

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 87615/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

Date: 7 August 2023

K. La M Manamela

In the matter between:

PKX CAPITAL (PTY) LTD

Plaintiff

(Registration No: 1[...])

and

ISAGO AT N12 DEVELOPMENT (PTY) LTD

Defendant

(Registration No: 2[...])

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **7 AUGUST 2023**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] In this action, the plaintiff, PKX Capital (Pty) Ltd (“PKX”), caused summons to be issued against the defendant, Isago at N12 Development (Pty) Ltd (“Isago”), in November 2019 claiming payment for fees in respect of services rendered in the amount of R180 million. PKX’s claim arises from an alleged breach of a contract concluded between PKX and Isago in October 2017¹ regarding a transaction for the sale of land and/or sale of shares belonging to Isago financed by the Public Investment Corporation (“PIC”). PKX claims Isago breached the contract due to non-payment of the fee claimed for the services on the transaction. Isago denies liability, essentially on three bases, including that PKX relied on an invalid or “superseded” agreement.²

[2] The trial or testimony of the witnesses on behalf of the parties in this matter took place a while back on 2 - 4 November 2021, except for the closing address. The trial was postponed to 25 February 2022 to conclude the matter. But, on 7 January 2022 subsequent to the postponement, PKX launched an application for leave to amend its particulars of claim. The application was opposed by Isago. Leave to amend was granted on 25 March 2022,³ but Isago sought leave to appeal the outcome. The application for leave to appeal was also opposed. The latter application was only heard on 21 October 2022 and leave was refused on 9 December 2022.⁴ The hearing of the closing argument or address eventually took place on 20 April 2023, significantly due to challenges in the coordination of the dates of hearing.

[3] This judgment was reserved on 20 April 2023, after I heard closing argument by counsel on behalf of the parties to conclude the trial. The appearances in the matter over the abovementioned dates were by Mr I Semanya SC, jointly with Mr M Matera, for PKX, and Mr PG Cilliers SC, jointly with Mr RJ Groenewald, for

¹ The parties actually do not agree as to the agreement or contract governing their relationship including that the one relied upon by PKX is extant. See pars 19-43 below.

² Par 16 below.

³ CaseLines 0-1 to 0-28 (“Judgment (Leave to Amend)”).

⁴ CaseLines 0-29 to 0-45 (“Judgment (Leave to Appeal)”).

Isago.⁵

[4] The central issues in the determination of this matter have already crystallised in the argument advanced for and against PKX's application for leave to amend its particulars of claim and Isago's subsequent application for leave to appeal. This Court also had an opportunity to engage with the issues in the two detailed judgment already handed down in the two interlocutory applications.⁶ Against this background, I deal with the issues - as in the pleadings and the evidence during the trial - only to the extent I consider warranted for purposes of this judgment.

Pleadings

[5] A full complement of pleadings was delivered on behalf of both parties. At some stage the pleadings on both sides were amended, including in terms of the order of this Court in the Judgment (Leave to Amend) referred to above.⁷ Next are the material aspects of the pleadings for current purposes.

Plaintiff's case (on the pleadings)

[6] The essentials of PKX's case as in its pleadings may be stated as follows. It conducts specialist business in the field of "transactional advisory services". The services are regulated by the Financial Sector Conduct Authority, previously known as the Financial Services Board. Whilst conducting this type of services or significantly related services, PKX came to be involved in the transaction with Isago and other parties, as outlined below.

[7] On 27 October 2017, PKX and Isago, as well as three other entities, concluded a memorandum of agreement ("MOA") in terms of which PKX was appointed a transaction advisor. The services rendered in the transaction, according to PKX, included "pre-deal process evaluation"; transaction evaluation,

⁵ Mr Matera appeared alone for the closing argument on 20 April 2023, although both counsel appear to have been involved in the drafting of the written argument.

⁶ Footnotes 3 and 4 above.

⁷ Par 2 above.

and “post deal implementation”. The services also involved the identification of and negotiation with stakeholders and black economic empowerment groups. Essentially, the transaction involved the sale or disposal of land (or shares in the entity which owns the land) situated in Klerksdop and/or funding sourced from the PIC; Government Employees Pension Fund (GEPF) and Municipal Council Pension Fund (MCPF)”.

[8] To predicate its claims, PKX specifically incorporated, among others, the following clauses of the MOA in the particulars of claim: (a) clause 4.1 regarding the recordal that PKX is the proximate cause and the effect of the “Transaction” (which is defined)⁸ and the successful application for the funding of the Transaction from PIC;⁹ (b) clause 4.2 recording that, in terms of the MOA, PKX will raise the capital in the amount of R680 million and Isago shall be liable to pay PKX an amount equaling R240 million as the “transactional advisory fees” for the services rendered;¹⁰ (c) clause 4.3 reflecting that should the capital amount raised by PKX be less than R680 million - in that event - the transactional advisory fee shall be reduced *pro rata*;¹¹ (d) clause 4.4 reflecting an alternative position “in the event that the Transaction is successfully executed on the basis that SANMVA¹² Trust (and any co-purchaser) purchases immovable property from Isago for the purchase price of R 680 000 000.00 (six hundred and eighty million Rands), then Isago shall be liable to pay PKX the Transactional Advisor Fee”,¹³ and (e) clause 4.6 dealing with payment of the fee.¹⁴

[9] PKX pleaded that it successfully raised the capital amount of R510 million for the “Transaction” of the total value of the development project in the amount of R850 million. Therefore, according to PKX it has duly performed all its obligations in terms of the MOA and Isago is liable to pay the transaction fee. Isago having failed to settle the invoice issued in the amount of R180 million by PKX on 15 May 2019 - notwithstanding a written demand - this lawsuit became inevitable.

⁸ Par 55 below, for a reading of clause 1.15 defining “Transaction”.

⁹ Par 55 below, for a reading of clause 4.1.

¹⁰ Par 55 below, for a reading of clause 4.2.

¹¹ Par 55 below, for a reading of clause 4.3.

¹² “SANMVA” stands for the South African National Military Veterans Association.

¹³ Par 55 below, for a reading of clause 4.4.

