REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

12/11/13

CASE NO: 15583/2010

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

11/11/2013
DATE

VRSN NKOSI

In the matter between:

SENTINEL TRUST N.O.	1ST PLAINTIFF
DENNIS NICHOLAS GALATIS N.O.	2ND PLAINTIFF
NADIA GALATIS N.O.	3RD PLAINTIFF

and

THERESA ROSE BARNES N.O.	1ST DEFENDANT
STANLEY PRESTON BARNES N.O.	2ND DEFENDANT
BRICK EMPORIUM (PTY) LTD	3RD DEFENDANT

J U D G M E N T

NKOSI AJ:

I. INTRODUCTION

[1] The plaintiffs' claim arises from an agreement to sell 100 per cent of the shares in the 3rd defendant to the 1st and 2nd defendants ("*the agreement*"). The plaintiffs' allege that the defendants breached the agreement by failing to pay the balance of the agreed purchase price, as a result of which they cancelled the agreement and are claiming restitution and damages.

[2] Although the defendants admit that the balance of the purchase price has not been paid, they allege that they are entitled to a reduction in the purchase price as a result of a misrepresentation they allege was contained in clause 6.3 of the agreement and which they allege induced them to agree to the purchase price of R3million. The defendants have raised a counterclaim for a reduction in the purchase price and damages.

[3] The plaintiffs allege that the Tideland Trust complied with its contractual obligations, but that the Sugar Plum Trust breached the agreement by paying only R500,000.00 of the purchase price, leaving the balance of R2 500,000.00 outstanding and due and payable.

[4] The plaintiffs allege that the Tideland Trust duly cancelled the agreement, based on the Sugar Plum Trust's breach, and claim restitution of the shares against repayment of the sum of R500,000.00. The plaintiffs, also claim damages in the amount of R1 316,712.33.

[5] In the alternative to the claim for restitution and damages, the plaintiff claims payment of the balance of the purchase price, in the amount of R2 500,000.00 as well as occupational rental.

(It is apposite to mention that in respect of the occupational interest amount, the plaintiff's claim rectification of the agreement. This is not contested by the 1st and 2nd defendants).

[6] The 1st and 2nd defendants admit the terms of the agreement, as pleaded in paragraphs 8.1 to 8.8 of the particulars of claim, insofar as it accords with Annexure "POC1". See: paragraph 10 of the plea on page 66 of the pleadings bundle.

[7] In paragraph 11 of the plea, on paginated page 67 of the pleadings bundle, the 1st and 2nd defendants plead that the following express warranty is contained in the agreement:

"*That, unless otherwise provided for in the agreement, <u>at the date</u> of signature <u>and until the completion date, the 3rd defendant would be the owner of the fixed property, fixtures and fittings, plant and equipment as set</u> out in Annexure "C" <u>thereto, as well as the mineral rights and old order mining rights attaching to the fixed property as set out in Annexure "D" to the agreement</u> (clause 6.3).*"

[8] As stated herein above, it is common cause that the agreement was signed on 6 February 2009.

[9] In paragraph 13 of the plea, on page 68 of the pleadings bundle, the 1st and 2nd defendants pleads that the applicable mineral rights and/or old order mining rights had lapsed on 12 December 2008.

[10] In paragraph 14 of the plea, on page 68 of the pleadings bundle, the 1st and 2nd defendants plead that, when making the representation (that the Tideland Trust was the owner of the mining rights and/or old order mining rights) the Tideland Trust's representative knew that

same had lapsed, *alternatively* through exercising of a reasonable degree of care and skill should have known that the mineral rights and mining rights had lapsed. [It is apposite to record that the 1st and 2nd defendants rely on an intentional, *alternatively* negligent misrepresentation]

[11] In paragraph 17 of the plea, on page 69 of the pleadings bundle, the 1st and 2nd defendants plead that the Sugar Plum Trust was induced to purchase the shares at the price of R3 000,000.00 by the representation, referred to herein above.

[12] The 1st and 2nd defendants, further, allege that the true value of the shares amounts to R500,000.00, only. See paragraph 12 of the plea, on page 70 of the pleadings bundle.

[13] Based on aforesaid, it is denied that the Tideland Trust performed its contractual obligations.

[14] In the light of the allegations that the Tideland Trust misrepresented that it owned mineral rights and old order mining rights as at 6 February 2009, the Sugar Plum Trust, further, delivered a claim in reconvention wherein it claims a declaratory order that it is entitled to retain the shares in the 3rd respondent, at the value already paid, being R500,000.00 the Sugar Plum Trust, further claims damages in the sum of R9 443,472.00.

[15] In paragraph 4.3 of the plea to the claim in reconvention, on page 83 of the pleadings bundle, the Tideland Trust pleads the following, in support of aforesaid denial:

"4.3 *The plaintiff specifically pleads that annexure "D" to the agreement, initialled by the defendants' duly authorised representative, stated that "unless this licence is suspended,* *cancelled or abandoned or lapses it shall be valid for a period (more than 2 years) which shall extent from the date of issuing until 2008/12/12…."*

[16] It is, finally, pleaded in paragraph 4.4 of the plea to the claim in reconvention, on page 83 of the pleadings bundle, that the 1st defendant had been advised by professional mining consultants, at the time of signing of the agreement, that it could convert the old order mineral rights to a new one on the basis of the mining licence, attached to the agreement as in Annexure "D".

