



OLIVIER J – 10/10/17

Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R19/2017**
DATE HEARD: **16/10/ 2017**
DATE DELIVERED: **20/10/2017**

In the matter between:

RICHTER, FREDERICK JOHANNES NICHOLAS NO	1 st Appellant
DE KOCK, ANNA WILHELMINA ELIZABETH NO	2 nd Appellant
ERASMUS, NICO NO	3 rd Appellant

and

SCHATHEUNA BOERDERY CC	Respondent
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Coram: Olivier J et Snyders AJ

JUDGMENT

Olivier J:

- [1.] The three appellants, Mr F J N Richter, Mrs A W E De Kock and Mr N Erasmus, are the trustees of the Richter Kempen Trust ("*the Trust*") and the respondent is Schatheuna Boerdery CC, a close corporation.

BACKGROUND:

- [2.] Until 29 May 2014 Schatheuna Boerdery was the owner of, *inter alia*, the agricultural properties described as Lots 40, 81 and 83, Kanoneiland ("*the farm*"),

where farming activities were conducted, and more specifically the cultivation of grapes; some varieties for the production of wine and others for the production of raisins.

- [3.] At all times material hereto Mr S W B Engelbrecht was the sole member and the representative of Schatheuna Boerdery, and he had in the past also normally been responsible for the daily management of those farming activities.
- [4.] In 2013 Mr Engelbrecht appointed Mr C M Opperman as the agent of Schatheuna Boerdery for purposes of the sale of the farm by Schatheuna Boerdery. Mr Engelbrecht supplied Mr Opperman with certain information regarding the vineyards on the farm, and on the basis of that information, as well as information acquired at the Deeds Office, a document¹ was compiled which, *inter alia*, set out particulars relating to the varieties or cultivars of the grapes and the age and the number of vines in the different so-called vineyard blocks on the farm.
- [5.] Mr Opperman placed an advertisement in a local newspaper and early in January 2014 Mr Engelbrecht and Mr Opperman showed the second appellant, Mrs De Kock, around the farm after she had, through the advertisement, become aware that it was for sale. At all material times hereto Mrs De Kock was the person who represented the Trust. Although there was some dispute about whether he had arrived at the farm with Mrs De Kock or separately, it was common cause that Mr Kempen, the son of Mrs De Kock, was also present there that day.
- [6.] Very shortly afterwards (possibly even the next day) Mrs De Kock paid a visit to Mr J Brits, at the time a credit manager at First National Bank in Kakamas, with a view to apply, on behalf of the Trust, for a loan.
- [7.] Shortly thereafter a written contract was concluded, in terms of which Schatheuna Boerdery sold to the Trust, *inter alia*, the fixed property and the vineyards and crops on it. It also recorded that the Trust purchased certain

¹ At the trial this document was handed in as exhibit "C". I will revert to its contents in due course.

movable property from Schatheuna Boerdery, including 4 000 so-called drying trays. The written contract set the total purchase price of R 4 837 000.00 out as consisting of R 3 000 000.00 for the fixed property, R 1 580 000.00 for the crops and R 257 000.00 for implements which according to annexure "A" to the contract included, *inter alia*, the trays at a total of R200 000.00.

- [8.] The Trust took occupation of the farm on 14 January 2017, and proceeded to harvest the crops.
- [9.] The transfer of the ownership of the farm to the Trust was, however, only registered on 29 May 2014.
- [10.] Mrs De Kock was subsequently informed that the Trust had to pay in a further amount towards the total price, which the attorneys of Schatheuna Boerdery at the time claimed to have been short-paid due to a miscalculation on their part. When the amount was not paid, a letter of demand was addressed to Mrs De Kock, claiming payment of not only the outstanding capital, but also payment of occupational interest.
- [11.] The response to the letter of demand was:
 - 11.1 that the Trust was not liable to make any payment towards any capital alleged to be outstanding:
 - 11.1.1 as it had in any event paid R440 000,00 more for the crops than what their actual value had at the time of negotiations been represented to be, and that the amount of R440 000,00 exceeded the portion of the capital amount alleged to be outstanding; and
 - 11.1.2 because the part of the purchase price pertaining to the trays was not actually payable, as the parties had orally agreed that, although annexure "A" to the contract would *inter alia*

reflect the trays and their price, the Trust would in fact not purchase the trays; and

- 11.2 that no occupational interest was payable, because the parties had agreed orally that interest would not be payable when the Trust was not to blame for the delay in transfer, and that the Trust had indeed during the applicable period not been the cause of the delay in the registration of transfer.

TRIAL COURT:

- [12.] In June 2014 the respondent issued summons (in the Regional Court, Upington) against the appellants, cited in their nominal capacities as trustees of the Trust.
- [13.] Arrears occupational interest in an amount of R118 324.46 was claimed, calculated from 1 March 2014 to date of transfer, as well as payment of an amount of R125 300.00, alleged to be outstanding in respect of the total purchase price in terms of the contract.
- [14.] As far as the issue of occupational interest is concerned, the appellants pleaded that the parties had concluded an oral agreement which had supplemented the written contract, alternatively amended it, resulting in the written contract not reflecting the true intention of the parties regarding the aspect of occupational interest. It was pleaded that the oral agreement was to the effect that the Trust would not pay occupational interest for as long as the Trust was not the cause of the delay in the transfer of the farm.
- [15.] With respect to the alleged outstanding balance of the capital, it was pleaded that there had been a material and fraudulent misrepresentation concerning the number of vines in a particular section of the farm. It was also pleaded that the harvesting of the crops yielded an income of only R1 140 000.00, and therefore R440 000.00 less than the amount of R1 580 000.00 allocated to the crops in the

written contract. It was furthermore pleaded that the particular part of the written contract regarding the purchase of the trays, constituted a simulation and that the true intention had never been that the Trust would actually purchase the trays, and it was pleaded that this also entitled the Trust to a reduction of the purchase price.