¹⁴ Par 55 below, for a reading of clause 4.6.

Defendant's case (on the pleadings)

[10] Isago denies liability for the amount claimed by PKX or overall. It filed a plea, later amended to incorporate a special plea. The essentials of Isago's defence, as garnered from the pleadings, are as summarised below.

[11] For purposes of its special plea, Isago relied on the provisions of the Estate Agency Affairs Act 112 of 1976 ("EEA Act") to the effect that the fee claimed by PKX in terms of the MOA represents an estate agent's commission or remuneration impermissible for someone or a recipient without a valid fidelity fund certificate.

[12] In a manner comparable to a special plea, Isago also alleges that another agreement was concluded with PKX, subsequent to the MOA concluded on 27 October 2017 (henceforth "the 2017 Agreement" or "MOA"). This subsequent agreement signed in April 2018 was backdated to 20 August 2017 ("the 2018 Agreement") by agreement between the parties, Isago further alleges. Isago claims that the 2017 Agreement or the MOA was superseded by the – subsequent-2018 Agreement. The circumstances surrounding the 2018 Agreement are pleaded by Isago as follows: (a) during or about April 2018 at Pretoria, PKX, duly represented by Colonel Papi Kubu ("Colonel Kubu"), and Isago, duly represented by Mrs Doreen Crause ("Mrs Crause"), concluded a further and superseding written agreement (i.e. the 2018 Agreement); (b) the 2018 Agreement was backdated to 20 August 2017 at the request of Colonel Kubu; (d) clause 9¹⁵ of the 2018 Agreement expressly provides that it superseded all previous contracts, which "previous contracts" includes the 2017 Agreement or the MOA, and (e), therefore, the 2018 Agreement was substituted for the 2017 Agreement and thereby rendering the 2017 Agreement of no force or effect, thenceforth.

[13] Isago further pleaded as follows on the issues relating to the 2017 Agreement, albeit conditionally in the event this Court finds the terms of the 2017

¹⁵ Par 37 below, for a reading of clause 9.

Agreement still binding and enforceable on the parties. It denied that a transaction of the type contemplated by the 2017 Agreement was concluded entitling PKX to payment of the transaction advisory fee, when the matter is viewed from the definition of “Transaction” in clause 1.15,¹⁶ read together with other clauses of the MOA. Isago explained that on or about 7 November 2018 Isago and the GEPP concluded the Sale of Land Agreement. In terms of the latter agreement, among others, Isago sold to GEPP certain immovable properties situated in the North West Province for the sum of R510 million. An amount of R306 million of the aforesaid proceeds of sale was paid into an escrow account only to be released upon the GEPP issuing a release note. A further amount of R210 million of the sale proceeds was paid or was then still to be paid to Isago. The Sale of Land Agreement was concluded without the involvement of PKX. Under the circumstances, PKX was not the proximate and effective cause of the Sale of Land Agreement and Isago is not indebted to PKX for any amount or at all, it is further pleaded by Isago.

[14] Isago also emphasised that the “Transaction”, as defined under clause 1.15 of the MOA,¹⁷ includes the acquisition of either Isago’s immovable property and/or shareholding in Isago, which acquisition was to be funded by PIC. However, under the “the final” Sale of Land Agreement, concluded in respect of the relevant immovable property or properties, what was sold was an undivided 60% share in some immovable properties (as defined in the Sale Agreement).

[15] By way of replication, PKX, among others, denied that it is an estate agent or had conducted the business of an estate agent for the impugned fee, and also denied that the 2017 Agreement has been superseded by the 2018 Agreement.

Issues requiring determination

[16] The issues central to the determination of this matter can be deduced from what has been extracted from the pleadings appearing above. Also, as already mentioned, the issues – to some extent – crystallised in the argument advanced in

¹⁶ Par 55 below, for a reading of clause 1.15.

¹⁷ *Ibid.*

the two interlocutory applications for leave to amend and leave to appeal. With a slight mutation resulting from the closing address or argument by counsel, this or the other way, the following appear to be the germane issues for determination in this matter:

[16.1] whether PKX performed its mandate in terms of the 2017 Agreement;

[16.2] whether PKX is prohibited from receiving remuneration by the provisions of the EEA Act, and

[16.3] whether the 2017 Agreement was superseded by the 2018 Agreement.

[17] The first issue (i.e. in 16.1 above) is the essence of PKX's claim against Isago set out in the particulars of claim to the summons, referred to above. The other two issues (i.e. in 16.2 and 16.3 above) exclusively originate from Isago's plea. In fact, what appears under 16.2 above is the nub of Isago's special plea. All of these issues have the potential to be dispositive of this matter. For example, if one were to decide that the so-called "Transactional Advisory Fee" claimed by PKX is in fact a "masked" estate agent's commission proscribed by the EEA Act this would put paid to PKX's claim. Equally, a holding that the 2017 Agreement was superseded by the 2018 Agreement would be dispositive of this matter as PKX has exclusively relied on the former agreement.

[18] With all these issues contending equally to dispose of the dispute between the parties the Court becomes saddled with the task of deciding which issue to deal with first. In terms of the convention I would have had to first decide the special plea (i.e. the issue in 16.2 above), but the issues in the special plea are embedded in the disputed agreements. During the closing address by counsel it became clear – at least to me – that one may have to determine whether the 2017 Agreement was superseded by the 2018 Agreement, first. I remember that I canvassed this issue with counsel, but it is not necessary to record their answers here, if any. What became clear is that a finding whether the 2018 Agreement (if proven to exist) replaced the 2017 Agreement would scupper, so to speak,

PKX's claim which is solely based on the 2017 Agreement. So I will deal first with this issue. There is, in fact, some logic in this. The two agreements are inimical to each other. This simply means that one cannot determine the first two issues (i.e. in 16.1 and 16.2 above) based on the 2017 Agreement without denoting that the 2017 Agreement is extant and binding on the parties. Therefore, I turn next to determine whether the 2017 Agreement was superseded by the 2018 Agreement.

Whether the 2017 Agreement was superseded by the 2018 Agreement?