[17] The parties agreed to separate the issues of merits and *quantum*.

[18] The trial proceeded on the merits only.

BURDEN OF PROOF:

[19] It is submitted that the Tideland Trust carries the *onus* in respect of the following:

[20] The terms of the agreement concluded between the parties. It is apposite to mention that the *onus* is on the Tideland Trust to prove that clause 6.3 of the agreement does not contain the express warranty, alleged by the 1st and 2nd defendants. A Plaintiff relying on a contract carries the *onus* of proving that a term alleged by the defendant was not agreed upon between the parties, the Honourable Court is referred to: Kriegler v Minitzer 1949 (4) SA 821 A; Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk 1976 (3) SA 470 A.

[21] That it performed its contractual obligations;

[22] That the Sugar Plum Trust is in breach of the agreement;

[23] That it properly cancelled the agreement.

[24] It is submitted that, to succeed with the claim in reconvention, the Sugar Plum Trust have to prove the following:

[25] That the representation that the 3rd defendant owned the applicable rights, as at date of conclusion of the agreement, was false;

[26] That the representative of the Tideland Trust knew that the old order mining right, and/or the new order mining rights were not owned by the plaintiffs as at date of conclusion of the agreement, *alternatively* the plaintiff should have known aforesaid, through the exercise of a reasonable degree of care and skill;

[27] That the defendants were induced into concluding the agreement based on aforesaid misrepresentations.

II. <u>ISSUES IN DISPUTE</u>

(a) As they appear from the pleadings, the main issues in dispute are:

(i) Whether clause 6.3 of the agreement represented that an extension period for the conversion of old order mining rights applied to the rights set out in Annexure "D" to the agreement, which the plaintiffs warranted the company was the owner of? If so:

(ii) Did the plaintiffs know, or ought the plaintiffs reasonably to have known, that this representation was false in that the mining licence had lapsed; and

(iii) Did the defendants act on this representation in agreeing to the purchase price of the shares?

(b) The issues were further crystallised by the following admissions made by the defendants in response to the plaintiffs' list of enquiries and admissions in terms of Rule 37(4):

(i) The "express warranty" referred to in paragraph 11 of the defendants' plea (i.e. clause 6.3 of the agreement) is the same as the "representation" referred to in paragraphs 14 and 15 of the plea.

(ii) The defendants allege that the expiration of the company's old order mining rights after 12 December 2008 was a latent defect.

(c) The plaintiffs bear the onus of proving the terms of the agreement as well as the breach by the defendants entitling them to cancel. The defendants bear the onus of proving that they are entitled to a price reduction on the basis of an intentional or negligent misrepresentation.

(d) The defendants' case on the pleadings is therefore that they were induced by clause 6.3 of the agreement, which they say constituted a representation that an extension period was applicable to the conversion of the mining licence, to agree to a purchase price of R3million for the shares in the company, and that the expiry of the mining licence on 12

December 2008 constituted a latent defect. It is on this basis that they claim that they are entitled to a R2.5 million reduction in the purchase price of the shares.

(e) It is however important to be clear on what the defendants' case is *not*. First, the defendants do not in their pleadings rely on a pre-contractual negligent misstatement inducing them to enter into the agreement. The defendants' further do not allege that clause 6.3 does not reflect the true intention of the parties or seek an order rectifying the agreement. Finally the defendants' case is not that the agreement was void or otherwise invalid, they simply claim a reduction in the purchase price.

<u>THE TERMS OF THE AGREEMENT:</u>

[28] It is common cause that the agreement was reduced to writing and that a true copy of the agreement is attached to the particulars of claim as Annexure "POC1".

[29] The Honourable Court has, already been referred to the express wording of clause 6.3 of the agreement. The following is, *inter alia*, expressly warranted in said clause: "That, unless otherwise provided in this agreement, at the date of signature and until the completion date, the company will be the owner of ... as well as the mineral rights and old order mining rights attaching to the fixed property as set out in Annexure "D"."

[30] It is important to note that clause 6.3 has reference to ownership of rights as at 6 February 2009. It is not stated that the Tideland Trust previously owned the applicable rights.

[31] It, however, appears from the second page of Annexure "D" to the agreement that the rights to which said document relates had expired on 12 December 2008, being a date prior to 6

February 2009. *Ex facie* Annexure "D", therefore, the rights in question had already lapsed prior to the conclusion of the agreement.

[32] The conundrum is, therefore, that the express wording of clause 6.3 has reference to existing rights. It is, with respect, illogical for cause 6.3 to have reference to an expired licence as constituting the existing rights warranted in said clause. It is, therefore, submitted that the express wording of clause 6.3, read with the second page of Annexure "D", renders the agreement ambiguous.

