was reconfirmed by the Nels after the conclusion of the agreements.

42. Mr Claasen argued that the operation of a non-variation clause does not extend to a subsequent agreement by the parties on an issue not dealt with in the contract. He pressed that the verbal agreement was not a variation of the parties' contractual obligations or an additional obligation between them. In support of his argument, he referred to *Randcoal Services Ltd and Others,* supra, where the Court had to, *inter alia*, determine if the substitution agreement which came later during negotiations between the parties and mainly addressing the question of the employees' medical aid contributions was an addition to their prior restructuring agreement. The facts in *Randcoal Services Ltd* are completely distinguishable from the present. In that case the Court held that the restructuring agreement did not deal at all with the issue of liability for the payment of the ex-employees' medical aid contributions. It therefore found that the substitution agreement did not *amend* the restructuring agreement by adding to its actual subject-matter.

43. In my view, the mentioned orally agreed end of February 2008 "cut-off date" cannot be divorced from the agreements of sale because it seeks to expressly set out the date in respect of which the sale of the restaurant would lapse. To my mind, it was a fundamental addition which ought to have been reduced to writing and signed by both parties. The principle applicable in this situation was reaffirmed as follows in *HNR Properties CC and Another v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) at 479C-F para 19:

> "In *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) this Court held that a term in a written contract providing that all amendments to the contract have to comply with specified formalities is binding. The principle has

been consistently reaffirmed, most recently by this Court in *Brisley v Drotsky* 2002 (4) SA 1 (SCA)…. Courts have in the past, often on dubious grounds, attempted to avoid the Shifren principle where its application would result in what has been perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve a violation of the Shifren principle, for example, where it amounts to a pactum de non petendo or an indulgence in relation to previous imperfect performance."

44. Mr Claasen sought to argue that the contract did not prohibit the verbal variation of the non-variation clause therefore parties can agree not to abide by it or to amend it. There is no evidence in support of the existence of an agreement to this effect.

45. I now turn to the question on whether the period from 20 September 2007 to February 2008 was a reasonable time for the fulfilment of the suspensive condition. In the absence of an agreement on a specific date for the fulfilment of the condition, it would be implied that the obligation to give efficacy to the agreement of sale would be discharged after the lapse of a reasonable time. In *Lanificio Varam S.A. v Masurel Fils (Pty) Ltd* 1952 (1) SA 581 (C) at 586B-C the Court made the following pronouncement:

"It is a rule of law that, where the parties have not expressly fixed the time for the performance of a contract, it must, unless the other terms of the contract indicate a contrary intention, be implied that performance should take place within a reasonable time. Halsbury (2nd ed., para. 268, p. 190); Williston on Contracts, Vol. 1, para. 38, p. 101; Hick v Raymond & Reid, 1893 A.C. (H. of L.) 22. In my opinion the same rule applies to a condition in a contract requiring that some act should be performed in order that an obligation under the contract can come into existence."

46. Compare *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 697G-H where Botha J puts it thus:

"In my view, when a suspensive condition, of a kind which has not been inserted in the contract for the specific benefit of one of the parties only, remains unfulfilled after the lapse of a reasonable time for fulfilment, the contract is discharged automatically, by virtue of an implied term to that effect, unless there is something in the contract negativing the implication of such a term, and subject to the possibility of fictional fulfilment of the condition by reason of the conduct or inaction of either of the parties. Ordinarily, no action on the part of either of the parties equivalent to a placing in mora of the other in relation to the fulfilment of the condition as such is required before the contract comes to an end."

47. Mr Benade argued that by the plaintiff's own admission she had a long-term plan for the restaurant and had effected many improvements thereon. That she did not receive any pressure from the Nels to expedite the sale of her house in

Jeffreys Bay and therefore the end of February 2008 was not a reasonable period for the conditions to be fulfilled. He contended that the letters that the plaintiff wrote to the Nels' attorneys in February 2008 demonstrates that she desperately wanted to resile from the contracts because she had changed her mind about the transaction. In addition, he argued, that the plaintiff removed the "For sale" signs on her property in Jeffereys Bay. That around January and February 2008 she did not lower her asking price of R1.4 million rand for her house to be sold while her outstanding debt on the mortgage bond was R300 000.00. That she did nothing after she had returned the restaurant to the Nels but remained jobless on a farm outside Colesburg for several months.

