

IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NO: 11073/2012

DATE: 8 MAY 2015

In the matter between:-

PURGLAS (PTY) LTD

First Plaintiff

GARTH LIONEL HATTON

Second Plaintiff

CUNNINGHAM JOHN ALAN

Third Plaintiff

and

SALTUS POLES CC

Defendant

JUDGMENT

SKOSANA AJ

[1] In this matter the plaintiffs have claimed against the defendant on contractual basis. Originally there were 3 claims in this action. Claim 2 has been abandoned. In claim 1 the first plaintiff claims from the defendant an amount of R425 000-00 based on breach of a contract of sale of the plaintiffs business. In claim 3, the second plaintiff claims from the defendant an amount of R129 692-03 on the basis of a breach of contract for services rendered by the second plaintiff to the defendant.

[2] For claim 1, the agreement was concluded in writing between the first plaintiff and the defendant during August 2009.

[3] The parties have formally agreed before me that the terms of the contract are common cause and that the defendant did not comply with paragraph 5 of the agreement by paying the purchase price of the business of

the first plaintiff in accordance therewith (claim 1) or paying the monies due to the second plaintiff for services rendered (claim 3).

[4] The parties initially argued the case without leading any evidence and requested me to make a ruling or judgment.

[5] When we resumed, I posed questions to both parties. First, to the plaintiffs' counsel, I asked whether or not it was necessary for the plaintiffs to plead fictional fulfilment of the suspensive condition in replication to the defendant's plea. The plaintiffs' counsel retorted that in terms of the Rules everything alleged in the plea must be regarded as having been denied by the plaintiffs and therefore the plaintiffs have effectively denied that the suspensive condition was not fulfilled.

[6] I have my reservations as to the correctness of this approach, especially since the plaintiffs need to prove, as it will appear later herein, that the defendant's failure to comply with the suspensive condition was deliberate. Nevertheless, for the purposes of this case I accept that the issues were joined and thus the plaintiffs' reliance on fictional fulfilment may be subsumed under the deemed denial in terms of Rule 25 of the Uniform Rules. No objection came forth from the defendant in this regard either during argument or when the evidence of the second plaintiff was led.

[7] To the defendant's counsel, I asked if he prefers to amend the plea to include fraudulent misrepresentation. The defendant's counsel immediately applied for such amendment and since there was no objection from the plaintiffs, it was granted. Consequently, paragraph 10.2.3 of the defendant's plea now reads:

“10.2.3 The representations as aforesaid were false and were made fraudulently, alternatively negligently in that:

10.2.3.1 The business could not produce a monthly turnover of approximately R300 000-00;

10.2.3.2 The stock appeared to be redundant and would not be sold within a period of 6 months; and

10.2.3.3 The business would not generate sufficient cash to repay the purchase price within a year after delivery”.

[8] The parties then decided to lead evidence. The aim of the evidence was respectively to answer the following questions:

[a] Whether or not the defendant's non-compliance with the terms of the contract as contained in

clause 5 thereof, was deliberate and aimed at frustrating the plaintiffs. In this regard, the onus of proof rested on the plaintiff;

[b] Whether or not the plaintiffs had, prior to the conclusion of the contract, fraudulently misrepresented facts to the defendant regarding the subject matter of the sale so as to render the subsequent contract voidable. The onus to prove this fraudulent misrepresentation rested on the defendant.

[9] The plaintiff led the evidence of Mr Hatton who testified as follows:

[9.1] He is a Director of the first plaintiff: Negotiations for the sale of the business of the first plaintiff started in 2006 with Mr Venter, the sole member of the defendant.

[9.2] Various offers were considered which ranged from R1 500 000-00 and above but eventually dropped down to R750 000-00.

[9.3] Various aspects of the business were discussed and considered. Of importance, is the cash flow projection spreadsheet which was provided on behalf of the first plaintiff to the defendant showing a cash flow projection for the first plaintiffs business over a period of 12 months in 2009. Mr Hatton was involved in the compilation of this document.

[9.4] The purpose of the projection was to demonstrate how the plaintiffs had expected the business to run but it did not take into account if someone else was involved or the location of the premises of the business were changed.

[9.5] Although the turnover in sales was projected at R300 000-00 per month from the tenth month onwards, the predicted costs were high and resulted in a continual deficit. This also appears to have been one of the reasons for Mr Venter to have reduced his initial offers, to the final one being R750 000-00.