- [16.] A counterclaim was also instituted. In claim A payment of the amount of R47 378.50 was claimed, being the total cost of the replacement of the missing vines. Claim B was for payment of the difference between the R440 000.00 allegedly suffered in damages as a consequence of the alleged fraudulent misrepresentation, on the one hand, and the outstanding balance of the total purchase price in terms of the written contract, on the other hand.
- [17.] In its plea to the counterclaim the respondent denied the allegation that the contract did not reflect the true common intention of the parties regarding occupational interest, and also the allegation of a simulation. The allegation of a misrepresentation was denied and it was pleaded that the amount of R1 580 000.00 had only been an estimate, and not a representation of the value of the crop or of the harvest.
- [18.] The oral evidence presented at the trial on behalf of the respondent was that of Mr Engelbrecht and Mr Opperman, as well as the evidence of Mr D J Coetzee. Mrs De Kock and Mr Kempen testified on behalf of the Trust, and also Mr Brits. The evidence of Mr L Mosemeng was also presented on behalf of the Trust.
- [19.] In terms of clause 3 of the written contract occupational interest would be payable by the Trust in the event of transfer not having taken place by 1 March 2014, and would be calculated at 10% per annum on the purchase price, calculated from 1 March 2014. The written contract obviously contained no mention of the Trust not being liable for the payment of occupational interest if it was not the cause of the delay of transfer.

- [20.] It was common cause that at least one meeting had taken place at the offices of the attorney who had at the time acted on behalf of the respondent and was responsible for the drafting of the contract, Mr F S P Snyman, and it was also common cause that the meeting was attended by Mr Snyman, Mr Engelbrecht, Mr Opperman and Mrs De Kock.
- [21.] The evidence of Mrs De Kock was that she had, at that meeting, indicated that the Trust should not be liable for the payment of occupational interest during a period of delay in the transfer of the ownership of the property if the Trust was not to blame for such delay.
- [22.] Mr Engelbrecht insisted that the written contract contained everything that had been agreed as far as occupational interest is concerned. Mr Opperman, however, conceded that, although he could not remember what (if anything) had in the end been agreed in this regard, there had been a discussion where Mrs De Kock, Mr Snyman, Mr Engelbrecht and he himself were present and where Mrs De Kock had raised the issue of liability for occupational interest in the event of, and during a period when, the Trust was not the cause of the delay in transfer.
- [23.] As regards the counterclaim for damages, the evidence on behalf of the appellants, through Mrs De Kock, Mr Kempen and Mr Mosemeng, was that:
- 23.1 Upon completion of the harvesting process it appeared that there were 2561 vines less in the block named "*Tjance*" on Lot 83. These vines were replaced at a total cost of R 40 976.00;
- 23.2 The vines that were replaced by the respondent after the frost damage in September 2013 were not rooted vines, but cut vines, which were of a quality inferior to that of rooted vines;
- 23.3 The harvest of the crops yielded R440 000.00 less than the amount of R1 580 000.00, which Mr Engelbrecht had guaranteed to be the value of

the crops as at the time when the vineyards were viewed by Mrs De Kock and Mr Kempen; on the occasion already referred to and only days before they took occupation of the property and started harvesting those crops;

23.4 Mrs De Kock testified that Mr Engelbrecht had told her that he had in 2013 harvested 100 tons of grapes, while the Trust had in 2014 only managed to harvest a total 72 tons;

23.5 In the period after the Trust took occupation, and until the crops were harvested, nothing happened which could have had a detrimental effect on the proceeds of the harvest of the crops;

23.6 The guarantee, and Mr Engelbrecht's indication that the crop was indeed insured for that amount, induced Mrs De Kock to conclude the written contract in terms of which the Trust purchased, *inter alia*, the crops.

[24.] The Regional Magistrate ordered the Trust to pay to the respondent the amount of R122 000.00, which was found to be the outstanding balance of the purchase price. There is no counter-appeal against this order.

[25.] It was also found that, on probabilities, no supplementary or amending oral agreement had been concluded regarding occupational interest. The counterclaim for rectification of the written contract in this regard was dismissed and the Trust was ordered to pay the occupational interest claimed.

[26.] The Trust's claim for damages was dismissed on the basis that, in terms of clause 6.2 of the written contract, the risk in the crop had passed to the Trust when occupation was taken by it, and on the basis that clause 11 of the written contract recorded that no promises, undertakings, guarantees or estimations had induced the conclusion of the contract.

- [27.] Lastly the respondent was ordered to pay to the appellants the amount claimed in respect of the “missing” vines.

GROUND OF APPEAL:

- [28.] This appeal is in the first place directed at the dismissal of the counterclaim for rectification² and the order that occupation interest be paid. It was submitted that the Regional Magistrate had erred in rejecting the evidence of Mrs De Kock that the contract “*incorrectly failed to record*” an oral agreement that the Trust would only pay occupational interest if it was the cause of the delay in transfer. It was submitted that it was clear on the evidence that the Trust had not been the cause of the delay in the period that occupational interest was claimed for.