General

[19] This matter was categorised as a commercial matter and dealt with in terms of chapter 4 of the Commercial Court Practice Directives of this Court.¹⁸ This, essentially, meant that the Commercial Court Practice Directives of this Court govern the conduct of this matter, including the trial. The Commercial Court Practice Directives stipulate that unless the leave of the Court is obtained, the parties shall file witness statements which would constitute evidence in chief.¹⁹

[20] As already pointed out above, the trial or hearing took place from 2 to 4 November 2021 through a virtual platform as the directives of this Court required or allowed at the time. PKX called two witnesses, namely Colonel Kubu and General Mbulelo Fihla. The two witnesses had filed witness statements. On the part of Isago, three witnesses were called, namely, Mr Christiaan Crause ("Mr Crause"), Mrs Crause, and Dr Martin Khunou ("Dr Khunou"). These witnesses had also already filed their witness statements. The witnesses confirmed their statements and some of them were subjected to cross examination by counsel on behalf of the parties. But

¹⁸ **"CHAPTER 4 – GETTING THE MATTER READY FOR TRIAL"**

1. Matters heard in the Commercial Court will be dealt with in line with broad principles of fairness, efficiency and cost-effectiveness.
2. The following steps will usually be of application, subject to the requirements of the particular case.
3. The plaintiff, within the period specified by the Judge at the first Case Management Conference, must file a statement of the case containing the following:
a) The plaintiff's cause(s) of action and relief claimed;
b) The essential documents the plaintiff intends to rely on, and
c) A summary of the evidence the plaintiff intends to rely on.
4. The defendant, and third parties, if any, within the period specified by the Judge or Judges at the first Case Management Conference must file a responsive statement of the case..."

¹⁹ Chapter 5 of the Commercial Court Practice Directive of 3 October 2018.

not all witnesses' testimony is relevant to the issue currently under determination, namely, whether the 2017 Agreement was superseded by the 2018 Agreement. Therefore, I will – for now – deal with the issues material to conclude on the issue.

[21] It is common cause between the parties that PKX and Isago concluded the 2017 Agreement or the MOA on 27 October 2017.

The coming into being of the 2018 Agreement, if it did

[22] Agreement is said to have been signed by the parties on 25 April 2018, but backdated to 20 August 2017. Mr Crause, the first witness for Isago, in his filed witness statement, stated, among others, what follows. Around 20 April 2018, after the letter of approval dated 5 April 2018 was received from PIC, Colonel Kubu contacted Mr Crause and asked that a new agreement on commission between PKX and Isago be urgently drawn up. When Mr Crause enquired the reason for this, Colonel Kubu told him that PIC was “most concerned” that PKX would receive the amount of R180 million “for the minimal role it played in the sale of land transaction” and, thus, Colonel Kubu “wanted to lessen the commission payable to 12% of the transaction value”. Mr Crause agreed and the agreement was drafted. Several emails were exchanged between the parties in the process of finalising the agreement. According to Isago, when it came into existence, the “fourth agreement” (as “the 2018 Agreement” is also known) expressly replaced all prior agreements between PKX and Isago.

[23] As I mentioned above, this issue or defence is similar to a special plea. Isago made the allegations with PKX reacting. But I will deal with the relevant facts and the evidence thereon in no particular sequence to avoid complicating the discussion.

The 2017 Agreement is off the table, perhaps even the 2018 Agreement

[24] Mr IM Semanya SC, joined by Mr M Matera, for PKX argued that when Mr Crause was cross-examined, he testified that the 2017 Agreement is “off the table”. Surprisingly, Mr Crause also confirmed upon a question from counsel that “the

fourth agreement” (i.e. the 2018 Agreement) was “also ... off the table”. This effectively meant that not only one but both agreements were “off the table”. This means Isago’s defence lacks “rational basis” to stand for consideration, as it is essentially reliant on a non-existent agreement, counsel submitted.

- [25] Mr PG Cilliers SC, joined by Mr RJ Groenewald, for Isago argued regarding the statement by Mr Crause in cross examination that the 2018 Agreement was “off the table”. Counsel, further, explained that by stating that the 2018 Agreement was “off the table” Mr Crause simply did not convey that the 2018 Agreement was “non-existent”. What was conveyed was that the 2018 Agreement was “off the table” since the agreements with PIC were not structured according to the 2018 Agreement.

Is that Colonel Kubu’s signature on the 2018 Agreement or not?

- [26] The 2018 Agreement reflects what appears to be the initials (or rather initialling) and signature of Colonel Kubu. But Colonel Kubu appears to deny that he signed the document. According to Isago, the 2018 Agreement was signed by the representatives of both parties on 25 April 2018. The direct evidence from the testimony of Isago’s witnesses is that on 25 April 2018 Colonel Kubu appended his signature to the 2018 Agreement at the Crause home. And the expert opinion of Mr Hattingh is to the effect that the signature on the 2018 Agreement belongs to Colonel Kubu. This expert opinion was admitted by PKX or not challenged by PKX.
- [27] Faced with the apparent insurmountable task of refuting all these, Colonel Kubu ventured when asked by counsel for Isago whether he was contesting the correctness of the expert’s opinion: “if your signature is your signature and that ... signature is on a document the forgery could not be that maybe it is in terms of scribbling your signature” but “could be in terms of it being imposed on that document”. When counsel retorted that “it is original [signature and] it could not have been imposed if it is original”, Colonel Kubu simply responded “I did not sign”. But what is important to the Court is that Colonel Kubu conceded that the signature on the 2018 Agreement is not a forgery. This, obviously, places doubt on Colonel Kubu’s denials in as much as they remain inexplicable.

How could the 2017 Agreement be invalid when used by Isago beyond 25 April 2018?