[9.6] Eventually the agreement of sale was signed between the parties in August 2009 as attached to the plaintiffs' particulars of claim. Paragraph 5 of such agreement sets out the terms for payment of the purchase price. The defendant paid an amount of R250 000-00 as a deposit in accordance with paragraph 5.1.1 of the agreement, albeit not in accordance with the time stipulated in such clause. The defendant further paid instalments over 3 months in accordance with paragraph 5.1.2 of the agreement and thereafter stopped the payment. The defendant therefore did not comply with the terms set out in paragraph 5.1.2 and 5.1.3 of the contract.

[9.7] The defendant was in possession of the cash flow projection document when the contract was signed in August 2009. The stock that had been purchased by the defendant from the first plaintiff in terms of paragraph 5.1.3 of the contract included running material and material that could be used to produce or manufacture other products such as sand paper, paint and the like. No warranties were made to the defendant regarding the performance of the business. Mr Hatton had a meeting with Mr Venter in December 2009 where Mr Venter undertook to make payment of the full amount to the plaintiffs. He also referred to several e-mails wherein Mr Venter had undertaken to either restart the repayment process or to pay the outstanding amount but never did.

[9.8] In cross-examination a number of discrepancies in the agreement were pointed out to Mr Hatton. In particular, it was put to Mr Hatton that if the defendant wanted to resile from the contract he could have done so by not making any payments at all as clause 5 which regulates payment constituted a suspensive condition.

[9.9] It was also put to Mr Hatton that the payment made by the defendant in terms of clause 5.1.1 was made late and not in accordance with such term.

[9.10] It was further put to Mr Hatton that Mr Venter will testify that he complained about the cash flow projection in the meeting of December 2009. This was denied. However, Mr Hatton admitted that Mr Venter had at some stage tendered the return of the stock and that he had complained about the stock being '*unsaleable*'. He also admitted that the first plaintiff refused to take back the stock.

[9.11] He conceded that the first plaintiff had closed down shop during June 2009 due to a previous sale agreement that did not go well resulting in the discharge of all the staff of the first plaintiff which was re-hired in less than a day.

[9.12] He however denied that Mr Venter was led to believe that the turnover of the business was more than R300 000-00 per month before June 2009.

[9.13] He also admitted that the plaintiffs agreed to the defendant moving the business from Durban to Sasolburg during June 2010.

[9.14] The expertise of the business had gone with the relocation of the business to Sasolburg and Mr Hatton was also in Sasolburg for 2 weeks to ensure the proper re-assembly of the machinery.

[9.15] There were pre-existing orders and a client based when the business was sold to the defendant. He also indicated that they accepted the lower and final offer of R750 000-00 for the purchase of the business since both he and Mr Alan Cunningham, as directors of the first plaintiff were over the age

of 70 and wanted to quit.

[9.16] Various possibilities which might have affected the profitability of the business were put to Mr Hatton such as the development of new products, new methods and importation of Chinese cheaper material. Mr Hatton persisted that the business had survived various adverse economic circumstances in the past and they expected it to do so under ownership of the defendant.

[9.17] At the end of the evidence by Mr Hatton, the plaintiffs closed their case.

[10] On behalf of the defendant only Mr Venter testified. His testimony is as follows:

[10.1] He is the only member of the defendant and holds a Bachelor of Chemical Engineering Degree and a Masters in Chemical Engineering.

[10.2] He met the plaintiffs in 2004 and saw an opportunity in manufacturing poles, which at the time very few companies were doing.

[10.3] He knew the 2 owners of the first plaintiff and knew that Mr Cunningham's health was deteriorating and that they had struggled for 4 years to sell the business. He bought the business in order to assist them or help them out.

[10.4] However, he had requested them to give him details of the business and in particular the annual financial statement for the last 3 years but they could only give him financial statements of the business for the financial years 2006 and 2007 and did not give him the financial statement for 2009.

[10.5] When he saw the cash flow projection spreadsheet, he made his calculations of what he could repay. He never expected that the business will make enough sales so he paid the first R250 000-00 out of his own pocket. However, he expected that from the fourth or fifth month, the R25 000-00 per month instalment would have to come from the sales on the basis of the cash flow projection given to him.

