



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED YES

DATE: 3 APRIL 2022

SIGNATURE:

[Handwritten signature]

Case No. 56232/2020

In the matter between:

ENYUKA PROPERTY HOLDINGS (PTY) LTD

PLAINTIFF

And

DELPOR VAN DEN BERG INC.

FIRST DEFENDANT

**GEDEELTE 1 VAN ERF 3887 BARBERTON
(PTY) LTD**

SECOND DEFENDANT

Coram: Millar J

Heard on: 22 & 24 March 2022

Delivered: 31 March 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the Case Lines system of the Gauteng Division and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 3 April 2022.

Summary: Agreement for sale of immovable property - retention of portion of purchase price pending fulfilment of certain conditions within 1 year of date of transfer – only one condition fulfilled - each condition separate and distinct and not to be conflated – Plaintiff entitled to payment of retention due to non-fulfillment of all conditions.

ORDER

It is ordered:

- (1) It is declared that the purchase price set out in the sale of business agreement concluded between the Plaintiff and the Second Defendant on 26 August 2016 is reduced from R62 250 000.00 to R59 127 648.00.
- (2) The First Defendant is ordered to immediately pay to the Plaintiff the sums of R2 500 000.00 and R622 352.00 respectively being presently held by it in its Attorneys Trust Account;

- (3) The First Defendant is ordered to pay to the Plaintiff such interest as may have accrued on the sums of R2 500 000,00 and R 622 352,00 respectively from 14 May 2017 to date of payment;
- (4) The Second Defendant's counterclaim is dismissed.
- (5) The Second Defendant is ordered to pay the Plaintiff's costs of the action on the scale as between party and party.

JUDGMENT

MILLAR J

1. The genesis of the present action between the Plaintiff and the Second Defendant is a contract entered into between them on 23 August 2016 in terms whereof the Plaintiff purchased from the Second Defendant a shopping center located in Barberton in the Mpumalanga province. When the Plaintiff ("Enyuka") entered into the agreement, the Second Defendant ("Gedeelte") had already entered into an agreement with its anchor tenant ("PnP") of the property in question in terms whereof the space let to that tenant was to be renovated.
2. The renovations were substantial and the increased rental which would be earned from PnP were factored into and considered by the parties in the determination of the purchase price to be paid. The renovations had not yet been completed by the time the parties entered into the agreement for the sale of the property and provision for this was made in the agreement. The First Defendant was cited in the action as the monies which form the subject matter of the action are held in their trust account.

3. The relevant clauses of the agreement between the parties is quoted hereunder in full. The interpretation of the clauses that have been underlined are those that pertinent to this judgment for the reasons that follow.

‘23. SPECIAL TERMS

- 23.1 The Seller and the Purchaser agree that, at the Purchaser's election, the Seller will continue to manage the Jock of the Bushveld Shopping Centre (hereinafter referred to as "the Shopping Centre") for a period of 3 (three) month's after the Date of Transfer at no charge to the Purchaser.
- 23.2 While the Purchaser is under no obligation to continue to use the services of the Seller to manage the Shopping Centre after the 3 (three) month period as contemplated in clause 23.1 above, the parties may in their absolute discretion by way of written agreement at the time, agree that the Seller continue to manage the Shopping Centre on terms and at a management fee to be agreed at such time.
- 23.3 Pick 'n Pay Project:
- 23.3.1 Whereas:
- 23.3.1.1 the Seller is liable to undertake certain works for Pick 'n Pay, an existing tenant, in terms of their lease agreement; and
- 23.3.1.2 Pick 'n Pay will pay an increased monthly rental on completion of the works referred to in clause 23.3.1.1 above; and

23.3.1.3 Notwithstanding that the seller anticipates that the works contemplated in clause 23.3.1.1 above will be completed prior to the Date of Transfer, the parties have agreed on the structure set out in clause 23.3.2 below, in the event that the completion of the works to the satisfaction of Pick 'n Pay, and consequent increase in the monthly Pick 'n Pay rentals have not taken place prior to the Date of Transfer.

23.3.2 In the event that the completion of the works contemplated in clause 23.3.1.1 above, to the satisfaction of Pick 'n Pay, and consequent increase in the monthly Pick 'n Pay rentals have not taken place prior to the Date of Transfer:

23.3.2.1 The Seller shall be liable to pay the Purchaser, on a monthly basis in advance, the difference between the increased monthly rentals that would have been payable by Pick 'n Pay had the works been completed, and the actual monthly rentals payable by Pick 'n Pay at such time, in this regard the Purchaser shall provide the Seller with an appropriate VAT invoice. This obligation of the Seller shall be extinguished upon completion of the works contemplated in clause 23.3.1.1 above and consequent increase in the monthly Pick 'n Pay rentals.