48. In *St. Martin's Trust v Willowdene Landowners' (Pty) Ltd* 1970 (3) SA 132 (W) at 135F–136C the Court laid down the following principles as governing the enquiry into the question whether a reasonable time for the fulfilment of a suspensive condition in the contract had elapsed:

"It will be sufficient if I state the following principles which seem to me to govern a case of this kind.

(a) As the problem, namely, whether or not a reasonable time for performance has been allowed, arises out of contract, it is to be resolved in the light of the intention of the parties, as expressed by them, or as properly inferred by the Court from the language of the contract and the surrounding circumstances.

(b) In deciding what would have been a reasonable time the Court must have regard to the nature of the performance which was due by the party who is alleged to have been in default, and to the difficulties, obstacles and delays attendant upon such performance.

(c) The difficulties, obstacles and delays to be taken into account are, however, only such as were within the contemplation of the parties at the time of the contract. That was laid down by Tindall, .J, as he then was, in *Young v Land Values Ltd.,* 1924 W.L.D. 216 at pp. 224-225.

(d) In taking account of the nature of the required performance, with the relevant difficulties, obstacles and delays attendant thereon, the Court should postulate reasonably prompt and appropriate action and due diligence on the part of the party obliged to perform.

(e) In deciding upon the promptitude and diligence which was to be expected of the party obliged to perform, the Court must have regard to the commercial and other interests of the other party to the contract. Although in a particular case it may prove impossible for one of the parties to complete performance until after the lapse of a very long time indeed, it does not necessarily follow that that very long period constitutes a reasonable time which must elapse before cancellation is justified. The period necessary for performance may be so unreasonably long in the light of the other party's interest that cancellation may be justified before that period has expired."

49. The following dictum appears in *Cardoso v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (3) SA 54 (W) at 67A-C:

> "From the passages cited above I derive the following principles which, in my view, should be applied in order to determine whether a reasonable time for the fulfilment of the suspensive condition in the contract has elapsed.
>
> (1) Each case must depend upon its own peculiar circumstances.
> (2) Important factors to be borne in mind are
> (a) the contemplation of each of the parties at the time of entering into the contract; and
> (b) the commercial interests of each of the parties.
> (3) As regards (a) above, however, the test is not solely subjective. An objective test must also be applied. In other words, although one of the parties may in fact not have contemplated any particular difficulty or cause of delay that might or did arise, if it was reasonably foreseeable it must be taken into account."

50. The Nels did not controvert Mr Cooper's testimony on the reasonableness of the purchase price in respect of which the plaintiff's property was placed on the market. Mr Nel conceded under cross-examination that he did not have facts to substantiate that the purchase price was set high. Regard being had to the evidence, prior to February 2008, the plaintiff's house was on the market for approximately six months. The Nels did not tender any evidence on their pleaded economic downturn during the period the property was placed on the market. Save to state that the period was unreasonable to lead to the perfection of the sale of the house in Jeffereys Bay, the Nels did not adduce evidence to rationally demonstrate that the period was inadequate.

51. The plaintiff's commercial position was sketched out earlier. To sum it up, she paid the full purchase price for the movable assets and the business rights in the restaurant. She borrowed R200 000.00 from her flexi-reserve, R115 000.00 from her son and also paid the Nels a monthly occupational rent of R4 000.00 for the restaurant. She was not receiving any rental from her house as she had requested her lessees to vacate the property so as to increase its sale prospects. She had to pay off her increased bond repayments in the amount of R4000.00 including municipal services for her house. To this must be added that the plaintiff was also obliged, in terms of the contracts, to pay all costs pertaining to the drafting of the contracts and all the attendances on an attorney and client scale. In these circumstances it could not have been expected of the

plaintiff to carry on with the contract in perpetuity until the sale was perfected. On the other hand the Nels' commercial interest is somewhat unclear. What one gathers from the plaintiff's testimony is that they intended to buy a house.