[10.6] Since the business premises were moved to Sasolburg, he has increased the product range as the Chinese fishing rods had affected the sales. He expected the sales to increase soon.

[10.7] As far as the stock that he had bought from the plaintiffs is concerned, he had attempted several methods to ensure that the stock was sold but all failed. This included appointing an administration manager, doing telly marketing and telesales of the fishing rods as well as using road shows.

[10.8] He indicated that the turnover per month of the business has started to increase but was very

bad for the first 2 years. He intends to restart the repayments after the turnover has improved. He also indicated that he sold shares and put up an investment of approximately R3 million to turn the business around but up to this day the business has never made any profit and would have never made the turnover that was projected to him by the plaintiffs.

[10.9] He also tendered the stock back to the plaintiffs as 25% thereof was not saleable and was still in the store room at Sasolburg.

[10.10] The reason for the first payment to have been made late was because he had to release funds from his other investment.

[10.11] He had no intention to resile from the contract and as long as the cash projections were valid, he was prepared to keep on trying.

[10.12] In December 2009, he explained to the plaintiffs the problems he had with the sales which were not as per forecasted projections and therefore could not pay them as per the projected cash flow. The plaintiffs did not really listen to him and did not accept his explanation.

[10.13] He referred to draft financial statements of the first plaintiff for 2009 which show a loss of about R825 000-00 for the financial year 2009. He insisted that if he had seen this document, he would not have purchased the business and that he had actually asked for this document but it was never given to him. He only saw that document for the first time in court.

[10.14] In cross-examination, it was put to him that he had in this initial testimony painted a picture that this was a charitable transaction wherein he was saving 2 desperate old men who were pleading with him to buy their business. To this he indicated that he was doing this to help the second and third plaintiffs but the transaction had to make business sense. He still had to do due diligence. He insisted that he bought the business because of the cash flow spread sheet which had been shown to him.

[10.15] It was further put to him that the plaintiffs did not say that their business is turning over R300 000-00 per month but had told him that they had a client list and that if he conducts the business right, on month ten he would see a turnover of R300 000-00 per month. To this he stated that the pessimistic projection was R280 000-00 in a month which would give him a profit of R80 000-00. They had shown him the annual financial statement for 2006/2007 and he assumed that the business could still make the amount of R300 000-00 per month.

[10.16] Being constrained to explain what he had done with the profit of R125 000-00 per month that he alleged to have generated through the business, he indicated that he decided to pay the second and

third plaintiffs' salaries with that amount rather than to pay the purchase price as agreed.

[10.17] When it was put to him that the cash flow projection document shows that the company would be in deficit with almost R600 000-00 in 6 months, he indicated that he relied on the sales as the expenses were within his control but he could not control the sales. He indicated that he was hesitant to sign the contract before getting the due diligence documents but in any event did so.

[10.18] It was also put to him that he had made several promises to pay but did not.

[10.19] Finally it was put to him that there is a conflict between his testimony in court, his affidavit which he made in his application for rescission of judgment and the plea filed on behalf of the defendant. He insisted that because he did not make payment, the contract is suspended and therefore he is absolved, though still in possession of the business.

[10.20] In re-examination, he testified that the actual sales were quite lower than the projected ones. Although he worked hard to turn the business around, he still could not pay as agreed with the plaintiffs.

[11] After this witness, the defendant also closed its case.

[12] In argument the plaintiffs' counsel, Mr Shapiro, submitted in the main that the court ought to interpret the contract as a normal commercial contract and in particular not to regard clause 5 of the agreement as a suspensive condition. He acknowledged that such an approach would require that clause 5.2 of the agreement be regarded as *pro non scripto*. Clause 5.2 of the agreement reads:

"5.2 In the event of any of the above conditions not being fulfilled timeously, this sale agreement shall be of no force or effect".

[13] He contended that, if clause 5 of the agreement is regarded as a suspensive condition, the agreement is rendered absurd as such an approach creates a direct conflict between this clause and several clauses of the agreement including clause 6.1 which reflects a purchase price of R750 000-00, clause 11.1 which makes the purchaser liable for breach of contract if it fails to make any payment timeously and in full and then entitles the first plaintiff to claim specific performance, among other remedies.