- [29.] It was furthermore submitted that the Regional Magistrate had erred in accepting the evidence of the respondent that the written contract correctly reflected what had been agreed upon regarding occupational interest, and by drawing a negative inference against the Trust for not presenting the evidence of Mr Snyman.

- [30.] It was furthermore submitted that the Regional Magistrate had disregarded the following probabilities concerning the issue of occupational interest:

30.1 When demand was initially made for payment of the outstanding balance of the purchase price nothing was said regarding occupational interest, and the issue of outstanding occupational interest was only raised when the Trust refused to pay any amount towards the outstanding balance of the purchase price.

30.2 The bank account number of the respondent for the payment of the occupational interest was not included in the written contract.

² Concerning the issue of occupational interest.

30.3 The respondent failed to stay transfer of ownership until the occupational interest had been paid, as the respondent could, according to the submission, have done.

[31.] As grounds of appeal in respect of the dismissal of the claim for damages it was submitted that the Regional Magistrate had erred :

31.1 in failing to find that the respondent had fraudulently made false representations regarding the value of the crop and the quality of the vines in block "*Tjance*" on Lot 83;

31.2 in finding that clause 6.2 of the written contract precluded reliance on such a misrepresentation;

31.3 in failing to find that the value of the harvest had from the outset been presented as R1 580 000.00 and that this representation had induced the conclusion of the written contract;

31.4 in failing to find that the appellant was entitled to claim damages, with or without cancellation of the written contract, or a reduction of the purchase price;

31.5 in failing to find that the appellant had indeed proved damages in the amount of R440 000.00;

31.6 in failing to find that clause 11 did not preclude remedies based on fraudulent misrepresentation; and

31.7 in failing to find that the **Consumer Protection Act**³ had been applicable, in terms of which implied warranties against latent defects could not be

³ 68 of 2008

excluded, clauses 7 and 11 would be prohibited⁴ and the making of false and misleading statements would be prohibited⁵.

RECTIFICATION / OCCUPATIONAL INTEREST:

- [32.] The appeal against the order that the Trust pay occupational interest is dependent on this Court finding that the Regional Magistrate should have found that clause 3 of the written contract should be read and applied as rectified in the manner proposed by the appellants.
- [33.] On the evidence of Mrs De Kock herself it is, however, in my view clear that there is no merit in the ground of appeal that the written contract "*incorrectly failed to record*" what had according to Mrs De Kock been agreed regarding payment of occupational interest in the event that the Trust was not to blame for a delay in the transfer of ownership.
- [34.] Mrs De Kock testified that, when the written contract was made available to her at some time subsequent to the meeting at the offices of Mr Snyman, but before it was signed, she pointed out to Mr Snyman that clause 3 contained no proviso to the effect that the Trust would not be liable for the payment of occupational interest if it was not the cause of the delay. According to her Mr Snyman told her that he was "*in charge*" and that he would see to it "*that things will go right*", and by implication that, regardless of the contents of clause 3 of the written contract, he would see to it that the Trust would in fact not pay occupational interest if it was not the cause of the delay. Mrs De Kock testified that she trusted Mr Snyman and signed the written contract in that form.
- [35.] On Mrs De Kock's own version she had, after the assurance allegedly given to her by Mr Snyman, decided to sign the written contract which contained no proviso that the Trust would not in such circumstances be liable for the payment of

⁴ See section 51(1)(g) of the Act.

⁵ See section 48 of the Act.

occupational interest. She was, on her own version, satisfied that what had according to her earlier been agreed upon orally, would be applied regardless of the fact that it was not recorded in the contract.

[36.] On her own version, therefore, the contract correctly recorded what she had ultimately accepted and intended it to record. On Mrs De Kock's own evidence there had therefore not, when the contract was signed, been a common intention that it should contain the proviso, or a common belief that it did in fact include it⁶. The fact that Mrs De Kock signed the contract without it including the proviso was not the result of a mistake on her part. She did so fully aware of the absence of the proviso, but confident that the proviso was not necessary to protect the rights of the Trust. This, as far as I am concerned, is the end of the appeal against the orders denying the rectification of clause 3 of the contract and ordering the appellant to pay the occupational interest.

[37.] The alleged oral agreement could in any event never, as pleaded, have been intended to supplement the written contract:

37.1 It was, according to Mrs De Kock, concluded before the conclusion of the written contract. At that stage there was, therefore, no written contract which the parties could have mutually intended to be supplemented by the oral agreement.

37.2 Mrs De Kock never claimed that, when the written contract was subsequently signed by her, she had not intended it to record, as it did in clause 11 thereof, that the purchaser acknowledged that the contractual relationship between the parties was exclusively regulated by the written contract. One of the issues which the written contract addressed was precisely the payment by the Trust of occupational interest, and the contract recorded that it had been agreed that, should transfer still not have taken place by 1 March 2014, the Trust would have

⁶ **Kathmer Investments Ltd v Woolworths (Pty) Ltd** 1970 (2) SA 498 (AD) at 503

to pay occupational interest calculated from that date. The contract therefore specifically dealt with the issue of occupational interest after 1 March 2014, the period which Mrs De Kock claimed to be the subject of the oral agreement. The written contract therefore indeed regulates the issue of the payment of occupational interest for the period after 1 March 2014, and in terms of clause 11 thereof it is to be regarded as the sole and complete record of what had been agreed regarding occupational interest after 1 March 2014, and for as long as the Trust occupied the property before it was transferred to the Trust.

