



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 21575/2022

REPORTABLE

In the matter between:

SAAMBEGIN (PTY) LTD	First Plaintiff
JACOBUS HENDRIK SLABBER N.O.	Second Plaintiff
ANNA MAGDALENA NEETHLING N.O.	Third Plaintiff
CORNELIUS JOHANNES NEETHLING N.O.	Fourth Plaintiff
and	
OVERHEX WINES INTERNATIONAL (PTY) LTD	Defendant

Coram: **MOOSA AJ**

Heard: 7 AUGUST 2025, 11 AUGUST 2025, 18 SEPTEMBER 2025, 21 OCTOBER 2025

Delivered: 16 JANUARY 2026 (delivered electronically to the parties)

Summary: Sale and delivery – Plaintiff sues for sale price – Defendant’s business interrupted due to Covid-19 lockdown – Defendant exercised its discretion under price adjustment clause – discretion not exercised properly – concept of *arbitrio boni viri* discussed – exercise of discretion delayed – reasonableness of

delay evaluated – hallmarks for proper ‘consultation’ process
before exercise of discretion is discussed – defence dismissed.

ORDER

1. The Plaintiffs’ claim succeeds with costs.
2. The Defendant shall pay to the Plaintiffs jointly the sum of R622 960,04 together with interest thereon at the prescribed legal rate computed from 7 March 2021 until the date of final payment, both days included.
3. The Defendant shall pay the Plaintiffs’ costs on a party and party scale, such costs to include counsel’s fees on scale B.

JUDGMENT

Moosa AJ

Introduction

[1] This judgment concerns a joint claim by the Plaintiffs (“Saambegin”) against the Defendant (“Overhex”) for payment of R622 960,04, being the undisputed balance of the price for grapes sold and delivered by Saambegin to Overhex. The facts giving rise to Saambegin’s cause of action are largely uncontroversial and common cause.

[2] Saambegin produces grapes at the farm Saamstaan in Malmesbury, Western Cape. Overhex is a wine producer. For this purpose, Overhex bought grapes from Saambegin during the 2020 harvest season. The grapes were used to make a variety of wines that were bottled and sold in the domestic and international markets.

[3] Saambegin’s claim against Overhex has its genesis in a written supply and delivery agreement concluded between them on 3 December 2019 (“the 2019 agreement”). That agreement must be read with a written memorandum of agreement dated 19 December 2016 (“the 2016 agreement”). The latter agreement

is the main contract. It contains Overhex's standard terms and conditions of purchase from its grape producers. The 2019 agreement is annexure A to the 2016 agreement. In this judgment, unless the context indicates otherwise, "the parties" mean Overhex and Saambegin as the contracting parties to the 2016 agreement and the 2019 agreement.

[4] The 2016 agreement read with the 2019 agreement created binding and legally enforceable rights and obligations for the parties (i.e., Saambegin and Overhex).

[5] The material terms of the 2019 agreement are that Saambegin agreed to sell and deliver 660 tons of grapes to Overhex during the 2020 harvest season comprising certain classes (or cultivars) of grapes, subject to annexures B (grape classification) and C (Overhex's harvest rules). Overhex agreed to buy and receive the grapes and pay Saambegin the total price of R3 952 500,00 in 12 equal monthly instalments, starting on 7 April 2020 and ending on 7 March 2021. Overhex also agreed to strive to sell much of the wine produced with Saambegin's 2020 grapes as Fairtrade within the contemplation of clause 2 of the 2016 agreement (read with annexure D thereto).

[6] In February and March 2020, Saambegin delivered the agreed cultivars (classes) of grapes, but fewer tons. The total value supplied was R3 696 900,00. Overhex paid R3 070 939,96. That left a shortfall of R622 960,04. Saambegin demanded payment of the balance. Overhex refused to pay, culminating in this action.