- [28] After the parties had signed the 2018 Agreement on 25 April 2018, as alleged by Isago, and with that having invoked the power of “supersession” on all previous contracts including the 2017 Agreement, Isago nevertheless continued to rely on the 2017 Agreement. PKX finds this discordant with the argument that the 2017 Agreement was superseded.
- [29] PKX relies on the email sent on 12 June 2019 by Mr Crause to a Mr Kapei Phahlamohlaka of PIC regarding “PKX Capital invoices and Contracts”. In the email Mr Crause refers to the “fee agreement” entered into between Isago and PKX. He mentions, among others, that Isago “has every intention of honouring the contractual obligations with PKX”. Mr Crause conceded whilst under cross examination that he attached to this email the impugned PKX’s invoices and the 2017 Agreement.
- [30] Counsel for PKX pointed out that this conduct by Mr Crause is not less significant as the invoices had the same figures as PKX’s claim in these proceedings. Counsel, further, argued that even if Isago’s version is accepted and with that the fact that the 2017 Agreement was replaced by the 2018 Agreement, after the latter was backdated, this begs the question why under such circumstances Mr Crause would on 12 June 2019 still have sent the email to PIC requesting payment for the transaction advisory services and confirming Isago’s commitment to honour its contractual obligations with PKX. This was almost a year since the 2017 Agreement had been replaced by the backdated 2018 Agreement - based on Isago’s version - counsel further pointed out.
- [31] Another pertinent aspect involves a letter dated 26 May 2019 written by Dr Khunou to PIC. In this letter the subject line or matter also related to payment of the transaction advisory fee and related services from the escrow account. This letter stated that the request for payment was a unanimous agreement reached by a special meeting of the shareholders and directors of Isago held on 24 May 2019.

The letter conveyed a “special request” for consideration by “the PIC/GEPP Co-Ownership partner”. Counsel for PKX argued that considering all these, Mr Crause’s and Dr Khunou’s respective testimonies that the 2017 Agreement was “off the table” cannot stand. All these render the supersession defence bad and bound to be rejected, as it is not only contradictory, but lacks merit too, counsel further argued.

Other issues for and against supersession of the 2017 Agreement

[32] The following, according to counsel for PKX, constitutes some of the further pertinent issues regarding the supersession ability (or perhaps inability) of the 2018 Agreement: (a) the 2018 Agreement purports to be concluded by only two parties, namely PKX and Isago, in breach of clause 9.2²⁰ of the 2017 Agreement. (b) The 2018 Agreement purports to assign rights and obligations or cede PKX’s rights to Colonel Kubu, when such conduct is impermissible in terms of clause 9.5²¹ of the 2017 Agreement. (c) The backdating of the 2018 Agreement to 20 August 2017 could not have superseded the 2017 Agreement as same was still to be concluded in October 2017.

[33] Counsel for Isago raised other issues to advance their client’s case for supersession of the 2017 Agreement, including the following. The express provision under clause 9²² of the 2018 Agreement that it superseded all previous contracts includes the 2017 Agreement. Also, PKX rendered invoices to Isago instead of levying a transaction advisory fee.

Analysis and conclusion on whether the 2017 Agreement was superseded by the 2018 Agreement

[34] Let me commence the analysis of the argument by counsel by restating a few

²⁰ Clause 9.2 of the 2017 Agreement provides that no “variation, cancellation, addition or deletion of any provision or part of any provision of [the 2017 Agreement] shall be of force unless reduced to writing and signed by all of the Parties”. The word “Parties” or rather “Party/ies” is defined as encompassing more than PKX and Isago. See par 52 below.

²¹ Clause 9.5 of the 2017 Agreement proscribes cession of the rights, delegation of the obligations, or assignment of the rights and obligations of any of the Parties under the agreement, “without the express prior written consent of the other Parties”.

²² Par 37 below for a reading of clause 9 of the 2018 Agreement.

relevant common cause facts, including issues below the radar of the current dispute.

[35] The so-called “2017 Agreement” or “MOA” was signed by all parties on 27 October 2017. In terms of clause 1.6 of the 2017 Agreement the words “Effective Date” meant the date of the signature appended thereon “by the last of the parties signing”. This, effectively, meant 27 October 2017, as the document was signed by PKX, Isago and the other three entities not participating in these proceedings. Clause 1.18 of the 2017 Agreement defined the “Signature Date” to the same effect.

[36] On the other hand, the 2018 Agreement – at face value - was signed by the parties (this time only Isago and PKX) on 20 August 2017. Unlike the 2017 Agreement, the 2018 Agreement did not have the definitions or interpretation clause which would have catered for the meaning of the “Effective Date” or the “Signature Date”, but nothing really turns on this.

The 2018 Agreement contains a clause on its duration (i.e. that it “shall commence on the date of signature ...and will continue until the transaction is completed unless terminated”), but I don’t think there was any argument or evidence led on this clause. But, equally nothing turns on this issue, as it is one of those flying below the radar of the dispute.

[37] Clause 9 of the 2018 Agreement is central to the dispute in the issue currently being determined. I consider it important that this clause is reflected fully, warts and all:

“Parties confirm that this contract contains the full terms of their agreement and that no addition to or variation of the contract will be of any force and effect unless done in writing and signed by both parties. This contract will supersede all previous contracts.”

[underlining added for emphasis]

[38] *Ex facie* the document containing the 2018 Agreement one would note an agreement concluded on 20 August 2017. No doubt, this date is before the date of conclusion of the 2017 Agreement, namely 27 October 2017. At face value, this means the 2018 Agreement was concluded before the 2017 Agreement, awkward as the choice of those tags or references may now sounds. According to Isago this was the intention of the parties.

[39] The parties, according to the evidence, actually signed the 2018 Agreement on 25 April 2018. By “backdating” the document the parties would have intended the 2018 Agreement to apply from the chosen date of 20 August 2017. I cannot recall whether anything was said about the reason for choosing 20 August 2017, but it is really not important. What is vital is that the parties to the 2018 Agreement appear to have been resolute in the effect they intended the 2018 Agreement to have, judging from their choice of words in this part of clause 9: “[t]his contract will supersede all previous contracts”.

[40] Counsel on behalf of PKX argued that by backdating the 2018 Agreement to 20 August 2017 this could not have superseded the 2017 Agreement, as the latter was still to be concluded in October 2017. I think this submission requires some increased level of probing. With respect, the submission appears to have been tucked deep in argument almost to oblivion or insignificance. But it shouldn’t be. I find this point or submission to have an important bearing on the current issue under determination.