[38.] Mrs De Kock's own evidence that the oral agreement was concluded prior to (and not after) the conclusion of the written contract, is also irreconcilable with the alternative averment (in the appellants' pleadings) that the oral agreement had amended the written contract as regards occupational interest. When the oral agreement had according to Mrs De Kock been concluded, no other agreement had existed for it to amend.

[39.] It is therefore unnecessary to consider whether the probabilities favoured Mrs De Kock's version as regards to conclusion of the oral agreement, as submitted on behalf of the appellants, and whether a negative inference regarding her failure to call Mr Snyman as a witness was justified.

DAMAGES:

[40.] It was not in dispute that exhibit "C"⁷ had been handed to Mrs De Kock on the day when she first viewed the farm. The statement made by the appellants' counsel during the evidence-in-chief of Mrs De Kock that Mr Opperman had denied this, was clearly not correct. Mr Opperman's evidence was that he could not remember whether he had possibly sent the document to Mrs De Kock by e-mail, but in cross-examination he readily conceded that it may have been given to Mrs De Kock on the farm.

⁷ See para [4] and footnote 1 above.

- [41.] It was furthermore common cause that it was conveyed to Mrs De Kock that the portion of the total purchase price reflected in exhibit "C" that pertained to the crops, was R1 580 000.00. What was in dispute is whether this had been said on the first occasion, when exhibit "C" was handed to Mrs De Kock on the farm, or only after she had visited the farm, had already decided that the Trust would buy the farm and had approached Mr Brits for financing.
- [42.] Although nothing to this effect was specifically pleaded Mrs De Kock, when she was asked (during her evidence-in-chief) to comment on the proposition that, if the income of the Trust from the harvesting of the crops had been R440 000.00 less than the amount of R1 580 000.00 mentioned to her, the Trust could not hold the respondent liable for that shortfall, because the risk in the crop had passed to the Trust when occupation was taken, her response was that the *"grapes... only delivered 70 tons and not like he said a 100 the previous year"*.
- [43.] In cross-examination of Mr Engelbrecht it had been put to him that Mrs De Kock's complaint regarding the harvest actually concerned only the raisin grapes that had been harvested, and it was furthermore put to him that that part of the harvest had amounted to only 72 tons.
- [44.] It was never put to either Mr Engelbrecht or Mr Opperman that it had been said (by either of them) that the 2013 raisin grape yield had been 100 tons, or that a representation had been made to the effect that the 2014 raisin grape yield would be a 100 tons. The furthest that counsel for the appellants went in cross-examination of Mr Engelbrecht was to ask him to explain the shortfall of 28 tons, which would have been the difference between 100 tons and 72 tons.
- [45.] It was also never explained where the figure of 100 tons could be discerned from the information in exhibit "C". I certainly could not. It is also not clear whether the 72 tons and the 100 tons referred to so-called *"dry"* mass, in other words the mass of those grapes after having been dried, or the wet mass. Exhibit "C"

contained information on only the wet mass of the grapes that were produced in the 2013 season.

- [46.] According to claim “B” of the appellants’ amended counterclaim, read with paragraphs 2.2 to 2.10 of the amended plea⁸, the respondent had through exhibit “C” misrepresented the number of vines on Lot 83.
- [47.] In paragraph 2.4 of the grounds of appeal it was submitted that it was the representation that the value of the crops was R1 580 000.00 that actually induced Mrs De Kock to sign the contract.
- [48.] It is now submitted, on behalf of the appellants in the heads of argument, that the Regional Magistrate should have found that the respondent had misrepresented not only the number of vines on Lot 83, but also the quality and age of those vines.
- [49.] Mrs De Kock’s evidence, however, was that Mr Engelbrecht at the occasion on the farm said that he guaranteed that there were at that stage, apparently on the farm as a whole, grapes or crops to the value of R1 580 000.00.
- [50.] The appellants’ claim for damages was based on an allegation that what had been conveyed to Mrs De Kock had constituted fraudulent misrepresentation.
- [51.] The respondent denied this and pleaded that the appellant was, in view of the contents of the written contract of sale, precluded from relying on any alleged representation not recorded in the contract. Specific reference was made to clause 11, in terms of which the purchaser (the Trust) would be deemed to have acknowledged that:

53.1 *“no statements or representations had been made by or on behalf of the seller to induce the contract”⁹; and that*

⁸ Which was incorporated in the counterclaim by reference.

⁹ My own translation of the words *“geen verklarings of voorstellings gemaak is deur of ten behoeve van die verkoper om hierdie verkoping tot stand te bring nie”*.

53.2 “the relationship between the seller and the purchaser was regulated exclusively by the contract”¹⁰.

[52.] The appellants’ present submissions in this regard are that:

54.1 the transaction was one as intended in the **Consumer Protection Act**¹¹, in terms of which *inter alia* clause 11 of the written contract would be prohibited; and that

54.2 even if clause 11 was valid, it would not protect the seller (respondent) in the event that such a representation had been made fraudulently, as opposed to negligently or innocently¹².

[53.] In what follows I will firstly deal with the issue of the **Consumer Protection Act**.

[54.] The appellants’ pleadings made no reference to the Act, even after those pleadings had been amended subsequent to the respondent raising clauses 7 and 11 in its response to the appellants’ plea and counterclaim before they were amended.

[55.] Section 69 of the Act provides a consumer with several “*internal*” remedies and has been held to mean that a consumer who has not exhausted such remedies will not be entitled to seek redress anywhere else than a consumer Court¹³. The appellants have made out no case in this regard, and in fact never even made as much as an allegation that the Regional Court had, or that this Court has, the jurisdiction to entertain these defenses.