[33] It is common cause that the agreement contains an integration clause, being clause 11.2 of the agreement. The general rule is that any extrinsic evidence that is at variance with the terms of an integrated written agreement constitutes inadmissible parol evidence. It is, however, contended that, *in casu*, the Honourable Court can, *inter alia*, have reference to extrinsic evidence in order to assist it in the interpretation of the ambiguous agreement.

[34] Aforesaid evidence explains the apparent contradiction between clause 6.3 and Annexure "D" to the agreement.

[35] It is submitted that, before considering the evidence it is prudent to take cognisance of the applicable principles relating to the interpretation of contractors, *in casu*, the nub of the case revolves around the interpretation of clause 6.3 of the agreement, read with Annexure "D" thereto.

INTERPRETATION OF THE AGREEMENT:

[36] In Schmidt v Dwyer 1995 (3) SA 896 (C) at 899 AS, the following is stated:

"The primary object of a deed of sale is to record the terms of a contract between the parties, and it follows that any statement in such a document prima facie constitutes a term of the contract unless it appears from the contract itself or other admissible evidence that the parties did not so intend."

[37] *In casu*, it is expressly recorded in the agreement that the 3rd respondent "*will*" own certain rights.

[38] It is important to consider the effect of the parol evidence rule *in casu*.

[39] In Johnston v Leal 1980 (3) SA 927 (A) at 943 the following is stated at page 943 B to D:

"Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is usually to enforce the contract as redefine or, at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence. On the other hand, in a case such as the present, where ex facie the document itself the contract appears to be incomplete, the object of leading extrinsic evidence is not to contradict, add to or modify the written document or to complete what is complete so that the contract may be enforced thus completed, but merely to explain the lack of completeness...."

[40] Aforesaid should be considered in conjunction with the technique consistently adopted by our Court so interpret written contracts as summarised in Coopers & Lybrand v Bryant 1995 3 SA 761 (A) 767E – 768E:

"According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument ... The mode of construction should never be to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

40.1 to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract ...;

40.2 to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted ...;

40.3 *to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions."*

THE GRAMATICAL AND ORDINARY MEANING OF THE WORDS IN A CONTRACT:

[41] As per the first consideration, the Court seeks the common intention of the parties from the wording of the contract because that wording, being agreed between the parties, is common to them. So, if the words speak with sufficient clarity it must be taken as expressing the parties' common intention. In this regard see: Total South Africa (Pty) Ltd v Bekker 1992 (1) SA 617 (A) at 624 G - G25 B.

[42] *In casu*, however, the express and clear wording of clause 6.3 is at variance with Annexure "D". As a result, it is necessary for the Honourable Court to have reference to the context of clause 6.3.

CONTEXT:

[43] Context relates to context within the contract as well as the wider context, relating to background evidence. In Jaga v Dönges 1950 (4) SA 653 A at 602 H, the following is stated:

"*The context" is not limited to the language of the rest of the statute regarded as throwing light of a dictionary on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background.*"

[44] Although aforesaid *dictum* relates to the interpretation of a statute, the principle therein has been applied in relation to the interpretation of statutes in a number of cases. *Inter alia*, in Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank 1974 (1) SA 641 (A) at 646 C it was found that reference should also be made to the nature of the transaction between the parties as it appears from the entire contract.

[45] In Van der Post v Twijfelhoek Diamond Prospecting Syndicate (1903) 20 SC at 213 it was found that the context does not stop at the four corners of the contract.

[46] It was, finally, decided in Eastern Free State Board of Executors v Theron 1922 OPD 174 at 178 that if the object (of the contract) could be determined, a long step would have been taken towards ascertaining the meaning of ambiguous words.

[47] *In casu*, the purpose of the object of the agreement was to sell shares in a company that owns a brickyard. Bricks were manufactured with clay mined on the premises.

EXTRINSIC EVIDENCE:

[48] In Delmas Milling Co. Ltd v Du Plessis 1995 (3) SA 447 (A) at 454 – 455 it is, *inter alia*, confirmed that extrinsic evidence of surrounding circumstances may be considered to clarify ambiguous terms in a contact. *Inter alia*, recourse may be had to what passed between the parties on the subject of the contract.

[49] At page 455 of aforesaid dictum the Court concludes as follows:

"*One must use outside evidence as conservatively as possible but one must use it if it is necessary to reach what seems to be a sufficient degree of certainty as to the right meaning.*"

[50] A party intending to lead evidence of surrounding circumstances need not plead his intention, because the admissibility of the evidence is apparent from the ambiguity of the contract. In this regard see: Garlick v Smartt 1928 AD 82 at 87 and Dorman Long Swan Hunter (Pty) Ltd v Karibib Visserye Ltd 1984 (2) SA 462 (C) at 476 G – H.

CONSTRUCTON CONTRA PROFERENTERM:

[51] If the wording of a contract is incurably ambiguous, it's author should be the one to suffer because he had it in his power to make his meaning plain.

[52] Aforesaid is known as the *contra proferentem* rule. See: Zietsman v Allied Building Society 1989 (3) SA 166 (O) at 177 D - E.