[41] The parties when – according to Isago – concluded the 2018 Agreement and included the supersession in its clause 9, did not refer expressly to the 2017 Agreement. They simply placed the 2018 Agreement back on a timescale pinned on 20 August 2017. They then obliterated any “previous contracts” in terms of clause 9 of the 2018 Agreement. In other words, not only did they backdate the 2018 Agreement, but they also gave it retrospective effect by deliberately superseding any “previous contracts”. This would be any contracts in existence as at 20 August 2017. Not any future contracts. It is irrelevant whether the parties intended to also supersede the 2017 Agreement, as this is not borne by the evidence or the contents of the 2018 Agreement, not even by any stretch of the

rules of interpretation.

[42] Bearing in mind what I have just said, it appears the 2018 Agreement - with respect - failed to achieve its intended objective or to have had the desired effect. This is when considering that its target was to obliterate the agreement concluded on 27 October 2017 (i.e. the 2017 Agreement). The relative ineffectiveness of the 2018 Agreement is apparent when its clause 9, quoted above, is juxtaposed with the meaning of “Effective Date”²³ in the 2017 Agreement and clause 3²⁴ of the 2017 Agreement which refers to “the Parties’ other documentation”. But I don’t think that anyone relied on the latter clause, although nothing would really turn on this.

[43] Against the backdrop of all these, I find that the 2017 Agreement was not superseded by the 2018 Agreement. This does not dispose of the matter, but only leave on the slate the other two issues for determination in this matter: (1) whether PKX performed its mandate in terms of the 2017 Agreement, and (2) whether PKX is prohibited from receiving remuneration by the provisions of the EEA Act. I deal with the latter first.

Whether PKX is prohibited from receiving remuneration by the provisions of the Estate Agency Affairs Act 112 of 1976

[44] Isago, as stated above, raised by way of a special plea a defence based on the provisions of the Estate Agency Affairs Act 112 of 1976 (“EAA Act”).

[45] The essence of Isago’s special plea is that PKX’s claim constitutes commission

²³ Par 35 above.

²⁴ Clause 3 of the 2017 Agreement reads as follows in the material part:

“3.1. This agreement shall govern the effects of the services rendered by PKX ...in the Transaction and shall take precedence over any other terms and conditions which may be contained in any of the Parties’ other documentation and will govern all transactions between Parties in this regard.

3.2. In the event of a discrepancy between this Agreement and any other terms and/or conditions contained in any of the Parties’ other documentation, the provisions contained in this Agreement shall prevail”.

and/or fee payable to an estate agent²⁵ and is governed by the provisions of the EAA Act. Section 34A of the EAA Act prohibits the receipt of remuneration in respect of or arising from the performance of any act relating to the business of an estate agent.²⁶ The claim by PKX in its entirety is structured in such a way that PKX is entitled to the commission, remuneration or fee in terms of the 2017 Agreement primarily in respect of the selling of Isago's immovable property in Klerksdorp, Isago contended.

[46] But, I have noted that the EEA Act was repealed and replaced by new legislation. The Property Practitioners Act 22 of 2019, assented to on 19 September 2019, came into force on 1 February 2022. In terms of section 76 of the Property Practitioners Act 22 of 2019 ("the 2019 Act") the EEA Act is repealed by the 2019 Act. The special plea appears to have been inserted through an amendment to Isago's plea effected in January 2021. Evidently, this was more than a year before the 2019 Act came into force, not minding the date of its assent.

[47] Section 75 of the 2019 Act makes provision for "transitional" matters including for "any proceedings against a person which were instituted in terms of or under the

²⁵ Section 1(a) of the EAA Act defines an "estate agent" as:

"... any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person—

i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor; or

ii) lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or

iii) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or

iv) renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the Gazette".

²⁶ Section 34A of the EAA Act reads as follows in the material part:

"(1) No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of the definition of 'estate agent', unless at the time of the performance of the act a valid fidelity fund certificate has been issued-

(a) to such estate agent; and

(b) if such estate agent is a company, to every director of such company ...

(2) No person referred to in paragraph (c) (ii) of the definition of 'estate agent', and no estate agent who employs such person, shall be entitled to any remuneration or other payment in respect of or arising from the performance by such person of any act referred to in that paragraph, unless at the time of the performance of the act a valid fidelity fund certificate has been issued to such person."

Estate Agency Affairs Act, immediately before the commencement of this Act, must be disposed of as if that Act had not been repealed”.²⁷ I consider it arguable whether the reliance by Isago on the provisions of the EEA Act survived the repeal of that piece of legislation by the 2019 Act or whether the issues in the special plea constitute “transitional” matters envisaged by section 75 of the 2019 Act. But, as I did not hear the parties on this, I would assume that the special plea is still based on valid law, as pleaded and argued.

[48] It is argued on behalf of Isago that the definition of the word “Transaction”²⁸ under clause 1.15 of the MOA or the 2017 Agreement, refers to the acquisition of “immovable property owned by Isago funded through an application to PIC. The definition of “immoveable property” under section 1 of the EEA Act, includes references to “any undivided share in immovable property”;²⁹ “any interest in immovable property”,³⁰ and “any share in a private company”³¹ referred to under the repealed Companies Act 61 of 1973.³²

[49] says that PKX’s claim of a “Transactional Advisory Fee” of R180 million constitutes commission or fee under the purview of the EEA Act which is impermissible under section 34A³³ of the EEA Act. The latter provision prohibited an estate agent from receiving remuneration for performing an act relating to the business of an estate agent without a valid fidelity fund certificate at the time of the performance of such act. On the other hand, PKX points out that it is a transaction advisor registered or enrolled with the National Credit Regulator. PKX denies that the fee claimed for performance of the transaction advisory services and the conclusion of the “Transaction” as envisaged in the MOA renders it an estate agent or its business that of an estate agent. Several grounds are advanced to support the denial by PKX that it ever purported to be an estate agent and that its claim is predicated on any terms of the EEA Act or breaching the provisions of this

²⁷ Section 75(g) of the Property Practitioners Act 22 of 2019 or the 2019 Act.

²⁸ Par 53 below.

²⁹ Section 1(c) of the EEA Act.

³⁰ Section 1(d) of the EEA Act.