[14] He further submits that the conduct of the parties demonstrates that they did not regard clause 5 as a suspensive condition and that the first time reliance was placed on this alleged suspensive condition was when the plea was filed. Otherwise the parties have acted as if the agreement was binding. In other words, in the minds of the parties the agreement did not lapse even when the first payment was made out of time.

[15] Further, the conduct of the plaintiffs is such that they regarded the agreement as binding and final in that, immediately after the signing of such agreement, they discharged their staff and allowed the premises of the business to be moved from Durban to Sasolburg. Clause 12 of the contract which requires the purchaser to ensure the assets of the business from the effective date, also shows that clause 5 could not have been regarded as a suspensive condition.

[16] To this, Mr Roos on behalf of the defendant counter argued that the plaintiffs relied on the contract as it stands and not with any amendments. The plaintiffs have not amended their particulars of claim with a view to incorporate different intentions of the parties to the agreement. He further contended that the interpretation of an agreement requires that one starts with the ordinary meaning of the words. He then submits that clause 5.2 of the agreement is not ambiguous and therefore requires no interpretation.

[17] In the alternative, Mr Shapiro, relied on the fictional fulfilment of the suspensive condition, that is, if the court finds that clause 5 constitutes a suspensive condition. He insisted that the non-feasance by the defendant was deliberate viewing it from his evidence whereby he painted a picture of a young man trying to do a good deed by assisting two old people but later altered his version to the effect that this was a mere commercial interaction.

[18] Mr Venter had conceded that he was never told that the business made a turnover of R300 000-00 per month and that the cash flow projection spread sheet was a straight line and did not cover the issues such as moving the premises of the company. He therefore submitted that no false representation was made to the defendant.

[19] Mr Venter, the argument continued, also conceded that he never expected the business to pay for itself in a year but could not explain what is stated in the plea filed on behalf of the defendant, it is also clear that he acted deliberately in not making payment as he decided consciously to rather pay the third plaintiff. He also decided to use the money to invest rather than pay the plaintiffs. He had a choice and he could not explain why the funds were not used to discharge his obligation towards the first and second plaintiffs. It is clear from his evidence that he committed to a debt of about R2 million after he had purchased the business from the first plaintiff at R750 000-00.

[20] It is clear that the defence of the defendant was cynical and designed to obstruct the implementation of the contract.

[21] He then submitted that the evidence of Mr Venter should be rejected and that of Mr Hatton be accepted as true. As regards claim 3, it was submitted that the evidence adduced on behalf of the plaintiffs stands independently of any issue about the lapsing of the agreement and it was not challenged by the defendant and

therefore that the second plaintiff should succeed in claim 3 with costs, even if claim 1 fails.

[22] As regards the alternative argument, Mr Roos persisted that the nonfeasance by the defendant was not deliberate. The defendant testified that he was not in a position to make payments due to the false representations made by the plaintiffs. He had to choose between paying salaries or the first plaintiff. His hopes to receive payment did not materialize.

[23] The financial statements for 2009 were not given to Mr Venter though he had requested them and when they surface in court, they show that the company ran at a loss of over R800 000-00.

[24] He pointed out that Mr Venter was not a party to the agreement and therefore could not be criticized for not complying with the terms of the agreement and he had not signed any suretyship for the defendant.

[25] He submitted that the defendant had undertaken to sell the stock on behalf of the plaintiffs. He further submitted that the conduct of the parties, on which the plaintiffs seek to rely, is excluded by clause 4.2 of the agreement and therefore clause 5.2 of the agreement cannot be ignored or substituted by such conduct.

[26] As regards clause 3, he submitted that such claim was left in the hand of the court.

[27] **CLAUSE 5: SUSPENSIVE CONDITION OR NOT**

Clause 5 of the agreement provides:

“5 Suspensive conditions

5.1 This sale is subject to the fulfilment of the suspensive conditions that:

5.1.1 On or before the Effective Date the Purchaser shall have paid to the Seller a first instalment of R250 000-00, directly into its bank account, the details of which follow;

5.1.2 The second instalment of R250 000-00 payable in eleven (11) monthly instalments to include interest due at the specified rate at no more than R25 000- 00 per month from the effective date must be made directly into the Seller’s bank account, the details of which follow;

5.1.3 Subsequent monthly payments to the value of the stock of R250 000-00 as agreed. This stock will be sold on behalf of the Sellers over 6 months and paid to the Seller directly into its bank account, the details of which follow;

Account holder: PURGLAS (PTY) Ltd

Bank: Standard Bank

Branch: Gale Place

Branch code: 42526

Account No: [...]