[53] *In casu*, the agreement was drafted by the Tideland Trust's attorney and on the instruction of Mr Galatis. Mr Galatis, therefore, instructed his attorney to include clause 6.3 in the agreement. Insofar as there is an ambiguity in the agreement, by virtue of the conflict of clause 5.3 with Annexure "D", the Honourable Court should favour the interpretation of clause 6.3 advanced by the First and Second Defendants. This should be considered in conjunction with the fact that the *onus* is on the Tideland Trust to prove that clause 6.3 does not constitute the warranty relied on by the First and Second Defendants.

WEIGHING OF EVIDENCE:

[54] The warranty in clause 6.3 of the agreement is an express/implied warranty given by the Plaintiffs. The wording of clause 6.3, with respect, is clear and leaves no doubt as to the fact that reference is made to a right that existed at 6 February 2009.

[55] Insofar as reference to Annexure "D" may render clause 6.3 ambiguous, the evidence referred to herein above shows that the parties accepted on 6 September 2012 that the rights were extended (Mr Galatis insisted that this was his understanding based on what he was told by the 1st defendant).

[56] In the premises, the intention of the parties as to clause 6.3 is clear.

[57] Clause 6.3 could, never, refer to a historical right, why include it then?

[58] It should be borne in mind that the *onus* of excluding the alleged warranty from the agreement is on the plaintiff's and, based on the *contra proferentum* rule, if there remains uncertainty as to the meaning of clause 6.3 said clause should be interpreted against the plaintiffs in favour of the 1st and 2nd defendants.

[59] Insofar as Mr Galatis signed the agreement, incorporating clause 6.3, he was, at least, negligent in not investigating the status of the mining rights as at 6 February 2009. This could not be left in the hands of Becker nor the defendants.

[60] In the premise, the plaintiff's claim falls to be dismissed with costs and the Honourable Court should find in favour of the 1st and 2nd defendants in relation to the merits of the claim in reconvention.

III. <u>THE EVIDENCE</u>

[61] The plaintiffs called Mr Dennis Galatis ("*Galatis*") to testify. The defendants called Ms Theresa Barnes ("*Ms Barnes*") and her son, Mr Stanley Barnes ("*Mr Barnes*") to testify. It is common cause that Galatis and Ms Barnes represented the plaintiffs and the defendants respectively in entering into the agreement.

[62] The following undisputed facts arose from the evidence of the three witnesses called:

62.1 Mr Barnes approached Galatis out of the blue with a proposal to purchase the brickyard. Initially no purchase price was mentioned. Shortly after meeting with Mr Barnes in Cape Town in 2008, Galatis was advised that the proposed purchase price would be R3million. At the time that Galatis agreed to the possibility of selling the brickyard, it was being leased on an indefinite basis to Debby Bekker ("*Bekker*").

62.2 A written offer to purchase the property on which the quarry and the brickyard were located, signed by Mrs Barnes on behalf of an entity known as Bayview Trading 103

CC t/a Madiba Bricks, was accepted by Mr Galatis on about 9 September 2008. Thereafter on 29 September 2008 an addendum to the offer to purchase agreement dated 9 September 2008, was signed by the parties. Both the offer to purchase and the addendum thereto subsequently became annexures to the agreement.

62.3 A "Rental Agreement take over" in terms of which Bekker consented to her lease with the company being ceded to Bayview Trading 103 CC, was also signed. This document did not form part of the final agreement.

62.4 Ms Barnes had sight of the mining licence from the beginning of the negotiations and by at least 12 September 2008, and was at all times aware that the licence expired on 12 December 2008.

62.4 After the offer to purchase had been signed it was agreed between Galatis and Ms Barnes that Ms Barnes would take over the process of lodging the application for the conversion of the old order mining licence from Bekker.

62.5 For this purpose, Ms Barnes appointed a professional firm of mining consultants, namely JJP Mining Consultants ("*JJP*"), to advise and assist her with the application for conversion of the old order mining right. She consulted with them and explained to them exactly what old order mining rights she required to be converted. She paid an amount of R71,250.00 being the initial 50% deposit of JJP's fee. She did not pay the balance.

62.6 JJP lodged the application for the conversion of the mining licence on 30 April 2009. On about 20 May 2009 Ms Barnes was advised by the Department of Minerals and Energy ("*the DME*") that the application for conversion could not be processed as the mining licence had expired on 12 December 2008.

62.7 The agreement was signed at Ms Barnes' home in Heidelberg on 6 February 2009. Galatis' attorney, Ivan Zartz ("*Zartz*"), who drafted the agreement, was present and explained the terms of the agreement to the parties. Certain changes to the draft agreement were made at Ms Barnes' home. The agreement was then signed by Ms Barnes on behalf of the defendants and by Galatis on behalf of the plaintiffs. Each page as well as the annexures to the agreement was initialled by the parties.

62.8 The expiry of the mining licence was never discussed at the signing of the agreement on 6 February 2009.

62.9 The defendants did not dispute that the "whole agreement" clause (clause 11 and its sub-clauses) was a term of the agreement that was signed on 6 February 2009.