³¹ Section 1(e) of the EEA Act.

³² Companies Act 61 of 1973 was replaced by Companies Act 71 of 2008, save for a few of some of the former’s provisions, with effect from 1 May 2011.

³³ Footnote 26 above.

legislation. I agree.

[50] The definition of “estate agent” under section 1 of the EAA Act requires that, among others, the particular person seeking to gain thereby “holds himself out as a person” who “advertises” that he may be instructed by another person to “sell.. or purchase... or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor”. Isago has not shown that PKX has done any of these other than generally alleging that because the “Transaction” involves the acquisition of immovable property the provisions of the EAA Act are implicated. I do not understand the impugned provisions or the provisions of the EEA Act to have meant that any transaction, involving the acquisition of property where remuneration is received by one of the parties involved, implicated the provisions of this piece of legislation. Further, Isago is on record, as discussed next, in arguing what it urges this Court to consider as the ultimate transaction which evolved between the parties. With respect, I would avoid viewing the issues in this matter in some artificial compartments. Therefore, I find that the claim advanced by PKX in this matter is unaffected by the provisions of the EEA Act to sustain the special plea raised by Isago. Same would be dismissed with costs. I turn now to the third and final issue: whether PKX performed its mandate in terms of the 2017 Agreement.

Whether PKX performed its mandate in terms of the 2017 Agreement

General

[51] This issue represents the essence of PKX’s claim for payment of its fee in the amount of R180 million. PKX claims it was the proximate cause and effect of the funding or payment of the amount of R510 million or the approval of that amount by PIC for the transaction that has since evolved. Essentially, PKX’s claim is that it had performed its obligations or rendered the “Transaction Advisory Services” as required by the 2017 Agreement or the MOA and, therefore, it should be paid the agreed fee. Isago, as indicated, disputes PKX’s claim and denies liability for the claimed amount or any amount. Isago’s defence includes the basis that the

transaction which eventually evolved differs from the “Transaction” as defined in the MOA. I think it would be prudent to start this part of the discussion by referring to the relevant clauses of the 2017 Agreement.

Pertinent clauses of the 2017 Agreement

[52] As indicated above, the 2017 Agreement was concluded by more than just PKX and Isago. The agreement involved three other entities, namely “Anglo”, “Moedi” and “BMA”, to adopt their shortened and defined names. The five entities are defined “individually or collectively” as “the Party/ies” under clause 1.12 of this agreement. Other than these five entities, the following entities are also mentioned in the agreement without being parties or signatories to the agreement: GEPF, PIC and SANMVA Trust. Also, clause 1.9 of the agreement refers to “Isago Shareholders” which are defined as Anglo and Moedi.

[53] Transaction” is defined under clause 1.15 as follows:

“Transaction” as “the transaction entered into amongst *inter alia* SANMVA Trust (and/or PIC and/or GEPF and/or any co-purchaser), Anglo, Moedi and/or Isago, whereby SANMVA Trust (and any co-purchaser) acquire either immovable property owned by Isago and/or shareholding in Isago, which acquisition is funded through application made to the PIC”.

[54] The purpose of the 2017 Agreement is apparent somewhat from clause 3.1, already referred to above³⁴ albeit under a different context:

“This Agreement shall govern the effects of the services rendered by PKX and BMA in the Transaction ...”

[55] The payment for the services is provided for under clause 4, which reads as follows in the material part, together with its title:

³⁴ Par 42 and footnote 24.

“PAYMENT OF TRANSACTIONAL ADVISOR FEES

- 4.1. The Parties record that PKX is the proximate cause and effect of the Transaction and the successful application for the funding of the Transaction from the PIC.
- 4.2. In the event that the Transaction is successfully executed on the basis that SANMVA Trust (and any co-purchaser) purchases shareholding in Isago from the Isago Shareholders for the shares purchase price of R680 000 000.00 .., then the Isago Shareholders shall be liable to pay PKX the sum of R240 000 000.00 ... inclusive of VAT (**“the Transactional Advisor Fee”**) *pro rata* their respective shareholding.
- 4.3. Should the shares purchase price, for any reason, be less than the amount of R680 000 000.00, then the Transactional Advisor Fee shall be reduced *pro rata*.
- 4.4. Alternatively, in the event that the Transaction is successfully executed on the basis that SANMVA Trust (and any co-purchaser) purchases immovable property from Isago for the purchase price of R680 000 000.00 ..., then the Isago shall be liable to pay PKX the Transactional Advisor Fee.
- 4.5. Should the purchase price for the immovable property, for any reason, be less than the amount of R680 000 000.00, then the Transactional Advisor Fee shall be reduced *pro rata*.
- 4.6. The Transactional Advisor Fee payable to PKX shall be paid immediately upon the proceeds of the Transaction becoming available and into such account/s as the PKX may specify and shall, save where otherwise provided for in this Agreement, be made free of exchange, any other costs, charges or expenses without any deduction, set-off or counterclaim whatsoever.”

Pertinent clauses versus the parties' claims and the defences (a preliminary review)

- [56] PKX's claim is based on the terms of the 2017 Agreement. PKX had initially only relied on clause 4.2, read with clause 4.3 thereof, for purposes of the accrual and payment of its fee.

It amended its particulars of claim (after leave was granted)³⁵ to incorporate the alternative basis for the payment of the fee envisaged under clause 4.4, read with clause 4.5, of the 2017 Agreement.

- [57] Clause 4.2 provides for payment of the fee to PKX by Isago Shareholders, not by Isago. Isago Shareholders, as stated above, are defined as Anglo and Moedi. Anglo and Moedi are neither cited nor taking part in these proceedings. Further, the liability for the fee is triggered under clause 4.2 by the successful execution of the Transaction "on the basis that SANMVA Trust (and any co-purchaser) purchases shareholding in Isago from the Isago Shareholders".³⁶ Put differently, there has to be a purchase of the shares held by the Isago Shareholders (i.e. Moedi and Anglo) in Isago with one of the purchasers being SANMVA Trust, besides the unidentified or unrestricted "co-purchaser".