[5.2] In the event of any of the above conditions not being fulfilled timeously, this sale agreement shall be of no force or effect. ”

[28] There is no doubt that the contract was inelegantly drafted. It seems to me that the contract was drafted between the parties without involving legally trained persons.

[29] I agree with counsel for the plaintiffs that the conduct of the parties was not *stricto sensu* in line with the terms of the agreement but nevertheless reflected an understanding by both parties that the agreement was regarded as a normal commercial agreement. The very first instalment was paid out of time when regard is had to clause 5.1.1 which required such instalment to have been paid on or before the effective date, being the date on which the agreement was signed on 11 August 2009. Nonetheless, none of the parties took issue with the validity of the contract at any time before the plea was filed. This is despite the fact that the defendant only made 3 instalment payments of R25 000-00 per month, the last of which was in 2010 and nothing seems to have been paid in respect of the stock. The stock related payment of R250 000-00 had to be made to the first plaintiff in full over 6 months as required by paragraphs 5.1.3 and 6.2 of the contract.

[30] Although the defendant argues that the agreement lapsed because of non-payment as contemplated in clause 5 of the contract, the parties continued to treat the agreement as valid way beyond the date of non-payment. Mr Venter in his evidence repeated more than once that he was prepared to make good the bad once he was able to bring a turnaround in the business and once the business was able to be profitable.

[31] Interpretation of a contract is a matter of law and not of fact.

[32] In **KPMG Chartered Accountant (SA) v Securefin Ltd & Another 2009(4) SA 399 (SCA)** at para [39], Harms DP stated as follows:

“[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning

(Johnson v Leal 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) Phipson on Evidence (16 ed 2005) paras 33 - 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 455B - C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'.

The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See Van der Westhuizen v Arnold 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another 2008 (6) SA 654 (SCA) para 7.)”

[33] It is clear from the above that the plaintiffs did not have to plead or prove the interpretation that they now contend for as such is a matter of law and for the court.

[34] Over and above the conduct of the parties which consistently showed that they regarded the contract as valid and binding despite the provisions of clause 5 thereof (at least up to the time of the filing of the plea in April 2013), the interpretation of clause 5 of the contract as a suspensive condition is in conflict with the provisions of clause 11.1 thereof. Clause 11.1 thereof holds the defendant in breach of the contract if it fails to make any payment timeously and in full or any party breaching any of the other obligations under the agreement. This clause also entitles the agreed parties to claim, among other remedies, specific performance. Clause 11.2 of the contract also holds the defendant liable to pay interest on any overdue amount.

[35] It is impossible to phantom how these latter provisions of the contract would and could be enforced if failure to pay in accordance with clause 5 of the contract was regarded as optional for the defendant and that should the defendant opt not to comply therewith, the agreement lapses.

[36] Not only does the defendant's conduct reflect that the parties regarded the agreement as a normal commercial contract of sale, but also the conduct of the plaintiffs fortifies the same. The plaintiffs agreed for the defendant take over the ownership of the business and to move its premises from Durban to Sasolburg. The plaintiff's also relieved its staff from employment and released its stock of the business to the defendant.

[37] It is also clear that the stock was sold to the defendant, as clause 6.1 of the agreement states that the purchase price is R750 000-00. This amount includes the R250 000-00 for the purchase of the stock. The defendant was therefore not selling the stock on behalf of the plaintiffs.

[38] Although the contract contains an exclusionary clause in clause 14.2 thereof, the implementation of clause 5 thereof as a suspensive condition renders the whole agreement absurd and commercially unsound. Extrinsic evidence of the conduct of the parties subsequent to the conclusion of the agreement is therefore admissible.

[39] It is therefore my view that it could never have been the intention of the parties as reflected by their subsequent conduct that clause 5 of the agreement would be regarded as a suspensive condition, and that by non-feasance thereof the contract would lapse.