[7] Overhex denies liability for payment of the purchase price balance, or any part thereof. The nub of its defence stems from clause 3.2 of the 2016 agreement. To that end, the following paragraphs in Overhex's plea are significant:

'5. In terms of clause 3 of the agreement and a proper interpretation thereof:

5.1 The price payable by Overhex for the grapes would be the price agreed upon in writing by the parties before the last day of December preceding the relevant wine making season, which price would be determined per class of grapes and per grading, and which would be based upon the then prevailing conditions of the wine market. [clause 3.1]

- 5.2 Because Overhex was continuously exposed to the annual fluctuating tendencies of the wine market, which played a material role in contracts with its buyers, Overhex would be entitled, despite the provisions in clause 3.1, during and after a wine making season and after consultation with the Plaintiffs, to adjust the agreed purchase price upwards or downwards in accordance with the tendencies and conditions of the wine market [clause 3.2] (**“the price adjustment term”**) ...
9. Subsequent to the Plaintiffs’ sale and delivery of the grapes during 2020:
- 9.1 The Covid-19 pandemic and the legal restrictions imposed as a result thereof caused a significant decline in the wine market.
- 9.2 Overhex informed the Plaintiffs accordingly and consulted them regarding its proposed 17% reduction of the total purchase price, as contemplated in the price adjustment term.
- 9.3 The Plaintiffs refused to consent to any price reduction whatsoever.
- 9.4 In the event, Overhex duly exercised its right under the price adjustment term and reduced the total purchase price by 17%, amounting to a reduction of R622 960,04.
- 9.5 Overhex accordingly paid to the Plaintiffs a duly reduced purchase price of R3 070 939,96, thereby discharging its total indebtedness to the Plaintiffs.’

[8] Saambegin disputes the validity of Overhex’s reliance on clause 3.2 of the 2016 agreement and, therefore, the purported exercise of its discretion thereunder.¹

Issues for adjudication

¹ The 2016 agreement is drafted in Afrikaans. An agreed English translation forms part of the record. The relevant provisions of clause 3 in the translated version reads:

- ‘3.1 The price payable by Overhex for the grapes is the price agreed upon in writing by the parties before the last day of December preceding the relevant harvest season, which price will be determined per class of grapes and per grading and which would be based upon the then prevailing market conditions (The South African and International Wine Industry).
- 3.2 As Overhex is continuously exposed to the annual fluctuating market trends, which play a significant role in contracts with its buyers, Overhex is entitled, notwithstanding the provisions of clause 3.1, to adjust the agreed purchase price, during and after a harvest season, after consultation with the Producer, in line with market trends, either upwards or downwards, according to the circumstances.’

[9] Based on the pleadings, Saambegin is entitled to judgment if Overhex's defence fails. Therefore, the issue here is a crisp one, namely, whether Overhex's exercise of its discretion under the price adjustment term in clause 3.2 had the legal effect of absolving it from the duty to pay Saambegin the undisputed balance.

[10] The adjudication of this issue turns on both questions of law and fact. The former involves an interpretation of clause 3.2 with a view to ascertaining the legal prerequisites for its proper utilisation. The latter involves determining whether, on the facts of this case, the prerequisites were fulfilled at all material times.

Material factual matrix

[11] Each party only led a single witness. Whereas Saambegin led Cornelius Johannes Neethling ("Neethling"), Overhex led Gert van Wyk ("Van Wyk"). The facts narrated by these witnesses are largely undisputed. Below is a chronological summary of relevant facts emerging from their testimony, including relevant facts emerging from documents included in a common trial bundle which was referred to during the trial.

Evidence by Cornelius Johannes Neethling

[12] Since 1984, Neethling is a farmer in the Swartland wine district of Malmesbury, Western Cape. In 2018, Neethling sold his farm Saamstaan and farming business in a Black Economic Empowerment deal. Through the CJ Neethling Boerdery Trust, Neethling now co-owns the farming business with his farmworkers. They own their shares through the Saamstaan Workers' Trust. The farm is owned by a different entity.

[13] About 95% of the grapes harvested on the farm Saamstaan are sold to wine producers. From 2006, Neethling sold grapes to Overhex. The terms and conditions of supply were initially regulated by a 10-year contract; later, by a 5-year contract, being the 2016 agreement. Both agreements contained substantially the same terms and conditions of supply, including the price adjustment term in clause 3.2.

[14] Throughout the subsistence of both agreements, Overhex purchased large quantities of grapes during every harvest season. For every season from 2006 to 2019, Overhex never exercised its discretion under clause 3.2. It did so for the first time in relation to the 2020 season that ran from 20 January 2020 to 10 March 2020.