- [58] Under clause 4.4, providing the alternative basis for the fee, payment of the fee to PKX ought to be made by Isago. Isago becomes liable to pay the fee to PKX, also, upon the successful execution of the "Transaction", when "SANMVA Trust (and any co-purchaser) purchases immovable property from Isago".³⁷ In other words, the fee would become due and payable to PKX when the immovable property belonging to Isago is purchased by at least SANMVA Trust. There is also provision for an unidentified or unrestricted "co-purchaser".

- [59] Clauses 4.2 and 4.4 are augmented, so to speak, by the definition given to the concept "Transaction", or, perhaps, the other way round. The definition of

³⁵ Judgment (Leave to Amend) pars 11-12.

³⁶ Par 55 above for a reading of clause 4.2.

³⁷ Par 55 above for a reading of clause 4.4.

“Transaction” under clause 1.15, also of the 2017 Agreement, makes it clear that what is to be acquired is “either immovable property owned by Isago and/or shareholding in Isago”.³⁸ Further, that SANMVA Trust ought to be one of the acquirers or purchasers. Room was also created under this option for the participation of an unidentified “co-purchaser”.³⁹ Anglo and Moedi are also mentioned in the definition of “Transaction”, most probably in their capacities as “Isago Shareholders”. And, unlike under clauses 4.2 and 4.4, PIC and GEPP, are referred to including that the “acquisition [by SANMVA Trust and any “co-purchaser” is to be] funded through application made to the PIC”.⁴⁰

Evidence and argument on behalf of the parties

[60] The relevant aspects of the pleadings and some aspects of the evidence regarding the issue currently under determination have already been referred to above or have been somewhat made clear by what appears above. Therefore, I do not intend to prolong my detention by this part.

[61] As pointed out, PKX relies on the 2017 Agreement for its appointment as a transaction advisor and, consequently, for claiming the “Transactional Advisor Fee” in terms of this action. PKX claims it is “the proximate cause and effect of the Transaction and the successful application for the funding of the Transaction from the PIC”.⁴¹ I hasten to point out – with respect - my agreement with the submission by counsel for Isago that clause 4.1 constitutes a bare recordal with no bearing on the current issue or its determination.

[62] Isago denies liability for the amount claimed by PKX or overall. The current issue in Isago’s defence is that the transaction consummated in the matter is not of the type contemplated by the 2017 Agreement and, thus, no liability is triggered on the part of Isago.

[63] According to Isago, as already indicated above, on or about 7 November 2018,

³⁸ Par 53 above for a reading of clause 1.15.

³⁹ *Ibid.*

⁴⁰ Par 53 above for a reading of clause 1.15.

⁴¹ Clause 4.1 of the 2017 Agreement, quoted in par 55 above.

Isago and the GEPP concluded a transaction labelled “the Sale of Land Agreement”. In terms of the latter agreement, among others, Isago sold to GEPP certain immovable property situated in the North West Province for the sum of R510 million, with an amount of R306 million thereof paid into an escrow account to be released upon GEPP issuing a release note, and Isago receiving an amount of R210 million of the sale proceeds. Isago contends that as the latter agreement was concluded to the exclusion of PKX, PKX’s claim that it was the proximate and effective cause thereof is without merit. And, consequently, Isago is not indebted to PKX for any amount or at all.

[64] Isago, further, emphasised that the “Transaction” defined under clause 1.15 of the 2017 Agreement, includes the acquisition of either Isago’s immovable property and/or shareholding in Isago, which acquisition was to be funded by PIC. However, the transaction in terms of the “the Sale of Land Agreement” involves an undivided 60% share in the immovable property or properties belonging to Isago.

[65] PKX’s argument is to the effect that in terms of the uncontested evidence of General Fihla, PKX has been always at the forefront of the deal. Its role as the transactional advisor was also acknowledged in correspondence with PIC, including the so-called “non-binding interest letter” and the approval letter by PIC.

[66] PKX relies – for its argument - on the contents of PIC approval letter directed to Mrs Crause. According to PKX the approval letter confirms that PIC on behalf of the GEPP has approved an investment portion into the land of Isago subject to some specified conditions. Other than GEPP acquiring 60% undivided share in the property, Isago is to transfer the remaining 40% undivided share into a newly incorporated entity. Isago will “own” 99%, ostensibly in the form of shareholding, of the new entity whereas SANMVA will be allotted 1% shareholding in the entity. The latter’s shareholding in the entity could increase up to 50% of the entire shareholding of the new entity. The following are further aspects of the argument regarding the approval letter: (a) it came into existence solely on the funding application by PKX; (b) the approval therein relates to the very piece of land involved in the funding application by PKX, and (c) PKX’s efforts ultimately resulted in the prior “non-binding interest letter” from the PIC. Also, SANMVA now holds 1%

of the total shares in the new entity to be incorporated.

- [67] PKX, further, addressed the defences raised by Isago, including as follows. The definition of “Transaction” in clause 1.15 of the 2017 Agreement is not specific as to who should be the “co-purchaser”. Therefore, PIC - acting on behalf of GEPPF as the co-purchaser – meets the reference to “co-purchaser” in the “Transaction”.
- [68] Overall, PKX submits that from the above, there is no doubt that PKX’s role as the transaction advisor or the services it rendered in terms of the 2017 Agreement is the proximate cause to the ultimate transaction. In other words, PKX’s transaction advisory role raised the funding or the purchase amount of R510 million expended by PIC. Therefore, Isago is liable to pay PKX for the role it played in terms of the 2017 Agreement. The conditions imposed by PIC in the ultimate transaction cannot sustain Isago’s evasion of liability, the argument on behalf of PKX concludes.
- [69] On behalf of Isago, further from what is stated above, the following were also raised. In terms of the 2017 Agreement, two bases are provided for the transactional advisory fee to be payable to Isago. The first basis is under clauses 4.2 and 4.3 (requiring the Isago Shareholders to pay the fee when the SANMVA Trust (and any co-purchaser) purchases shareholding in Isago), and the second basis is under clauses 4.4 and 4.5 (requiring Isago to pay the fee when the SANMVA Trust (and any co-purchaser) purchases immoveable property from Isago).⁴²
- [70] Bearing in mind the two abovementioned bases for payment, it is argued on behalf of Isago, that the approval letter by PIC provides uncontested evidence on the nature and structure of the ultimate transaction. It is clear that the ultimate transaction concluded and implemented does not fall within the ambit of any of the alternatives or bases under the 2017 Agreement relied upon by PKX. PKX’s claim premised on clauses 4.2 and 4.3 of the 2017 Agreement ought to fail, as