62.10 Clause 6.3 of the agreement warrants no more and no less than the company was the owner of the rights set out in Annexure "D" to the agreement. There is nothing in clause 6.3 or the mining licence which makes any representation that the mining licence would be valid after 12 December 2008. It is apparent from an inspection of the mining licence that it expired on 12 December 2008.

62.11 The defendants received the letter demanding that they rectify their breach of the agreement by paying the balance of the purchase price within seven days, as well as the subsequent letter cancelling the agreement, which are attached to the particulars of claim as annexures "POC2" and "POC3" respectively.

a) Evidence of Galatis

[63] Galatis testified that Bekker had previously appointed a mining consultant to prepare the application for conversion of the mining licence on behalf of the company. After negotiations with Bekker, Ms Barnes informed him that that the conversion application had not progressed and that she wanted to take over the application for conversion. Galatis himself had never had any dealings with the DME regarding the conversion of the old order mining rights. He testified that he had made no representations to the defendants regarding an extension period for the conversion application and that Ms Barnes informed him that the consultants *she* had appointed had advised her that the application for conversion could be submitted up to 30 April 2009. After the DME rejected the application Ms Barnes refused to pay the balance of the purchase price as the licence could not be converted. However she never accused Galatis of having misled her in regard to the extension. Finally he testified that the agreement had been cancelled by the plaintiffs after the defendants failed to pay the balance due when demanded to do so.

[64] The cross-examination of Galatis focussed on the effect that an invalid mining licence would have on the business of the company. Galatis quite correctly conceded that the company would not be able to mine clay without a valid mining licence but would have to purchase clay to make bricks.

[65] It was put to Galatis that Ms Barnes would testify that he had informed her at a meeting at which Mr Barnes, Bekker and Zartz were also present, that there was an extension until 30 April 2009 for the conversion of the mining licence.

[66] When Galatis answered that it was Ms Barnes who had in fact told him, before the end of September 2008, that her mining consultants had advised her that the extension applied, it was put to him that Ms Barnes would testify that she only appointed JJP in November 2008.

[67] Galatis' evidence was consistent in examination in chief and under cross-examination. His version was also consistent with that set out in the pleadings. He readily conceded that he could not always recall precise details of events that occurred five or more years ago, but he did not alter his version that Ms Barnes had informed him, on the advice of JJP, that an extension until 30 April 2009 was applicable to the conversion of the mining licence. This was despite hearing for the first time in cross-examination that the defendants intended to testify that *he* had advised Ms Barnes of this extension.

[68] It is submitted that Mr Galatis was a credible and truthful witness whose version of events was consistent and accorded with the inherent probabilities. There is no reason why his evidence should not be believed. Why plaintiff only had a passive role about his own licence? To be renewed/or converted. Plaintiffs' passive role had a bearing on the expiry of the licence. Had he did the conversion of the licence in time, as the seller, there would be no litigation to demand the balance of sale price.

b) Evidence of Ms Barnes

[69] Ms Barnes' evidence did not accord in several material respects with what was put to Galatis and she was vague and evasive.

[70] In her evidence in chief she stated that Bekker *and* Galatis had advised her that there was an extension. This, she said, occurred at a meeting held in Zartz's office in Johannesburg, where both the "Rental Agreement take over" and the offer to purchase were signed. She testified that she had specifically asked for some form of confirmation from the DME that this was the case and that Bekker had referred her to the Government Gazette.

[71] She later said that the information regarding the extension "*came from the likes of Debby Bekker with the knowledge of Dennis Galatis*". However she again subsequently altered this and stated that Galatis told her that there was an extension.

[72] Under cross-examination she remained unsure who had allegedly advised her of the extension, saying first that *both* Bekker and Galatis had advised her but then changing this to say that it was Bekker who had advised her and that Galatis had, by his mere presence at the meeting, merely agreed to this. She followed this by saying that it was her assumption that Galatis knew about the extension. This was not clarified in re-examination. Ms Barnes further conceded that she could not dispute that Galatis had never appointed mining consultants himself.

[73] It is submitted that this is determinative of the issue, as on her own version, Ms Barnes has indicated that the advice that there was an extension did not come from Galatis at all

but rather from Bekker. The unreliability of Ms Barnes' testimony on this point is further apparent from the following:

73.1 She conceded under cross-examination that as the "Rental Agreement take over" indicates that it was signed in Heidelberg, it could not have been signed by all parties at Zartz's office as she had stated previously in her evidence in chief. She was then clearly uncertain about who was allegedly present at this meeting and where the two agreements had been signed and could not commit to an answer.

73.2 Despite testifying in her evidence in chief that she had no reason to believe that there was not an extension, she quite correctly conceded under cross-examination that she was indeed concerned about the correctness of this information as she had specifically asked for some form of confirmation from the DME. Despite Bekker failing to provide her with a copy of the relevant Government Gazette as she allegedly promised, Ms Barnes insisted that she still had no reason not to believe that there was an extension. She in fact testified that she would have ideally wanted a specific directive to this effect from the DME, addressed to the company.