[15] Overhex placed its purchase orders with Saambegin before the start of every harvest season. During November 2019, and in anticipation of the 2020 grape harvest, Overhex sent Saambegin its offer to buy 660 tons of grapes, including a proposed price per ton for each class of grapes that it intended to buy. Overhex also offered to strive to sell as Fairtrade much of the wine produced with the grapes to be purchased.

[16] On receipt of Overhex's offer with its proposed pricing structure, Neethling, acting for Saambegin, enquired from neighbouring farmers as to the prices they were achieving at that time for the forthcoming 2020 harvest season.

[17] On 3 December 2019, and at the farm Saamstaan, a meeting took place between Overhex, represented by Van Wyk, and Saambegin, represented by Neethling and his co-directors. The purpose of that meeting was to finalise Overhex's purchase order for the 2020 harvest season and the agreed terms of supply.

[18] At that meeting, the prices proposed by Overhex for the 2020 grape harvest were discussed. A negotiation ensued. Ultimately, Overhex's proposed price per ton for Sauvignon Blanc, Merlot, and Shiraz was revised upwards at the insistence of Saambegin. The meeting adjourned after the parties signed the 2019 agreement.

[19] I pause to reiterate that the material terms of the 2019 agreement are those summarised under the heading 'Introduction' (see para [5] above). It is common cause that Saambegin fulfilled its contractual obligations, except that it delivered fewer tons of grapes than was specified in the 2019 agreement. Nothing turns on this latter fact.

[20] Saambegin delivered the grapes to Overhex in stages. The final delivery occurred on 13 March 2020. Saambegin then invoiced Overhex for the aggregate value of the grapes actually sold and delivered, being R3 696 900,00.

[21] After delivery of the grapes, Neethling next interacted with Van Wyk when the latter visited him in mid-March 2020. Van Wyk discussed the impact of Covid-19 on Overhex's cash flow and finances in general. Neethling explained that Van Wyk labelled the situation in which Overhex found itself at that time as a 'force majeure'.

[22] I pause to mention that it is common cause that, on or about 25 March 2020, regulations were gazetted that imposed a national lockdown due to the Covid-19 pandemic. During that lockdown, alcohol sales, including the transportation of alcohol, was prohibited. By law, Overhex's trading operations were temporarily shut down.

[23] On 1 April 2020, Neethling and Van Wyk spoke telephonically on the issue of the lockdown and its effect on Overhex's ability to pay its agreed monthly instalments due to Saambegin. During that discussion, Neethling informed Van Wyk that Saambegin would be agreeable to extending the period over which the R3 696 900,00 debt is to be settled. As in all other conversations on this subject, Neethling informed Van Wyk that no other arrangement would be acceptable to Saambegin.

[24] A week later, Van Wyk sent an email to Neethling with a letter attached thereto dated 8 April 2020. Paragraphs 1, 2, and 3 of the letter recorded that the Covid-19 pandemic is a force majeure event which triggered clause 10 of the 2016 agreement.² In paragraph 2, Van Wyk wrote that, as a result, payment under the 2019 agreement is suspended, pending termination of the pandemic and the legislated restrictions. In paragraph 4, Overhex proposed two options for Saambegin's consideration. Neither option involved any price reduction. Both options were rejected by Saambegin.

[25] I pause to flag Overhex's reliance on clause 10 of the 2016 agreement. Later, Overhex enforced clause 3.2 of the same agreement. Overhex's use of both clauses arising out of the same facts is an aspect to which I will revert later in this judgment.

[26] On 8 May 2020, Van Wyk sent a letter to all Overhex's suppliers, including Saambegin. That letter recorded a material change in circumstance, namely, that the Covid-19 prohibition on the exporting of wine had been lifted and, as a result, Overhex had resumed its exporting operations with effect from 1 May 2020.

² Clause 10 of the 2016 agreement is headed 'Force Majeure'. In the translated version, it reads:
'The failure of a party to perform the provisions of the agreement will be excused to the extent that it was caused by an event that can be classified as force majeure. Force majeure is classified for the purposes of this Agreement as an event caused by factors that are completely and entirely beyond the control of a party to this Agreement.'