¹⁰ My own translation of the words “*die verhouding tussen die verkoper en koper uitsluitlik deur hierdie koopvooreenkoms gereël word*”.

¹¹ See the definition of “*transaction*” in section 1 of the Act.

¹² Compare **Firststrand Bank Ltd (T/A Rand Merchant Bank) and Another v Master of the High Court, Cape Town, and Others** 2014 (2) SA 527 (WCC) para [22]

¹³ See **Joroy 4440 CC v Potgieter and Another** NNO 2016 (3) SA 465 (FB)

[56.] Even if the sale in the present matter could be regarded as a transaction for purposes of the **Consumer Protection Act**¹⁴, the Act would in terms of section 5(2)(b) in any event not apply to “... *any transaction* –

(a);

(b) *in terms of which the customer is a juristic person whose asset value or annual turnover at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6; ...”*

[57.] In terms of the definition of a juristic person in section 1 of the Act the Trust would indeed be a juristic person as envisaged in section 5(2)(b).

[58.] In Government Notice R294 of 1 April 2011¹⁵ the Minister, in terms of section 6(1) of the Act, set the monetary threshold applicable to section 5(2)(b) at R2 000 000.00, to be calculated in accordance with the Schedule to the Notice and with reference, *inter alia*, to the asset value of such a juristic person. No evidence to this effect appears in the record, although it did at the very least appear that the Trust was able to raise a loan of R3 000 000.00 without selling any of its several other properties, at least some of which had been unencumbered by bonds. The appellants have therefore in any event not shown that the **Consumer Protection Act** would be applicable in this case.

[59.] Although I find it unnecessary in the circumstances to come to a finding in this regard, it may also be debatable whether the sale of this farm had taken place in the ordinary course of the business of the respondent. It appeared from the evidence that the respondent had conducted farming activities on its properties, and there is no indication that it had also been involved in the “*continual marketing*” of land¹⁶. For the Trust to have enjoyed the protection of the

¹⁴ See below

¹⁵ Published in Government Gazette 34181.

¹⁶ See the definition of “*business*” in section 1 of the **Consumer Protection Act**.

Consumer Protection Act the sale of the farm would have had to have taken place in the ordinary course of the respondent's business¹⁷.

[60.] In **ESKOM Holdings Ltd v Halstead-Cleak**¹⁸ it was held that, having regard to the purpose of the **Consumer Protection Act**, only consumers as defined in the Act would enjoy its protection. With reference to the fact that "*The definition of 'consumer' in s 1 is a person to whom goods or services are marketed in the ordinary course of a supplier's business, or who has entered into a transaction with a supplier in the ordinary course of a supplier's business*", it was confirmed that for purposes of the **Consumer Protection Act** an objective test is to be applied in determining whether a transaction took place in the seller's ordinary course of business¹⁹. The sale of an asset would not necessarily always be regarded as having been done in the ordinary course of a particular business²⁰.

[61.] I have therefore come to the conclusion that, even if the appellants could at this stage be allowed to rely on the provisions of the **Consumer Protection Act**, the provisions of the Act cannot on the available evidence be said to have been applicable to this particular transaction.

[62.] I will therefore proceed to consider:

64.1 whether what had been said or conveyed to Mrs De Kock had constituted a representation; and, if so,

64.2 whether it had been false, indeed also to the knowledge of the representative/s of the respondent.

[63.] If the "*split*" version of the purchase price had been conveyed to Mrs De Kock on the first day, and as part of the negotiations, it could be argued to have been

¹⁷ See, *inter alia*, the definitions of "*supplier*", "*consumer*" and "*transaction*", as well as the wording of sections 41, 48 and 51 of the **Consumer Protection Act**.

¹⁸ 2017 (1) SA 333 (SCA)

¹⁹ **Ibid**, paras [15] and [20]

²⁰ Compare **Paterson NO v Kelvin Park Properties CC** 1998 (2) SA 89 (E)

done to induce Mrs De Kock to agree, on behalf of the Trust, to buy the crops for that specific portion of the total purchase price.

- [64.] If, on the other hand, the separate amount in respect of the crops had only been supplied after the negotiations, and merely to facilitate matters for the Trust at the Bank, the position would clearly be different.
- [65.] The Regional Magistrate made no findings in this regard.
- [66.] It was submitted on behalf of the appellants that Mr Brits had been an independent witness whose evidence had been "*of a very high quality*". It was furthermore submitted, without really referring to specific aspects in the evidence in this regard of Mr Engelbrecht and Mr Opperman that fell to be criticized, that the evidence of Mr Engelbrecht and Mr Opperman on this aspect should be rejected insofar as far as it was in conflict with that of Mrs De Kock, Mr Kempen and Mr Brits.
- [67.] As far as the evidence of Mr Brits is concerned it was common cause that there had, at some stage after Mrs De Kock's visit to Mr Brits, been a telephone conversation between Mr Brits and Mr Opperman.
- [68.] Mr Brits was at one stage unsure whether he had called Mr Opperman, or Mr Opperman him, but later stuck to the version that he had called Mr Opperman. He was also unsure about how many times he had spoken to Mr Opperman. In my view it can, however, safely be accepted that Mr Brits had called Mr Opperman.
- [69.] What is more important, however, is what the reason for that call and conversation had been. Mr Opperman's evidence was that the reason was that Mr Brits required a split or a division into two parts of the total purchase price reflected in exhibit "C", in other words one part of the price for the land and the other part for the crops. His version was therefore that it had only then become

necessary to consider dividing the total purchase price reflected in exhibit "C" and allocating a part of that price to the crops.