[40] Even if I am wrong in my reasoning above, the alternative argument by the plaintiffs still supports my conclusion. If clause 5 of the contract constitutes a suspensive condition and the non-compliance therewith would result in the contract lapsing as expressly stated in clause 5.2 thereof, it must still be established whether or not the non-fulfilment of such condition was not due to the deliberate action or calculated inaction on the part of the defendant.

[41] First, it is clear from the wording of the agreement that the fulfilment of this condition depended entirely on the actions of the defendant and it was for its sole benefit. The defendant's failure to fulfil this condition can therefore only lead to the lapse of the contract if it was not due to deliberate or designed inaction on its part. Otherwise the condition must be taken to have been fictionally complied with.

[42] I have already referred to clause 11.1 of the contract which provides for breach by the defendant in the event of failure to pay timeously and in full. This, in my view, shows that the defendant could not volitionally decide not to pay without committing breach of contract.

[43] The defendant relies on false representations which allegedly led to its failure to perform or fulfil the suspensive condition. Such representations were, in terms of clause 10.2 of its plea, made to the defendant *"During negotiations preceding the conclusion of the agreement."*

[44] Those were therefore not representations falling within the ambit of those which form part of the contract in terms of clause 8 thereof. Ordinarily therefore such representations should be excluded by clause 9 read with clause 14 of the contract. Clause 9 of the contract is entitled "*voetstoots*" and emphasizes that no further warranties or representations whatsoever were made by the seller in regard to the business except those that are made in terms of the agreement itself. Since the representations relied upon by the defendant preceded the existence of the agreement, they are not contained and/or made in terms of the agreement.

Moreover, clause 14.2 expressly excludes any other agreements between the parties unless reduced to writing and signed by both parties¹.

[45] For such representations to have the effect of nullifying the contract including clauses 9 and 14 thereof, they should have been made fraudulently.

[46] Although the defendant, in its amended plea relied on fraudulent misrepresentation, the evidence given on its behalf did not support such allegation.

[47] In the first place, it is not clear how Mr Venter could have been misled by the cash flow projection spreadsheet which not only showed the sales but also the expenses which on more than 1 month caused a deficit. His explanation that he could control the expenses but not the sales is not convincing. In any event he did not elaborate as to how he would have been able to control such expenses to prevent such loss. The defendant did not rely on mistake or *iustus* error as to the subject matter of the contract.

[48] The defendant relied in its heads of argument on the case of **Sim Road Investment CC v Morgan Air Cargo Pty Ltd**, a judgment of the Supreme Court of Appeal given under case no. 024/10 on 27 May 2011. That case concerned a matter where property which had been sold for agricultural purposes was sold on the basis of an advertisement and therefore a representation that it was industrial land. The misrepresentation was found to have been fraudulent and related to the essential attributes of the merx which subsequently could not be used for the purpose intended by the purchaser in that case². The claim in that case was based on fraudulent misrepresentation.

[49] In paragraph [23] of **Sim Road** case (supra) it was stated thus:

“[23] But liability for a misrepresentation made innocently and even negligently may be excluded by parties to a contract-hence the conjecture that Murphy J found that the misrepresentation had been made negligently and that it had resulted in iustus error that rendered the contract, including the exclusion clauses, void. As stated, however, a misrepresentation generally renders the contract voidable. The innocent party may elect to abide by it even when where the other party has been fraudulent. The difference that fraud makes is that one cannot contract out of liability for fraudulent conduct”, [footnotes exclude]

[50] Further, on paragraph [25] of that case, Bosiello JA corrected Murphy J for misapplying **Trollip v Jordaan** ³ and concluded that the case of **Trollip** dealt with error or mistake and not fraud. Error is not something less than fraud but something different. In this case, if fraud is not proved, the exclusionary clauses 9 & 14 stand. In other words, the false representation relied upon, even if it is false, cannot be taken

into account as it constitutes extrinsic evidence.

[51] The defendant did not seek the cancellation of the contract or tender the return of the business. The contract remains extant. In any event, it sounds unbusinesslike that the plaintiffs would have made the representation or undertaking or warranty regarding the profitability of the business in the future without taking into account the manner in which the defendant would conduct the business. In this case it is clear that the relocation of the business was not part of the consideration by the plaintiff when they provided the cash flow projection.