[27] The letter recorded that the loss of sales over the preceding 5 weeks had adversely impacted Overhex's financial position. The letter recorded further that this situation would continue for some time, although it was anticipated to improve as markets reopened and wine sales improved. The letter concluded with a plan of action for the settlement of debts to all suppliers related to the 2020 grape harvest. Overhex's plan was conditional on it receiving financial assistance from the Covid-19 term loan scheme. Overhex failed to pay suppliers according to its own proposed action plan.

[28] As with the letter of 8 April 2020, the letter of 8 May 2020 also made no mention of clause 3.2 of the 2016 agreement, nor mentioned any proposed price reduction.

[29] Overhex paid Saambegin on 30 June 2020, 31 July 2020, and 31 August 2020, R123 120,00 per month, including for wine sold as part of Fairtrade. The value of each instalment and its date of payment were unilaterally changed by Overhex from that

agreed to with Saambegin in the 2019 agreement.

[30] On 3 September 2020, a meeting took place at Saamstaan between Van Wyk and Neethling. They discussed Overhex's then proposed price reduction of 20% (equated to R738 780,00), and its proposed settlement of the reduced balance over at R152 101,70 per month commencing September 2020 and ending January 2022. Neethling rejected the idea of a price reduction but indicated that Saambegin would agree to an extended payment period. Neethling's suggestion did not satisfy Overhex.

[31] On 4 September 2020, Van Wyk sent an email to Neethling. Attached thereto was a copy of Overhex's proposed contract changes which were discussed on 3 September. In response, Neethling telephoned Van Wyk on 7 September 2020 and repeated Saambegin's position as communicated in the meeting of 3 September 2020.

[32] On 15 September 2020, Van Wyk sent an email to Neethling in which he (Van Wyk) explained that Overhex's sales had reduced substantially since March 2020

due to the prohibition on wine sales associated with the Covid-19 pandemic. Van Wyk explained that this prohibition resulted in Overhex having substantial surplus stocks.

[33] Neethling testified that Overhex made additional payments to Saambegin on 30 September 2020 (R152 101,76), 31 October 2020 (R202 802,35), and 30 November 2020 (R202 802,35). The value of these instalments and their payment dates did not align with the agreed terms recorded in the 2019 agreement.

[34] On 9 November 2020, a meeting took place between Neethling and Van Wyk. It was followed up by a meeting on 16 December 2020. At the latter meeting, they discussed Overhex's revised price reduction proposal of 17% (equated to R622 960,04), and its settlement of the proposed reduced contract balance at the rate of R214 384,35 per month commencing December 2020 and ending September 2021. As before, Neethling rejected the idea of a price reduction in favour of settlement of the full price over an extended payment period. Overhex rejected that suggestion.

[35] On 22 January 2021, a further meeting was held at the farm Saamstaan. That meeting was followed up with a telephonic discussion on 25 January 2021 between Neethling and Van Wyk. On the same day, Van Wyk sent an email to Neethling which recorded the thrust of their discussions on 22 and 25 January 2021 respectively.

[36] The nub of the email of 25 January 2021 is Van Wyk's recordal that he informed Neethling of Overhex's inability to pay the full contract price for the 2020 season owing to the impact of the trading restrictions during lockdown and the abnormal conditions in the wine market which ensued from March 2020 owing to the Covid-19 pandemic.

[37] In the period from December 2020 to August 2021, Overhex paid Saambegin R214 384,35 per month, including at least one payment as part of Fairtrade. The value of these instalments and their dates of payment were unilaterally determined by Overhex. As before, no consultation took place with Saambegin on these matters.

[38] On 22 September 2021, a meeting took place at the farm Saamstaan. Representing Overhex were Van Wyk and Gerhard van der Wath ("Gerhard"), a senior member of Overhex's management team and ownership structure. Saambegin was represented by, inter alia, Neethling and his co-directors. The meeting ended abruptly within 5 minutes. Gerhard walked out after Neethling stated that Overhex was indebted to Saambegin for the full agreed price and that Saambegin expected full payment.