- [70.] The appellants' version was completely different. On the appellants' version a divided purchase price had at that stage already been conveyed to Mr Brits by Mrs De Kock, and it was put to Mr Opperman in cross-examination that Mr Brits had later called Mr Opperman to ask him to make sure that the written contract reflected the already divided and separate prices for the land and the crop.
- [71.] In direct contrast to what had been put to Mr Opperman in cross-examination, Mr Brits in his evidence denied that he had asked Mr Opperman this. According to him the reason for his call was to tell Mr Opperman to ensure that the written contract contained the same information as exhibit "C".
- [72.] If one considers for a moment the version put to Mr Opperman in this regard, the question arises why Mr Brits would have considered it necessary to discuss with Mr Opperman what the contents of the written contract had to be. His evidence was that he had already by then discussed with Mrs De Kock, who had for all practical purposes been his client, the requirement that the contract should contain a separate price for the land. The evidence was also that the signed contract would in any event have had to be submitted to Mr Brits to enable him to facilitate the formal application for a loan, which would have given him another opportunity to verify that the purchase price had indeed been divided and set out as required by him. It seems unlikely that Mr Brits would in those circumstances have thought it necessary to again discuss the very same requirement with Mr Opperman.
- [73.] In any event, Mr Opperman was the estate agent and it is not clear on the evidence why Mr Brits would have been under the impression that Mr Opperman would have anything to do with the drafting of the contract. Why would he not, if he had decided not to trust that Mrs De Kock would see to it that the contract

dealt with the purchase price as required by him, have phoned Mr Snyman instead?

- [74.] On the other hand Mr Brits' own explanation for his call to Mr Opperman is difficult to understand. Why would he have wanted Mr Opperman to ensure that the information in exhibit "C" was reflected in the contract? Exhibit "C" did not set out a separate price for the land, and it is unclear what other information in exhibit "C" Mr Brits would have wished to be included in the contract.
- [75.] As far as the evidence of Mrs De Kock is concerned, it was very clear that she had been present in Court when Mr Brits testified.
- [76.] The appellants' counsel attacked the credibility of Mr Engelbrecht on the basis, *inter alia*, that he was an accomplice "*with his attorney*" to fraud perpetrated on the Receiver of Revenue when the contract was drafted to reflect the sale of the trays, while the intention had never been that the Trust would really purchase the trays. On her own version, however, Mrs De Kock would then have been equally complicit in the so-called fraud and, on counsel's argument, this should then similarly impact on her credibility.
- [77.] Mrs De Kock's explanation of how it had come about that the split version of the purchase price was given to her on the very first day, was that it was given to her when she enquired how the total purchase price in exhibit "C" was calculated. Why would Mrs De Kock have needed to ask Mr Opperman how the purchase price in exhibit "C" was calculated, or even what the price of the land itself was? She knew that the Bank generally accepted the value of similar land in that area as being a R150 000.00 per hectare, as also confirmed by Mr Brits, and the total hectares concerned appeared from exhibit "C". On her own version she did in fact, during the meeting at the farm, very easily calculate the value of the land on the basis of the hectares reflected in exhibit "C" and arrived at a figure of R3 000 000.00. By simply deducting the R3 000 000.00 from the total purchase price reflected in the very same document, she would have arrived at a price of

approximately R1 580 000.00 for the crops. I fail to see why Mrs De Kock would have needed any input from Mr Opperman in this regard.

- [78.] Mrs De Kock's own evidence was, in fact, that all the information required by her in order to approach Mr Brits for a loan was contained in exhibit "C".
- [79.] On the record alone, and bearing in mind that the burden of proof in this regard had been on the appellants, I would not have been prepared to find, on a balance of probabilities, that the value of the crops had at the meeting on the farm been discussed as a separate component of the total purchase price reflected in exhibit "C".
- [80.] On the basis that fraudulent misrepresentation is not protected by a provision such as that in clause 11, the appellants say that representations had indeed been made on the farm on the first occasion when Mrs De Kock viewed the farm, that those representations were false and that they were made fraudulently, because Mr Engelbrecht had been aware of their falsity.
- [81.] From the record it appears that the appellants' case as far as the alleged fraud is concerned, is that there were not 10142 vines in block "*Tjance*"²¹ in January 2014, that the vines that had been planted there after the loss of vines due to the frost in September 2013, were not rooted vines²² but only cut vines, that not all of the vines in that block had been planted in 2011²³ and that the representation was made to Mrs De Kock that the value of the crops at the time of the negotiations and the visit to the farm was R1 580 000.00.
- [82.] Mrs De Kock's evidence was that the amount of R1 580 000.00 was conveyed to her by Mr Engelbrecht as being the value of the crop as it existed on the day of the meeting on the farm. It is not a coincidence, and it is indeed of some significance, that approximately the same figure is arrived at when one simply

²¹ The number of vines reflected in exhibit "C" in respect of that block.

²² Like those described in exhibit "C" in respect of that block.

²³ As indicated in exhibit "C" in respect of that block.

deducts the value of the land from the total purchase price reflected in exhibit "C". This would certainly fit in perfectly with the respondent's evidence that the figure of R1 580 000.00 was never intended as anything more than an estimate, that it was never even discussed at the meeting on the farm and that it was only provided to arrive at a separate price for the land, as required by the purchaser and/or the Bank.