⁴² Par 55 above, for a reading of clauses 4.2 to 4.4 of the 2017 Agreement.

evidently the contractual liability for payment of the fee is limited to Isago Shareholders and not Isago. The alternative claim premised on clauses 4.4 and 4.5 also ought to fail, as it is only possible when Isago's immovable property is sold to the SANMVA Trust (and any co-purchaser) whilst the uncontested true transaction does not provide for the SANMVA Trust (and any co-purchaser) to purchase Isago's immovable property. Under the true transaction SANMVA was given only 1% of the shares in the new entity formed, namely Isago Property Holdings. Evidently, SANMVA was neither the purchaser of the immovable property nor the co-purchaser thereof, but a 1% shareholder in Isago Property Holdings. Therefore, PKX has failed to prove due performance of its mandate in terms of the 2017 Agreement.

Conclusion and costs

- [71] What is very clear from the facts of this matter is that PKX, led by Colonel Kubu, actively took part in the process or activities (or part thereof) which involved the disposal of the land or immovable property belonging to Isago or an indivisible portion thereof being part of the transaction involving GEPP at the instigation of the PIC. There is proof of the activities or efforts by PKX towards that end. But the case or claim as framed in the pleadings is not in those terms and the evidence adduced at the trial did not establish a case envisaged in the pleadings or the terms agreed to by the parties in the 2017 Agreement and as relied upon by PKX.
- [72] PKX's claim, as pleaded, is based solely on the terms of the 2017 Agreement. The liability for Isago in respect of the fee is triggered by proof of the fulfilment of the terms of clauses 4.2 and 4.4 of the Agreement. There is no other basis for Isago's liability included in the pleadings or established by the evidence.
- [73] Isago's liability under clause 4.2 can only materialise when there is evidence that SANMVA Trust (and any co-purchaser) purchased shareholding from Isago Shareholders, namely Moedi and Anglo. This basis or option completely or expressly rule out any liability on the part of Isago. I agree with Isago that since none of the Isago Shareholders was cited, this option becomes unavailable. Our corporate law, including its heritage, has never allowed a company or

incorporated entity as a discrete juristic entity to be confused with its members and/or shareholders.⁴³ This leaves the alternative basis for PKX's claim.

[74] As indicated above, Isago's liability under the alternative basis in clause 4.4 is only possible upon proof that SANMVA Trust (and any co-purchaser) purchased the immovable property from Isago. For Isago to succeed under this basis or option Isago's immovable property ought to have been sold to the SANMVA Trust (and any co-purchaser). The evidence available in the matter - which I find not refuted - is that the ultimate transaction does not provide for the SANMVA Trust (and any co-purchaser) to purchase Isago's immovable property, but only allots SANMVA 1% of the shares in the new entity formed, namely Isago Property Holdings. This means that SANMVA is not the purchaser of Isago's immovable property, but is now a 1% shareholder in the newly created entity, Isago Property Holdings.

The new entity is therefore the owner of the immovable property and not its

⁴³ In Piet Delport, 'Henochsberg on the Companies Act 71 of 2008', *Lexis Nexis* (online version: Last Updated: May 2023) at p 82: "*A duly registered company is a distinct legal persona, quite a separate entity from its members, either individually or as a body*". [italics added] This view by the author constitutes a commentary to s 9 of the Companies Act 71 of 2008, which reads in the material part: "(1) *From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company—*

(a) *juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act;*

(b) *all of the legal powers and capacity of an individual ...*

(2) *A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.*" [italics added and]

Further, in Helena H Stoop, "Companies Part 1" in *LAWSA*, 3rd ed, 2022 volume 6(1) ("Stoop on Companies") at p 46 states the following: "*A company is a person that in law is altogether separate and distinct from its members. The full implications of the separate personality of the company were demonstrated in 1897 in Salomon v A Salomon & Co Ltd [1897 AC 22; 1895–99 All ER Rep 33 (HL)], where, reversing the decision of the Court of Appeal, the House of Lords held that a company, duly formed to take over the business of a person who became the beneficial owner of all its shares, was nevertheless in law a different person altogether from that person; and "though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them"... In general, both the English and the South African courts have rigidly applied the Salomon rule, and this despite the extreme pressure under which in the nature of things it was bound to come. At times unpalatable results have been adroitly avoided while keeping the rule intact.*" [italics added and footnoted omitted]

shareholders.⁴⁴ Clearly, this is not in accordance with the terms of the 2017 Agreement. Therefore, PKX's claim, as currently formulated, would fail with costs.

[75] The costs payable by PKX would include the costs of two counsel, bearing in mind that one of the counsel is senior counsel. The order to be made would also reflect that Isago raised and was unsuccessful with its special plea. The latter costs order would also include the costs of two counsel, one of the counsel being a senior counsel.

Order

[76] In the premises, I make the following order:

- a) the defendant's special plea is dismissed with costs, including costs consequent to the employment of two counsel, with one of the counsel a senior counsel.
- b) the plaintiff's claim against the defendant is dismissed with costs, including costs consequent to the employment of two counsel, with one of the counsel a senior counsel.

Khashane La M. Manamela
Acting Judge of the High Court

DATES OF HEARING : 2, 3, 4 NOVEMBER 2021, 20 APRIL
2023 DATE OF JUDGMENT : 7 AUGUST 2023

Appearances:

For the Plaintiff : Mr IM
Semenya SC

⁴⁴ "In the case of a partnership the partners are co-owners of the partnership property. But the assets of a company are its exclusive property. Its members have no proportionate rights in those assets, their proprietary rights being in their shares in the company.¹ Even a shareholder holding all the shares in a private company has no proprietary interests in the company's assets": *Stoop on Companies* at p 448. [italics added and footnoted omitted]

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