52. In *Melamed and Another v BP Southern Africa (Pty) Ltd* 2000 (2) SA 614 (W) at 625E-G the Court held:

> "The agreement under consideration is subject to a suspensive condition. This entails that the agreement would be discharged *ipso iure* on non-fulfilment of the condition (*Dirk Fourie Trust v Gerber* 1986 (1) SA 763 (A) at 773F--G; *Design and Planning Service v Kruger* [1974 (1) SA 689 (T)] (supra at 697G--H)). In *Tuckers Land and Development Corporation (Pty) Ltd v Strydom* [1984 (1) SA 1 (A)] (supra at 23H) Joubert JA said:
>
> > 'By nie-vervulling van die opskortende voorwaarde, wat nie aan die toedoen van die partye te wyte is nie, veral die koop/verkoop.'
>
> Where a suspensive condition is not fulfilled, a party who remains owner of the property sold may rely on his remedies qua owner and claim eviction of the party in possession (for example *Meyer v Barnardo and Another* 1984 (2) SA 580 (N)). Where there has been performance pursuant to a contract subject to a suspensive condition *pendente conditione* the parties must restore that which they have received *pendente conditione* or *conditione extincta*. The authorities seem to indicate that restoration can be claimed with one or other of the enrichment remedies."

53. Regard being had to the weaker bargaining power of the plaintiff at the time of transacting with the Nels as well her commercial position following the conclusion of the contracts I am not persuaded that the period that lapsed was unreasonable for the fulfilment of the suspensive condition.

It follows that the agreement was properly discharged. On the conclusion I have reached it is not necessary to deal with the claim for rectification or enrichment.

THE COUNTERCLAIM:

54. The Nels' counterclaim is provisional in nature and rested solely on the success of the plaintiff's claim in that, they contended, it would not have been necessary to determine it had the plaintiff's claim failed because the *status quo* prior to February 2008 would prevail. In their counterclaim the Nels claim restitution of a reasonable and fair value of the goodwill of the restaurant in the amount of R360 000.00; delivery of their antique water tank which was removed by the

plaintiff or not returned by her; alternatively the reasonable and fair replacement value of the historic tank in the amount of R8000.00; and restoration of the reasonable and fair net income of the restaurant from November 2007 to February 2008 calculated and based on the average net income earned in the preceding years in the amount of R68 835.00 which they stated would be proved by means of oral and documentary evidence.

55. In terms of Rule 35(3) of the Uniform Rules the plaintiff requested the Nels to produce the yearly financial statements of CJ's Restaurant for the period 28 February 2005, 2006, 2007, and 2008; the provisional and final tax returns for these period; the VAT returns; the particulars of employees remuneration; the IRP 5 and IT3 reconciliations, detailed ledger, detailed income statement and about 20 further like financial documents for inspection as envisaged in Rule 35(6) or to declare under oath that they were not in possession of same in which event to indicate their whereabouts. In response the Nels stated that they were not in possession of these documents because they were destroyed in a hailstorm during 2009. During Mr Nel's cross-examination he acknowledged that some of this information could have been retrieved from the South African Revenue Service.

56. It is as well to remember that Mr Nel had testified that his restaurant's average income was in the region of R60 000.00 and R90 000.00 during January and December. When confronted under cross-examination that in his pleadings he had averred that his income during the December 2007 was R36 000.00 he had no choice but to concede that he plucked the figures in vacuum. In essence, no evidence in any form was adduced by the Nels to prove their purported loss of income. As for the antique water tank, Mr Nel could not recall if he had ever informed the plaintiff to look after it.

57. The only argument tendered by the Nels in respect of their counterclaim is that although their movable assets were returned the plaintiff failed to prove that she restored the goodwill to them. By Mr Nel's own admission they sold the business rights and movable assets to the plaintiff for an amount of R315 000.00 and received the full purchase price from the plaintiff in respect thereof which they are still holding on to or have spent. Mr Nel could not say on what basis they still required the plaintiff to pay the goodwill for the restaurant.

Unquestionably, the Nels have failed to proof their counterclaim and it stands to be dismissed.