- [83.] It was never Mrs De Kock's evidence that Mr Engelbrecht or Mr Opperman had told her, at the meeting on the farm or at any other stage, that there were 10142 vines in that block and on Lot 83, or that the vines present at the time of that meeting had all been planted in 2011 and were all rooted (or 143B) vines. These particulars do, however, appear in exhibit "C" and it would therefore appear as though the appellants' case is that it is the handing of exhibit "C" to Mrs De Kock that had constituted a representation to her that, at the time of the meeting on the farm, the position regarding the number and type of vines in block "*Tjance*" was as reflected in exhibit "C".
- [84.] It was furthermore the case of the appellants that only 72 tons of grapes were harvested from block "*Tjance*" in 2014, and that it resulted in an income of R440 000.00 less than the figure of R1 580 000.00 represented to Mrs De Kock. When the vines were counted after the harvest of 2014 there were in fact only 7581 vines, in other words 2561 less than the number reflected in exhibit "C" in respect of that block. Also not all of the vines in existence in that block at the time of the meeting were 143B or rooted vines, and not all of them were 2011 vines.
- [85.] This, according to the appellants, meant that the representations that had according to Mrs De Kock been made to her, had been false, and their case was furthermore that the inference must be drawn, apparently on probabilities, that Mr Engelbrecht had been aware of the fact that there were in fact not 10142 vines in that block at the time of the meeting on the farm, and that the vines that had been planted there were younger and not rooted vines.

- [86.] The question arises whether it can be said that the handing of exhibit "C" to Mrs De Kock had amounted to a representation regarding the position, specifically as far as block "*Tjance*" is concerned, in January 2014.
- [87.] It is clear that the information in exhibit "C" was based on the position in 2013 and on the harvest which the vines described in exhibit "C" had yielded in 2013. The year 2013 appears at the top of the document, directly above the columns indicating the tons harvested per hectare and the income resulting therefrom. The total number of vines reflected in exhibit "C", including those reflected in respect of the block "*Tjance*", therefore in my view clearly referred to the position at the time when that 2013 crop was harvested.
- [88.] The same applies to the nature of the vines, in other words whether they were rooted or cut. The column in exhibit "C" in which the vines in the particular block were described as "*Onderstok 143B*" reflected the description of the vines in that block, and elsewhere on the farm, as it was in 2013, at the time of the harvest, and on all indications before the September 2013 frost damage occurred.
- [89.] It is common cause, in fact, that Mr Engelbrecht at the meeting on the farm in January 2014 admitted that the vines on the farm had in September 2013 suffered frost damage and that there were at the time of the meeting still missing vines in the block "*Tjance*" on Lot 83, in other words, in effect that the vines reflected in exhibit "C" were in fact no longer all there.
- [90.] The appellants' case was that Mr Engelbrecht had on the day at the farm represented to them that there were only approximately 150 to 200 vines less in that block than the number reflected in exhibit "C", while the respondent's case was that no representation had been made regarding the number of vines short in that block.
- [91.] The evidence of Mrs De Kock and Mr Kempen was unsatisfactory in this regard:

- 91.1 Mrs De Kock at first said that Mr Engelbrecht had told her that “150,200” vines were missing/dead after the frost. Later in her cross-examination Mrs De Kock said that they had stopped at a spot where she was told “*here short a few*”. What would that have meant? At a later stage Mrs De Kock testified that Mr Engelbrecht and Mr Opperman had said “*here are a few missing like in 200 or so*”. Later yet she testified that she had in fact been told that there were 200 vines short. Eventually she testified that she had been told that there were “*a few*” vines short or missing, which she had then interpreted to mean “*one or two hundred*”.
- 91.2 In cross-examination of Mr Opperman it was put to him that a specific area had been indicated to Mrs De Kock and that she had been told that there were “*a few vines*”²⁴ missing there. It was not put to Mr Opperman that any figure was mentioned to Mrs De Kock and the impression was created by counsel that it had been Mrs De Kock’s own estimate that about 150 to maximum 200 vines were missing there²⁵.
- 93.3 According to Mr Kempen Mr Opperman had said “*as you can see there are a few vines missing here*”²⁶. But according to Mr Kempen this had been said with reference not just to a limited area as suggested by and on behalf of Mrs De Kock, but as they were driving around the vineyards on Lot 83, and therefore it would seem with reference to the vineyards in general in that area. Mr Kempen said that the absence of vines was visible on the outer perimeter of the vineyards on the side of the vehicle where Mrs De Kock was seated. That there were vines missing over a general area must therefore on this version have been plain to Mrs De Kock. Yet it is clear that she never attempted to leave the vehicle to see, for example, how far into the vineyards vines were missing.

²⁴ My own translation of the words “*paar stokke*”.

²⁵ My own translation of the words “*omtrent so 150 tot maksimum 200 stokke... daar weg was*”.

²⁶ My own translation of the words “*soos julle kan sien is hier ‘n paar stokkies weg*”.

93.4 At first Mr Kempen did not want to say what conclusion had been reached as regards the number of missing vines, but when in re-examination Mrs De Kock's evidence in this regard was presented to him, he not surprisingly also arrived at an estimate of 150.

[92.] I would therefore not on the evidence of Mrs De Kock and Mr Kempen have been prepared to accept that they had reason to believe that the number of missing vines could not have been more than 200.