[39] On 1 October 2021, Overhex paid Saambegin the sum of R214 384,35. Van Wyk then sent an email to Neethling which enclosed proof of that payment. In the body of his email, Van Wyk recorded that the sum of R214 384,35 paid on 1 October 2021 was the final payment instalment under the 2019 agreement. The email confirmed that Overhex paid Saambegin R3 070 904,00, which sum is R622 960,04 (or 17%) less than the original agreed contract value for grapes actually supplied and delivered by Saambegin to Overhex. The essence of Overhex's reasons for the price adjustment appears from the following statement by Van Wyk in his email of 1 October 2021:

'Overhex was vanwee die verklaring van 'n ramptoestand, met gepaargaande inperkings, as gevolg van die Covid-19 pandemie en abnormale marktoestande, wat sedert einde Maart heers, genoodsaak om aanpassings aan die druiwepryse en betaaltermen te maak, iets wat ek reeds by verskeie kere aan jou kommunikeer het.'³

[40] On 18 October 2021, Neethling telephoned Van Wyk to enquire whether the payment made on 22 September 2021 was really the final payment for the 2020 harvest season purchases. Van Wyk confirmed that to be so. Saambegin did not accept that position. Saambegin then demanded payment of R622 960,04, being the admitted balance before the price adjustment effected by Overhex. It refused to pay.

Evidence by Gert van Wyk

³ This statement is loosely translated into English as follows:

'Due to the declaration of a state of disaster, with associated lockdowns, due to the Covid-19 pandemic and abnormal market conditions, which have prevailed since the end of March, Overhex has been forced to make adjustments to the grape prices and payment terms, something that I have already communicated to you on several occasions.'

[41] From Van Wyk's testimony viewed holistically, the facts narrated above are common cause. Thus, they are not repeated here. I will now summarise the remaining aspects of Van Wyk's evidence which are germane to adjudicating the disputed issues.

[42] In this regard, the following aspects will be dealt with: (i) the general nature of Overhex's business; (ii) Van Wyk's role at Overhex; (iii) the considerations that informed Overhex's price offer to Saambegin in November 2019 for grapes sought in the 2020 harvest season; (iv) the considerations that informed Overhex's decision to effect a price reduction in October 2021; and (v) the factors that informed Overhex's decision to impose the reduction at 17% of the final contract value.

[43] Van Wyk testified that he commenced employment with Overhex in 2013/2014. At all material times to this case, Van Wyk is Overhex's managing director. Overhex is a private company producing bottled wine for sale mainly, but not exclusively, in overseas markets. Its wine products include Mensa, Survivor, and Balance. For this purpose, Overhex requires substantial quantities of quality grapes.

[44] Overhex operates a sophisticated wine production and bottling process with stringent harvesting rules and grape classification. While some wines are produced with grapes sourced from a single supplier, others are produced using a blend (or mixture) of grapes sourced from different suppliers. Overhex uses technology that, inter alia, tracks a supplier's grapes from its delivery to their sale as a wine product.

[45] Except for wine produced at Overhex's plant in Darling with the so-called 'B sap', Overhex tracked the use of Saambegin's grapes in its wine manufacturing process. About 30% of Saambegin's grapes for the 2020 harvest season were used in wines produced for a client of Overhex in Denmark. The rest of Saambegin's grapes were used to produce wine mainly for sale in the domestic (South African) market.

[46] Van Wyk prepared Overhex's offer to Saambegin for the purchase of 660 tons of grapes in relation to the 2020 harvest season. Van Wyk used his experience in the wine industry and knowledge of the historic performance of Saambegin's grapes when he formulated the details of the offer. The price offered per ton for the cultivar of grapes sought to be purchased (such as, Chardonnay, Pinot Gris, Merlot, Shiraz,

Pinotage, Grenache, Cabernet Sauvignon, and Viognier) was based on a projection of the average price that Overhex would earn on the sale of wine produced with each cultivar.

[47] Van Wyk testified that sometimes Overhex would purchase a particular cultivar of grapes at a high price that would bring about losses on the sale of the wine produced from it. Van Wyk explained that this practice is part of the cost for doing business in a competitive market. If Overhex did not do so, then it would struggle to retain its market share. Van Wyk explained that losses incurred in that context do not affect Overhex's overall annual profitability. He explained that this is because such losses are factored into Overhex's business model and the pricing structure for its wine products.

[48] The Covid-19 pandemic led to a national disaster. Businesses were placed under lockdown. That occurred after Saambegin delivered its grapes under the 2019 agreement. A ban was imposed on wine sales, including on exports. While the ban on wine exports lasted about 5 weeks (from 27 March 2020 to 30 April 2020), the ban on domestic wine sales lasted approximately 5 months (from 27 March 2020 onwards).