23.3.2.2. A portion of the Purchase Price equal to R 5, 000,000.00 (Five Million Rand), ("Retention Amount") will be paid into the trust account of the Conveyancer, who shall hold such funds on behalf of the Purchaser and only release such funds to the Seller as follows:

- 23.3.2.3 50% (Fifty Percentum) of the Retention Amount, shall be paid to the Seller on the issue of a certificate jointly by both the Seller and the Purchaser's quantity surveyors, confirming that not less than 50% of the works have been completed; and
- 23.3.2.4 the remaining 50% (Fifty Percentum) of the Retention Amount plus any interest thereon, shall be paid to the Seller on:
- 23.3.2.4.1 the issue of a certificate jointly by both the Seller and the Purchaser's quantity surveyors, confirming that not less than 100% of the works have been completed; and
 - 23.3.2.4.2 the issue of a certificate of compliance in respect of the electrical installation in the Pick 'n Pay premises; and
 - 23.3.2.4.3 the issue of an Occupational Certificate by the local authority in respect of the Pick 'n Pay premises; and
 - 23.3.2.4.4 Pick 'n Pay having confirmed in writing that the works and all snags (if any) have been dealt with to their satisfaction.
- 23.3.3 In the event that the completion of the works contemplated in clause 23.3.1.1 above, to the satisfaction of Pick 'n Pay, and consequent

increase in the monthly Pick 'n Pay rentals have not taken place within 12 months from the Date of Transfer, the Retention Amount (or portion thereof if a payment has been made in terms of clause 23.3.2.3) plus interest shall be paid to the Purchaser and the Purchase Price shall automatically be reduced by an amount equal to the Retention Amount (or portion thereof). After the Purchase Price has been reduced as provided for in this clause 23.3.3, the Seller shall have no further liability of whatsoever nature in respect of the Pick 'n Pay works (whether for completion, quality of workmanship or otherwise) and shall, in particular, no longer be liable for payment in terms of clause 23.3.2.1 above'.

4. On 16 November 2016 registration of transfer of the property was effected from Gedeelte to Enyuka who then became the owner. For at least 3 months after this and in accordance with the agreement, Gedeelte continued to administer the property on behalf of Enyuka but thereafter administration was taken over by Enyuka's agent.
5. The renovation works had not been completed by the date of transfer and were continued by Gedeelte, who after transfer, paid additional rental amount due which PnP would have had to pay on completion.
6. By May 2017, a substantial portion of the renovation works had been completed and by agreement between the parties, R2.5 million was released from the R5 million retention to Gedeelte. This was done consensually and without any regard to the formalities provided for in the agreement.

7. The evidence led by each party did not differ materially with that led by the other and it is in the circumstances unnecessary to deal with the evidence of the individual witnesses. What is not in dispute is that after the payment of the initial R2.5 million, there continued to be outstanding works that needed attention. These were referred to as 'snags'¹ in the minutes of the site meetings held to discuss these outstanding works, although given the nature of the outstanding work, these items can hardly be said to have been minor or inconsequential. These included amongst others a persistently leaking roof and a loading bay and cold room floor area that degraded because the concrete from which it was manufactured had not been given sufficient time to properly cure.
8. Although Enyuka was aware that there were outstanding items that required attention, since this was the responsibility of Gedeelte they did no more than to offer support to PnP and assure them that they would see that all outstanding matters - the so called 'snag list' would be dealt with by them if Gedeelte did not do so.
9. It was at this time that PnP discovered that it had been invoiced for the additional rental from February 2017 even though the renovations were not complete – this in addition to Gedeelte also paying the additional amount. Enyuka credited this overpayment and from the beginning of July 2017, PnP paid the additional rent and Gedeelte no longer had any obligation to do so.
10. It was common cause or not disputed on the evidence that by 17 November 2017, and despite a number of meetings, Gedeelte had failed to finally

¹ "From 'snagging' - the process of checking a new building for minor faults" -The Shorter Oxford English Dictionary, 5th Ed. Vol 2 at p 2890

complete the renovation works and to resolve all of the outstanding 'snags'. Several of the outstanding issues have since over the succeeding 4,5 years been resolved by either Enyuka or PnP itself, but it was not in issue that still presently the leaking roof and the degrading loading bay and cold room floor remain unresolved.