[93.] As regards the exact number of missing vines (which was placed in dispute in the respondent's plea to the appellants' counterclaim), the evidence of Mrs De Kock that she had counted the vines after the 2014 harvest and had concluded that there were only 7 581 vines in the particular area, instead of the number 10 142 reflected in exhibit "C", appears to have been contradicted by Mr Mosemeng, who said that no counting of vines had been done after Mr Engelbrecht had left. Mr Mosemeng was also clearly unsure of how many vines had been planted to replace those lost in the frost of September 2013. Not much turns on this however.

[94.] It appears from the evidence that if a vine is significantly damaged by frost it will die, disintegrate and in time completely disappear. It is equally clear that Mrs De Kock was made aware of the fact that some vines had indeed died and had to be replaced. It must therefore have been clear to Mrs De Kock that some of the vines visible and in existence in block "*Tjance*" in January 2014 could not be the vines referred to in exhibit "C". It was in fact on the evidence clear that the difference between the old vines described in exhibit "C" that was still there and the newly planted vines, was plain to see by simply comparing their heights. In fact, Mrs De Kock herself testified that Mr Engelbrecht had pointed out to her that some of the vines on Lot 83 were younger than others.

[95.] Exhibit "C" could therefore, taking everything into account, not have brought Mrs De Kock under the impression that the number and type of vines in the block

"Tjance" were necessarily the same as the number, age or even type reflected in exhibit "C" in respect of that block.

- [96.] Could it in any event on probabilities have been found that Mr Engelbrecht had, at the time of the meeting, been aware that there were, even after the new vines had been planted after September 2013, not as many vines in block *"Tjance"* as at the time of the harvest of 2013 and as set out in exhibit "C"?
- [97.] The appellants' case in this regard was based entirely on the assumption that Mr Engelbrecht, as the person who had managed the farm, must have been aware of how many vines had been planted after September 2013 to replace vines that had been lost as a result of the frost, and also of the quality and specific type of those vines.
- [98.] It appears from the evidence, however, that Mr Engelbrecht had due to sickness in the period preceding the negotiations and the sale not been able to personally manage and conduct the farming activities on the farm and that this had actually been done by his son.
- [99.] The appellants' own witness, Mr Mosemeng²⁷ confirmed that Mr Engelbrecht had for a long time not been personally involved in the farming activities on the farm and that it had been Mr Engelbrecht's son who had been involved in the planting of the new vines.
- [100.] In the circumstances, and on the probabilities, an inference that Mr Engelbrecht had been aware of the fact that not enough vines had been planted to replace all those lost, would be unjustified.
- [101.] As regards the nature of the vines, there was no evidence that either Mr Engelbrecht or Mr Opperman had at that meeting on the farm said anything at all

²⁷ Who on Mrs De Kock's own evidence was not well-disposed towards Mr Engelbrecht as his former employer, who had in fact expressed a wish to kill Mr Engelbrecht and who had after the sale of the farm stayed on in the employment of the Trust, could never be said to have been an independent and objective witness.

about the nature or type (rooted or cut) of the newly planted vines. The only possible representation that the appellants could have relied on in this regard would be the description in exhibit "C" of the vines in block "*Tjance*", but as already mentioned it is clear that Mrs De Kock had, when handed exhibit "C", been made aware of the fact that things in that block were no longer necessarily as they appeared from exhibit "C".

[102.] In my view it is extremely improbable that either Mr Engelbrecht or Mr Opperman would in the one breath disclose that the vines on, *inter alia*, Lot 83 and in block "*Tjance*" had suffered frost damage and that those vines that were there were not all of the same age, and yet at the same time intend to make a representation, presumably through making exhibit "C" available to Mrs De Kock, that the position as far as the vines on Lot 83 were concerned was still exactly the same as it was in 2013 and as reflected in exhibit "C", and furthermore that those vines that were there in January 2014, would definitely yield the same harvest as in 2013.

[103.] Put another way, if Mr Engelbrecht or Mr Opperman had through exhibit "C" intended to mislead Mrs De Kock into believing that the 2013 particulars contained in exhibit "C" for block "*Tjance*" and for Lot 83 were still applicable and correct in January 2014, they would not have disclosed the September 2013 frost damage, the fact that it had resulted in thousands of the vines there having to be replaced or the fact that there were, even after the planting of new vines, still "*missing*" vines, in other words, vines that should according to exhibit "C" have been there at that stage, but were not.

[104.] It is equally improbable that Mrs De Kock could, in these circumstances, on that day have left the farm under the impression that all of the vines on Lot 83 and in block "*Tjance*" were at that stage the same as those that had produced 100 tons of grapes in the previous year.

[105.] Even if Mr Engelbrecht had mentioned that a 100 tons of grapes were harvested from the vines on Lot 83 in 2013, it is highly improbable that he would under these circumstances have intended to convey that the same could definitely be expected from the vines on Lot 83 in January 2014, much less guarantee that.

[106.] In view of the conclusion just reached it is unnecessary to consider whether the extent of the alleged damages had in any event been proved on a balance of probabilities.

[107.] In my view the appeal should therefore be dismissed in its entirety, and there is no reason why the costs of the appeal should not follow the result.

[108.] The following order is therefore made:

THE APPEAL IS DISMISSED WITH COSTS.



C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.



J A SNYDERS
ACTING JUDGE
NORTHERN CAPE DIVISION

For the Appellants:

Adv J C Tredoux
(Instructed by Haarhoffs Inc, Kimberley)

For the Respondent:

Adv J C Marais
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