73.3 She also testified that JJP were professionals whom she had hired specifically to prepare the application for the conversion and that she had not only consulted with them and provided them with the details of the licence which she required to be converted, but also specifically informed them that there was an extension period. Despite being professional mining consultants JJP did not advise her that there was no such extension. In her own words, JJP "*took it for granted that there was an* *extension*". She nevertheless refused to concede that in doing so JJP had been negligent.

[74] Despite testifying in her evidence in chief that she only appointed JJP in November 2008, Ms Barnes changed this under cross-examination to say that they only started with the application for conversion in November 2008. In light of quotations and invoices dated 10 and 29 October 2008 respectively, Ms Barnes conceded that she must have consulted with JJP sometime before those dates.

[75] Not only was Ms Barnes' evidence inconsistent, it is submitted that her version on the source of the advice that the application for the conversion of the mining licence could be submitted up to 30 April 2009, is highly improbably. Ms Barnes conceded that her request for confirmation from the DME showed that she was not prepared to take the alleged statement of Bekker at face value. However she testified that the first time she bothered to take this issue up with the DME herself was after 20 May 2009, *after* the DME advised her that the application for conversion could not be processed. This is despite having 20 years of experience in the mining industry and, on her own admission, being familiar with the workings of the DME.

[76] Instead *she* advised the professional mining consultants appointed by her that there was an extension which they allegedly took for granted. It is submitted that even on this version, the failure of JJP to advise her that there was no such extension constituted a *novus actus interveniens*. On either version therefore it was the advice of JJP (on the plaintiffs' version) or their failure to advise Ms Barnes (on the defendants' version) which

created the impression in Ms Barnes' mind that the application for the conversion of the mining licence could be lodged up until 30 April 2009.

[77] To the extent that the defendants were induced by the belief that there was an extension, to agree to a higher purchase price, their remedy is clearly against JJP for a negligent misstatement inducing a contract there was no basis laid for these submissions.

[78] Mr Barnes testified quite candidly that he had no knowledge of what was discussed at the alleged meeting on 9 September 2008 or of any issue surrounding the expiry of the mining licence. He further conceded under cross-examination that he was not sure where the offer to purchase and the "Rental agreement take over" (both of which he signed as witness) were signed. His evidence therefore did not support the version of Ms Barnes.

[79] Finally, Bekker was not called by the defendants to confirm what was allegedly discussed at a meeting in Zartz' office on 9 September 2008. My considered view that nothing stopped the plaintiff from ensuring that the process of sale is concluded properly including the transfer of the licence to the defendants which remains unexplained. This is a crucial missing link of the puzzle. Bekker could have been requested by the plaintiff to confirm her part.

IV. <u>ANALYSIS OF THE EVIDENCE</u>

[80] As mentioned, the defendants' case on the pleadings is that clause 6.3 of the agreement represented that an extension period was applicable for the purposes of the conversion of the old order mining licence. Despite being given the opportunity to indicate in the response to the plaintiffs' list of queries and admissions sought in terms of Rule 37(4),

whether the alleged representation took some other form, the defendants stated that it was mentioned in various meetings between the parties.

[81] However the version that the representation was made by Galatis on 9 September 2008, was raised for the first time during the cross-examination of Galatis. It is submitted by the plaintiff, that as this evidence is not relevant to proving a fact in issue on the pleadings, it is inadmissible and the Court should disregard it. That being so it cannot ignore all submissions made thus far.

[82] As it was submitted by counsel for the defendants during Galatis' cross-examination that such evidence is relevant and not excluded by the parol evidence rule, the legal principles applicable to this rule will be briefly considered.

V. LEGAL PRINCIPLES RELATING TO THE PAROL EVIDENCE RULE

[83] The parol evidence or 'integration' rule provides that where parties to an agreement have decided that their contract should be reduced to writing, that document shall be accepted as the sole evidence of the terms of their agreement.

[84] In other words: "*When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.*" The effect is that no extrinsic evidence seeking to contradict, add to or modify the terms of the agreement shall be admissible.

[85] The rule only applies where the written agreement was intended to be the exclusive recordal of the agreement between the parties, however there were so many things discussed prior to signing of the agreement of sale but not reduced in writing.

[86] A court may look to the surrounding circumstances, including the parties' negotiations to determine whether the parties intended the written agreement to be an integration of the whole transaction or merely a partial integration. However where the written contract specifically refers to a topic or subject in the wording, this is generally an indication that the written contract was intended to be conclusive. This is correct to a certain extent but the issue of the mining licence being renewed or converted to a new order one cannot be disregarded as non-important.

[87] Furthermore, where the written agreement contains a 'whole agreement' or non-variation clause, the effect of such a clause is that any undertaking that a party alleges was given in order to induce that party to enter into the agreement, cannot be taken into account when enforcing the agreement. Another question arise as to whether the defendants were aware that on signing the agreement there was no extension? Could she have continued to sign if she was aware? The answer was no, alternatively they had to re-look at the sale price."