[49] Van Wyk explained that the ban on all wine sales was unexpected. It was imposed on short notice. He explained that Overhex did not, nor could it, anticipate Covid-19 and the ban on trade. Therefore, Overhex did not factor Covid-19 or the ban's impact into the price negotiations with Saambegin on 3 December 2019.

[50] Consistent with Van Wyk's written communications to suppliers during March/April 2020, Van Wyk testified that the situation which existed owing to Covid-19 and the associated ban on wine sales (including exports) is a force majeure event. He testified that Overhex's business was hit hard by the trading restrictions imposed in response to the Covid-19 pandemic. Van Wyk testified that, in the circumstances that prevailed at the relevant time in 2020, Overhex was entitled to exercise its discretion under clause 3.2 of the 2016 agreement. Van Wyk's evidence to this effect was disputed, both during his cross-examination and during Neethling's testimony.

[51] The implementation of a complete ban on all wine sales, including exports, resulted in Overhex being unable to process orders in its system when the ban took effect. Under the ban, Overhex's South African retail clients were also unable to trade. Thus, some of them cancelled orders; others returned stock. While uncertainty existed about the ban's duration and effects, new wine orders were not placed with Overhex.

[52] The ban's impact on Overhex was severe. Wine sales halted. In response, Overhex's management adopted a proactive posture that, understandably so, was geared to protecting Overhex and its interests, both commercial and financial. Overhex's management had two key concerns: first, the payment to suppliers for purchases arising from the 2020 grape harvest season; secondly, limiting losses.

[53] As regards payment, Van Wyk engaged with suppliers, including Saambegin. He sent periodic updates on Overhex's plans for payment. Van Wyk's first communication on this issue was an email on 25 March 2020. In relevant part, it read:

'Dear Overhex producer, supplier and partner,

Attached herewith is a letter to inform you about the arrangements that Overhex must implement with immediate effect to manage the potential economic impact of the COVID-19 pandemic to "insure" the business and its partners' sustainability.'

[54] The lifting of the ban was not followed by an immediate return to the levels of domestic wine sales and overseas exports as they were prior to the ban. The demand for wine grew steadily over time. Van Wyk explained that consumers did not drink more wine to make up for lost drinking during the ban. Consequently, wine producers and retailers, including Overhex, did not make up their revenue losses incurred as a result of the ban. The loss of sales and profits owing to the ban were, thus, irrecoverable.

[55] Surplus stock levels made matters worse. The ban on domestic wine sales and on exports resulted in a build-up of stocks in the hands of producers and retailers. In December 2020, Overhex had 2 million litres of surplus stock. When markets reopened, high levels of surplus stock and low demand led to reduced wine prices, both locally and overseas. To remain competitive and to increase its local

sales and overseas exports, Overhex reduced its prices on wine, including wine produced with grapes delivered by Saambegin in 2020. In this way, Overhex worked away surplus stocks and created much-needed space for new bottled wines produced at that time.

[56] Overhex's loss of profits increased with the reduction in wine prices. Van Wyk testified that Overhex's financial woes would have been exacerbated if it paid each supplier the full contract price for grapes purchased during the 2020 harvest season. To limit Overhex's losses and improve its profitability and cash flow, a decision was taken that Overhex would approach every supplier and discuss a price reduction.

[57] Except for Saambegin, all of Overhex's grape suppliers agreed to a price reduction. Those agreements were recorded in writing. A similar agreement to vary the 2019 agreement was presented to Saambegin. Its directors rejected any price reduction. Therefore, they refused to sign the variation agreement. After the failed meeting on 22 September 2021 (see para [38] above), Van Wyk and Gerhard decided to exercise Overhex's discretion under clause 3.2 of the 2016 agreement. On 1 October 2021, Overhex effected a price reduction equal to 17% (or R622 960,04).