11. It was argued on behalf of Enyuka that clause 23.3.3 of the agreement, properly construed meant that for the remaining R2.5 million to be released to Gedeelte, two requirements had to be met – firstly that PnP had to be satisfied with the renovations and secondly that they had to have begun to pay the increased rental. It was argued that these were two separate and distinct obligations that had to be considered conjunctively but that a failure to comply with either one meant that there was noncompliance with the clause as a whole and that Enyuka then became entitled to the payment and took on the obligations accompanying that entitlement.
12. On behalf of Gedeelte, the argument was that the clause properly construed was a single condition with two parts and that a failure of both parts was necessary for the entitlement of Enyuka to be established.
13. Having regard to the respective arguments, on behalf of Enyuka, both of the requirements had to be met for Gedeelte to claim entitlement to the balance of the retention of R2.5 million. The fact that PnP paid the increased rental was of no moment until the 'snags' had been resolved to PnP's satisfaction.
14. On behalf of Gedeelte, the payment by PnP of the increased rental meant that the requirement for the works to be completed to PnP's satisfaction was rendered nugatory as far as any entitlement on the part of Enyuka to the remaining R2.5 million was concerned.

15. It was also argued that because PnP was not contractually obliged to confirm that the renovations had been completed to its satisfaction, it was an objective impossibility for Gedeelte to satisfy this requirement and this would result in an absurdity – that neither Enyuka nor Gedeelte would be entitled to claim the outstanding retention.
16. Any interpretation of the agreement must be consonant with the accepted approach to interpretation. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*² it was held that:

[18]. . . . The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, considerations must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or

² 2012 (4) SA 593 (SCA), para [18] footnotes omitted.

businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself,” read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

17. From the provisions of clause 23.3.1, it is apparent that both parties were aware that the obligations on the part of Gedeelte to PnP were in its capacity qua owner and not on any other basis³.
18. While the provisions of clauses 23.3.1.1 and 23.3.1.2 contain statements of fact and intention, it is the second part of clause 23.3.1.3 in which the agreement between the parties regarding the non-completion of the works by the transfer date is prefaced – ‘the parties have agreed on the structure set out in 23.3.2 below, in the event of the completion of the works to the satisfaction of Pick ‘n Pay, and consequent increase in the monthly Pick ‘n Pay rentals have not taken place prior to the Date of Transfer.’ (my underlining).
19. The two requirements set out in clause 23.3.2 (that the works be completed to the satisfaction of PnP and that they pay the increased rental) form the basis upon which the balance of the retention monies were to be paid. These conditions, phrased identically, are repeated in clauses 23.3.2 (although framed in the negative with reference to the conditions not being met by the date of transfer and dealing subsequently with the consequences thereof) and in clause 23.3.3.
20. The purpose of the agreement between the parties is self-evident – Enyuka would purchase the property from Gedeelte at a particular price and subject to

³ Mignoel Properties (Pty) Ltd v Kneebone 1989 (4) SA 1042 (A) at 1050J–1051A and reaffirmed in Massstores (Pty) Ltd v Pick n Pay Retailers 2016 (2) SA 586 (SCA) at para 24.

the fulfilment of the specific conditions relating to the completion of the renovations of the space let to PnP and payment of increased rental in respect thereof. The juxtaposition of the two conditions does not, to my mind, as was argued on behalf of Gedeelte, conflate them into a single condition.

21. The insertion of a 'comma'⁴ before 'and' is indicative that the use of the 'and'⁵ was not as a simple conjunction to link the two conditions into one but rather to juxtapose two separate conditions. It is readily apparent that on a proper interpretation of the clause there are two separate conditions, each of which must be fulfilled and not both of which must be fulfilled⁶. To interpret the agreement between the parties otherwise, would lead to the absurdity argued for by Gedeelte.

22. It is in clause 23.3.3 that the intention of the parties as to the duration of the time period within which the conditions were to both be met is made plain. It is specifically provided that unless the requirements are met within 12 months from the date of transfer, then the provisions of clause 23.3.3 would be applicable. The rationale for this is readily apparent – from the date of transfer Enyuka, qua owner, became solely responsible to PnP for the completion of the renovation works, irrespective of any contractual arrangement it had with Gedeelte.

23. The parties clearly contemplated a cutoff date by which all outstanding matters would be attended to by Gedeelte – 17 November 2017, one year after the date of registration of transfer.

⁴ 'comma' – a punctuation mark – 'indicating a pause between parts of a sentence or separating items in a list - Shorter Oxford Dictionary Vol. 1 supra at page 461.

⁵ 'and' used a conjunction- introducing a word, phr., clause, or sentence which is to be taken side by side with, along with, or in addition to that which precedes - Shorter Oxford Dictionary Vol. 1 supra at page 79.

⁶ African Products (Pty) Ltd v AIG South Africa Ltd 2009 (3) SA 473 (SCA) at para 13 – in which the court dealt with a clause where the word "and" was used as a conjunctive in respect of two separate terms which had in effect the same meaning. This is distinguishable however from the present matter where the two terms are clearly on an ordinary reading separate and distinct.