[88] In De Villiers v McKay NO and another the Supreme Court of Appeal held that a clause in the written agreement that read: "*This agreement contains all the conditions of the agreement between the parties and no amendment shall be valid unless it is in writing and signed by both parties hereto*", prevented one party relying on an earlier oral undertaking which it alleged had induced it to enter into the agreement.

[89] It was submitted that the party wishing to rely on an earlier undertaking or oral agreement would have to make out a case for rectification of the contract to delete such a clause. Absent such a case being made out, the party would be bound to the terms of the written agreement, which I do not fully agree with.

[90] A further effect of the parol evidence rule is that when the terms of the agreement are clear and unambiguous, no evidence may be lead to alter their plain meaning.

[91] In the present case, the defendants have never disputed the validity of the agreement or that clause 11 formed part of the agreement. It is further common cause that neither clause 6.3 nor Annexure "D" makes any representation that the mining licence would be valid beyond 12 December 2008. As the defendants have not sought to make out a case for the rectification of the agreement, they must be bound by the terms set out in the written agreement. This could not preclude the court to hear issues relating to the licence as the business operation as purchased by the defendants would need such licence.

[92] The ordinary grammatical meaning of clause 6.3, as it relates to the mining licence, is that the company was the owner of the mineral rights and old order mining rights set out in Annexure "D", which patently on the face of it, provides that the expiry date was 12 December 2008. This meaning is consistent with the terms of the agreement as a whole and creates no ambiguity.

[93] It is common cause that the plain meaning of clause 6.3 and Annexure "D" is clear. It is also clear from the terms of the agreement itself that the parties intended it to constitute the

full integration of their transaction. The evidence of Ms Barnes that Galatis orally advised her that an extension was applicable to the conversion of the mining licence was therefore led neither for the purpose of determining whether the parties intended the agreement to constitute a full integration, nor for the purpose of interpreting clause 6.3. It was lead for the purpose of contradicting, adding to of modifying the terms of agreement. It therefore falls foul of the parol evidence rule. I do not agree with this submission and the parole evidence rule is not applicable in this regard.

I am in agreement with the view expressed in the Delmas Minning Co. Ltd v Du Plessis 1995 (3) SA 447 (A) as quoted in paragraph [48] supra.

[94] What was discussed and agreed upon by the parties could not form part of clause 6.3 and Annexure D, except in circumstances where it would be fair to enable the Court to exercise its judicial discretion properly. The issue of the licence for the mineral rights had to be ventilated in full.

MY OBSERVATIONS FROM THE SUBMISSIONS:

[95] Plaintiff sold the business to the defendant. This is not in dispute.

[96] The business was then in the hands and control of one Bekker, on a lease agreement between the plaintiff and herself.

The price of R3million was set by the plaintiff knowing the business and its potential more especially the clay mining enterprise being conducted on a licence issued by DME. A licence is about to expire on 8 December 2008.

[97] The plaintiff knows, or ought to have known, of the expiry date of the licence or its conversion from an old order to a new order licence as required by the Law.

[98] Let's assume for a moment, if there was no offer to purchase, the owner of the licence could have taken an active role to have the licence renewed or converted to a new order one as required by the Law. This decision to leave it on the lessee's or the prospective buyer's discretion to convert it could not be justified as ownership rested with him.

[99] It is inconceivable that plaintiff, having an interest to sell the business to the defendant, would not see to it that the mining licence which was going to expire sooner be <u>properly transferred</u> to the prospective buyer who had already paid him with a substantial deposit of R500 000,00. The mining licence was not less important.

[100] The passive role by the plaintiff, in not making sure that the sale succeeds in *toto* affected the renewal and transfer of the clay mining licence before its expiry date.

[101] It is not unreasonable to observe that the sale price of R3million was inclusive of the above and any failure or cause to defeat the sale would lead to a possible cancellation of the sale or an *actio quanti minoris* or *actio red hibitoria*, in common law, without a breach of the contract of sale.

The seller's obligation in broad terms as his residual common law duty is:

(a) to care for the property sold from the date of sale until it is delivered to the buyer and the buyer takes delivery of the property sold;

(b) to make the property sold available to the buyer for the buyer's reciprocal duty to take delivery;

(c) to transfer ownership if the seller is the owner, or can obtain ownership, or warrant against eviction;

(d) to warrant that the property is fit for its common use (to mine clay amongst other things in this matter) or, in appropriate circumstances, to warrant that the property is suitable for the specific purpose for which it was sold (to mine clay for bricks manufacturing);

(e) to warrant against latent defects in the property: this will relate to the inability to mine clay which is a core component of the bricks manufacturing business which the defendants wanted to pursue.

[102] One other question coming to mind is that the clay mining licence as it was in plaintiff's name or his entity's on whose name was it to be renewed or converted to a new order licence?

(a) If it was to remain in plaintiffs name or his entity until the full purchase price was paid it placed an obligation to the plaintiff to be actively involved in such process. When the sale was concluded between the plaintiff and the defendants the property was under a lease agreement between the plaintiff and another person.