THE COSTS:

58. I now turn to the issue of costs. Mr Claasen argued that the Court should mark its displeasure by means of a punitive costs order against the Nels. He described the conduct of the Nels and their attorney as improper, dishonest and unconscionable particularly in view of the letter dated 18 June 2008 which they directed to the plaintiff's attorney wherein they recorded that the plaintiff restored the restaurant under a different name; did not sell traditional pizzas; had fired personnel and appointed new employees; that she removed her house from the market and had not mandated the estate agents to sell the house as promised. This was so, he contended, because the evidence demonstrated these allegations to be a fabrication.
59. In further motivating a prayer for costs on the punitive scale Mr Claasen argued that the Nels' defences and their counterclaim was a complete fabrication intended to frustrate the proceedings and/or the plaintiff in the hope that she would abandon her claim. He argued that the Nels had no *bona fide* intention to proof any of the defences they raised or the spurious allegations encapsulated in their provisional counterclaim. These actions, he contended, smacks of dishonesty towards the Court and the plaintiff and should not be countenanced.
60. In respect of the Nels' amendment to their plea, which was effected when this trial was underway and had the effect of rendering the plaintiff's enrichment claim moot, referred to earlier, Mr Claasen suggested that the conduct of the Nels and their legal team of the time required the attention of the Law Society and the Bar Council.
61. In my view, the few instances of the apparent breach of professional etiquette referred to by Mr Claasen, if proved to be true, ought to be severely deprecated and discouraged. The duties and functions of a legal representative who pleads his client's case were expressed as follows in *Hallowes v The Yacht Sweet Waters* 1995 (2) SA 270 (D) at 277A-D.

> "In the first place, of course, he is there to put forward the case of the person whom he represents with such vigour and ability as he has at his disposal. In our sophisticated

system of court procedure, however, his approach and attitude cannot be exclusively subjective. Secondly, he is required to communicate and discuss the matter with the representative of his opponent for the simple purpose of eliminating disputes which are not material, ascertaining that which is, in fact, common cause between the parties and, last but by no means least, endeavouring to achieve a compromise of the dispute where such compromise can be effected without an inordinate measure of capitulation. Thirdly, he has a duty to deal frankly and candidly with the court. Without these three functions being properly performed by any person who purports to appear before the court in a representative capacity, there must always be a tangible danger of a failure of justice."

62. The following passage appears in AC Cilliers on Law of Costs 4-14 para 4.09:

"In *Van Wyk v Millington* [1948 (1) SA 1205(C)] it was pointed out that the court's reluctance to award attorney and client costs against a party is based on the right of every person to bring his complaints or his alleged wrongs before the court to get a decision, and he should not be penalised if he is misguided in bringing a hopeless case before the court. If, however, the court is satisfied that there is an absence of *bona fides* in bringing or defending an action it will not hesitate to award attorney and client costs."

63. As was observed in *Waar v Louw* 1977 (3) SA 297 (O), the administration of justice is sometimes an irritating discipline where even the most skilful practitioners can make mistakes which cause unnecessary costs. All things considered I am not swayed that the Nels acted *mala fide* in defending their case to the extent which warrants an award of costs on the harsher scale. In my view, the costs should follow the success in the ordinary party and party scale.

64. In the result the following order is made:

ORDER:

1. Judgment is granted against Mr Johannes Christiaan Nel and Ms Ella Dorathea Maria Nel, the first and second defendants, for the payment of an amount of R315 000.00 (three hundred and fifteen thousand rand).
2. Interest on the aforesaid sum at the rate of 15.5 % per annum as from 01 March 2008 to date of final payment: provided that the interest does not exceed the capital sum of R315 000.00.
3. The first and second defendants' counterclaim is dismissed with costs.
4. The first and second defendants are to pay the plaintiff's costs of suit on party and party scale, jointly and severally, the one paying the other to be absolved.

_____

PHATSHOANE J

NORTHERN CAPE DIVISION

On behalf of the Plaintiff	Adv J.Y Claasen SC
Instructed by	Duncan & Rothman
On behalf of the Defendants	Adv H.J Benade
Instructed by	Haarhoffs Inc