[52] The next question is whether the plaintiffs have succeeded to prove that the defendant deliberately failed to fulfil the suspensive condition with the intention of avoiding its obligation under the agreement. In this regard the onus rests on the plaintiffs⁴. In the **Lekup** case, the Supreme Court of Appeal found that intention and not motive is required and negligence is not enough⁵, to vitiate the exclusionary clauses.

[53] In the present case it has already been found that the representations that the defendant seeks to rely on are excluded by the terms of the agreement. Those are the representations that the defendant sought to put up as a reason for not complying with the suspensive condition or not paying the debt. Absent such representation, the defendant has no reason for its failure to pay. Put differently, the defendant could not rightfully produce evidence showing its reasons for failure to fulfil the condition as such evidence is admissible.

[54] The defendant in this case had a choice but only decided to use the funds at its disposal for other purposes other than discharging its obligation towards the first plaintiff. In my view, *dolus* in the sense described in the **Lekup** case (supra)⁶ has been established and therefore the doctrine of fictional fulfilment applies. The contract continued notwithstanding the non-compliance, the business was transferred to the defendant and actually the defendant relocated the premises of the business. In the circumstances, it is difficult to see this in any other way than that the defendant had the intention to frustrate the contract in order to relieve himself of the obligation to pay.

[55] Further, in this case there was at least a moral, if not legal, duty on the defendant to fulfill its obligations to pay especially when regard is had to the extent to which the plaintiffs had already complied with their obligations in terms of the contract. In **Bark NNO v Boesch 1959 (2) SA 377 (T)** at 384-5, Williamson J stated thus:

“It seems to me that, if from the nature of a contract it can be implied that a moral or legal duty rests on a debtor not to effect the fulfilment of a resolutive condition which can relieve him of his obligation, deliberately to act in breach of that duty with the intention of ridding himself of his

obligation constitutes dolus exactly equivalent to the dolus adumbrated in the passages quoted above”.

[56] The statement quoted above applies equally, if not stronger, to a suspensive condition. In the present case, there is no doubt that the suspensive condition operated for the sole benefit of the defendant and therefore his deliberate non-compliance therewith ought not to be applied to benefit it.

[57] It is therefore my view that the first plaintiff has succeeded to prove claim 1 either on the basis of the argument in respect of the interpretation of the contract or on the basis of fictional fulfilment of the suspensive condition.

[58] As regards claim 3, such claim was essentially conceded to by the defendant and no reliance could be placed on clause 5 of the contract in respect of this claim.

[59] The defence that this court lacks jurisdiction as raised earlier on behalf of the defendant, is unfounded and must fail on the basis that it has not been pleaded as part of the defendant’s case. Nothing further needs be said in this regard.

[60] The second plaintiff therefore succeeds in claim 3.

[61] The parties have agreed that I need only to make a determination in regard to the above issues, the rest is common cause between the parties.

[62] Consequently, I make the following order:

[1] The first plaintiff succeeds in claim 1 against the defendant and the defendant is therefore ordered to pay R556 951-37 to the defendant as well as interest thereon at the rate of 11,5% per annum from 01 September 2011 to date of payment.

[2] The second plaintiff succeeds in claim 3 against the defendant and the defendant is ordered to pay R129 692-03 to the second plaintiff as well as interest thereon at the rate of 11,5% per annum *a temporae morae* to date of final payment.

[3] The defendant is ordered to pay the costs of suit.

DT SKOSANA

Acting Judge of the High Court

Acting on behalf of the Plaintiffs: Redfern & Findlay Attorneys

c/o Van Zyl Le Roux

1st Floor, Block 3 Monument Office Park

71 Steenbok Avenue Monument Park

Pretoria

Tel: (012) 435 9444

Fax: (012)435 9555

Adv WN Shapiro

Acting on behalf of the Defendant: CA Schoeman Attorneys

c/o Pierre Krynauw Attorneys

Soetdoring building

Ground Floor

7 Protea & Lupin Avenue

Doringkloof

Pretoria

Tel: (012) 667 4155

Fax: (012) 667 4153

Adv JM Roos

¹See KPMG case (supra) at para [39].

²At para [16], [19], [21]& [26]

³Trolly v Jordaan 1961 (1) SA 238 (A)

⁴Lekup Property Co NO 4 v Wright 2012 (5) SA 246 (SCA) at paras [12] and [24]

⁵Lekup case (supra) at para [8] & [9]

⁶Lekup case (supra) paras [10]-[11]