The plaintiff's duty to ensure proper conversion of the licence was an inalienable one. What if the sale, for another reason, happens to collapse would plaintiff wait for the expiry of the licence or could simply extended it or converted it to the new order. The blame for the abdication of this duty could only be placed on plaintiff's door and not the lessee of the property or prospective buyer, which are the defendants.

(b) The above question, if not anticipated, breeds further question as to whether the defendant could be in a position, in law, to bring an application to extend the clay mining licence or convert it to the new order without plaintiff's written authority or written resolution or addendum to that effect, to the defendant's name? This further indicates that the plaintiff was still obligated to be actively involved not to rely on one JJP Mining Consultants appointed by the defendants and paid to assist but only came on board after the expiry to the licence. Their binding agreement was signed on 6 February 2009 after the expiry of the licence in December 2008.

VI. <u>CONCLUSIONS & RELIEF</u>

[103] The defendants have succeeded to prove on a balance of probabilities that clause 6.3 constituted an intentional or negligent misrepresentation that an extension period applied to the rights in Annexure "D". The defendants did not and could not dispute that the wording of clause 6.3 and Annexure "D" contained no such representation. Instead they sought to establish that Galatis had advised Ms Barnes that there was an extension applicable to the conversion of the mining licence. In contrast Galatis' version that *he* had been informed by Ms Barnes, on the advice of the professional mining consultants appointed by her, that the

mining licence attached as Annexure "D" could be converted to a new order mineral right, was set out in the plaintiffs' plea to the defendants' counterclaim.

[104] Ms Barnes' evidence in this regard was unreliable and contradictory and wholly inconsistent with the probabilities that she was made to believe that there was an extension. The defendants have therefore established that this representation was made by Galatis, or with his implied knowledge.

[105] Further, Ms Barnes' evidence was that she was at all times well aware of the expiry date on Annexure "D". It was therefore anything but a latent defect. The defendants have therefore succeeded to prove that they were entitled to a price reduction. This was supported by evidence that she had to secure clay from other service providers at a cost instead of mining it self. Signing of the agreement on 6 February 2009 long after the expiry of the licence should have prompted the plaintiff to enquire as the licence holder but chose not to.

[106] The primary object of a deed of sale is to record the terms of a contract between the parties, and it follows that any statement in such a document *prima facie* constitutes a term from the contract itself or other admissible evidence that the parties did not so intend.

An almost similar situation occurred in: Cloete v Smithfield Hotel (Pty) Ltd 1955 (2) SA 622 (OFS) where the plaintiff entered into negotiations for the purchase of a hotel and was shown over it. The working of the sewerage system and the fact that the septic tank was on municipal property was explained to plaintiff and he was aware of the fact that the municipality had the right to withdrawn permission (licence my own emphasis) for it to be there. The day before the sale was concluded, (8 December 2008 in this case and the contract was signed and concluded on 6 February 2009), the municipality withdrawn permission and this fact was known to the seller and not the buyer. The court held that the seller should have disclosed that fact to the buyer.

In this matter the plaintiff goes on to signed the deed of sale on 6 February 2009 knowing that the mining licence has lapsed but say nothing about the agreed price of R3million which encompassed the mining rights. Plaintiff know that the mining rights are no longer there and what about the sale price? My view is that the plaintiff was duty bound to make sure that the mineral rights or the conversion of the licence to the new order was done properly and not to leave everything in the hands of the defendants, including the conversion of a licence that belongs to him as plaintiff without his active involvement in that regard.

Howits J in the quoted case remarked as follows: "Die skadevergoeding was eiser toegeken moet word, is die bedrag waarmee eiser se vermoë verminder is deur die onregmatige gedrag van die verweerder. Die bedrag is dus die verskul tussen die koopprys en die verminderde waarde van die hotelbesigheid as gevolg van die terugtrekking van die vergunning," at 633.

The expired mining licence in the present case had to have a bearing on the sale price of the business.

Having considered all submissions from both sides and the case law referred to, I am of the view that this matter will be concluded as in the last paragraph of this judgment.

[107] My view is that plaintiff has failed to satisfy the seller's implied warranty or the seller's obligation as outlined above. Implied warranties do not require an express statement or promises "that all is in order" but it is a common law requirement. Should the plaintiff have complied with the implied warranty this could entitle him to his claim as prayed for in the particulars of claim. Plaintiff's submissions are therefore not accepted as probable.

[108] In the premise, the plaintiff's claim falls to be dismissed with costs and the Honourable Court should find in favour of the 1st and 2nd defendants in relation to the merits of the claim in reconvention.

Consequent upon the above is ordered as follows:

1. Plaintiffs claim is dismissed with costs.
2. 1st and 2nd Defendant claim in reconvention is upheld.

VRSN NKOSI
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF ***ADV. S FERGUS***

ATTORNEYS FOR THE PLAINTIFF ***C/O SAVAGE JOOSTE & ADAMS***

COUNSEL FOR DEFENDANT ***ADV. D PRINSLOO***

ATTORNEYS FOR THE DEFENDANT	*JORDAAN'S INC ATTORNEYS*
DATE OF HEARING	***16 OCTOBER 2013***
DATE OF JUDGMENT	***12 NOVEMBER 2013***