24. It is for the very reason that Gedeelte argues an absurdity would arise and to avoid such a situation that the second part of clause 23.3.3 is framed the way it is – if neither the increased rental was paid nor PnP were satisfied then Enyuka is entitled to claim back the unpaid portion of the retention. Such payment is however not of the nature of a simple reduction in the purchase price without value but rather a payment in consequence of the failure of Gedeelte to comply with the condition of having to complete the renovations. Following from such payment, Gedeelte is indemnified by Enyuka against any further liability “of whatsoever nature” in respect of the PnP renovations.
25. If regard is had to the special terms of the agreement, it is patent that the terms were inserted into the agreement to address two separate concerns – the first being the completion of the renovation works to the satisfaction of PnP and the second being the payment of increased rental by PnP. Both are separate and distinct and expressed as such. Each of the requirements when properly construed is mutually exclusive of the other and the actual situation in terms whereof the increased rent was paid while PnP were still dissatisfied with the renovation works is demonstrative of this.
26. The property was sold and bought based on a particular income and condition expectation which were to be fulfilled in terms of clause 23.3.3 within 1 year of the date of transfer. While R2.5 million of the retention was paid to Gedeelte by agreement between the parties, such payment together with PnP’s decision to pay the increased rental from July 2017 could never, properly construed, have resulted in a situation where Gedeelte then became entitled to the full amount of the retention. Although this is in effect what was argued by Gedeelte at the trial on the basis that PnP’s satisfaction was an objective impossibility, the conduct of the parties after the payment of the first portion of the retention is not consistent with this. Even after the payment by PnP of the increased rental – and when Gedeelte knew that it no longer had any obligation to pay towards the rental, Gedeelte continued to engage with PnP to resolve the

outstanding 'snags'. The objective conduct of the parties in the period from July 2017 to November 2017 demonstrates to my mind a common understanding that the 2 conditions were indeed separate conditions, both of which had to be fulfilled⁷.

27. In the circumstances, I find that the agreement properly construed provided for 2 separate conditions to be fulfilled in order for the balance of the retention to be released to Gedeelte. Since one of the conditions was not fulfilled by 17 November 2017, Gedeelte's claim to the balance of the retention money, its counter claim in the present action, must fail. For the same reasons, Enyuka's claim to repayment of the balance of the retention monies must succeed.
28. The parties in the present action applied for and were granted certification for this action to be heard in the Commercial Court. In consequence of compliance with the practice manual and directives issued, the action was trial ready and heard within 6 weeks of certification.
29. On the first day of the trial, the parties reached agreement in respect of a separate claim brought by Enyuka dealing with rentals and tenancy in respect of other premises within the building. This claim was also for payment of a portion of separate retention monies also held by the First Defendant in trust. This claim does not feature in this judgment as there was no evidence led about it and all that I need do is record in the Order that I make, the agreement between the parties. At the commencement of the trial, Gedeelte also abandoned a special plea that had been introduced by way of amendment shortly before the trial.

⁷ Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA) at para [63] in which it was stated ". . . the principal that contracts freely and voluntarily entered into must be honoured remains central to the law of contract. This principal, often captured under the phrase freedom of contract, recognises that persons, through voluntary exchange, may freely take responsibility for the promises they make, and have their contracts enforced. . . ."

30. On consideration of the matter as a whole, it is part and parcel of the cut and thrust of litigation that some claims or parts thereof are settled, abandoned or even conceded at the eleventh hour and the same is true in respect of defenses. I am of the view that there is no reason in the present matter to depart from the usual practice that costs are to follow the result and it is for this reason that I make the order for costs that I do.

31. It is ordered:

31.1 It is declared that the purchase price set out in the sale of business agreement concluded between the Plaintiff and the Second Defendant on 26 August 2016 is reduced from R62 250 000.00 to R59 127 648.00.

31.2 The First Defendant is ordered to immediately pay to the Plaintiff the sums of R2 500 000.00 and R622 352.00 respectively being presently held by it in its Attorneys Trust Account;

31.3 The First Defendant is ordered to pay to the Plaintiff such interest as may have accrued on the sums of R2 500 000,00 and R 622 352,00 respectively from 14 May 2017 to date of payment;

31.4 The Second Defendant's counterclaim is dismissed.

31.5 The Second Defendant is ordered to pay the Plaintiff's costs of the action on the scale as between party and party.



A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON: 22 & 24 MARCH 2022

JUDGMENT DELIVERED ON: 3 APRIL 2022

COUNSEL FOR THE PLAINTIFF: ADV. J HOFFMAN

INSTRUCTED BY: NMT ATTORNEYS

REFERENCE: MR. S NOCHUMSON / MS M PRETORIUS

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ADV. A ARNOLDI SC

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REFERENCE: MS. M PIENAAR