[58] The sum of R622 960,04 was an estimate of the aggregate loss that Van Wyk computed would be suffered by Overhex from the total sales of wine produced with grapes delivered by Saambegin in February/March 2020. In computing that estimate, Van Wyk used information available from Overhex's database at the time of his calculation. As his point of departure, Van Wyk applied the following formula:

	(i)	actual wine yield per ton of grapes supplied by Saambegin
<u>Multiplied by:</u>	(ii)	average selling price realised by Overhex from wine produced with Saambegin's 2020 grapes
<u>Less:</u>	(iii)	Cellar costs incurred by Overhex
<u>Add:</u>	(iv)	Saambegin's pro-rata portion of insurance pay-outs received by Overhex for damage to its cellar tank.

[59] Van Wyk decided that provision should also be made for the estimated future sales of wine produced with Saambegin's 2020 grapes that were unsold when the

calculation of the estimated loss took place. Using his knowledge of, and experience in, the wine industry, Van Wyk estimated the selling prices that Overhex would likely generate on the unsold wine. He computed that Overhex would, in due course, suffer further losses due to reduced selling prices. Van Wyk then added the estimated loss on the future sales into his aforementioned calculation of the aggregate, estimated loss to be recovered from Saambegin. In this way, he reached the 17% price reduction.

[60] Van Wyk testified that the objective sought to be achieved with the price reduction was to ensure that Overhex, at least, broke even as concerns the sale of wine produced with grapes bought from Saambegin in the 2020 harvest season. Van Wyk conceded that the price reduction mechanism was used to pass losses suffered by Overhex to Saambegin. In that way, Overhex minimised the adverse financial impact that the ban on wine sales and exports had on its business.

[61] Van Wyk testified that once Overhex had sold all the wines produced with all of Saambegin's grapes that were purchased during the 2020 harvest season, Van Wyk then calculated the actual position. It transpired that Van Wyk had underestimated Overhex's potential loss. Its actual loss was R770 852,42 (not R622 960,04). Van Wyk testified that if Overhex had known the true loss when the price adjustment was effected, then it would have used the increased loss figure for purposes of clause 3.2.

[62] However, Van Wyk explained that once Overhex exercised its discretion under clause 3.2 on 1 October 2021, it could not thereafter reduce the adjusted price again.

Submissions by counsel

[63] Adv Whitaker, for Saambegin, and Adv Du Toit, for Overhex, were *ad idem* that the outcome of the issues arising for adjudication is not a matter to be decided on the probabilities. The disputed issues are to be determined based on certain principles and their application to the conspectus of admissible evidence.⁴ They were also *ad idem* that Neethling and Van Wyk were both credible and reliable. On all this, I agree.

⁴ *The City of Tswane v Blair Atholl Homeowners' Association* 2019 (3) SA 398 (SCA) para 65.

[64] Applying the trite rules of interpretation enunciated in, for e.g. *Natal Joint Municipal Pension Fund v Endumeni Municipality*,⁵ Adv Whitaker argued that, except for the consultation requirement, the remaining prerequisites under clause 3.2 of the 2016 agreement for the valid exercise of the discretion conferred therein were not met. He argued that, on this basis, Overhex's exercise of its discretion to reduce the agreed price is invalid. In contrast, Adv Du Toit submitted that the prerequisites of clause 3.2 were met. He contended that, as was required by clause 3.2, the price adjustment was effected 'in line with market trends' that existed when the agreed contract price was unilaterally adjusted downwards by Overhex.

[65] Adv Whitaker argued further that if the prerequisites for the invocation of clause 3.2 are met, then the exercise thereof is invalid for three reasons. First, relying on *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*,⁶ he argued that the *arbitrio boni viri*⁷ standard for the valid exercise of Overhex's discretion was not met. Relying on *NBS Boland Bank Ltd v One Berg River Drive CC and Others*⁸ and *Erasmus and Others v Senwes Ltd and Others*,⁹ Adv Du Toit submitted that the methodology used by Van Wyk in determining the *quantum* of the price adjustment involved reasonable conduct and the exercise of a reasonable discretion.

[66] The second string in Adv Whitaker's bow is his argument that, based on the modalities of linguistic, contextual *cum* purposive interpretation, clause 3.2 of the 2016 agreement did not permit a price adjustment after Saambegin's rights to payment of the full agreed contract price accrued on 7 March 2021, being the date when the last instalment became due and payable for the 2020 harvest. Adv Whitaker argued that insensible and unbusiness-like results would ensue if clause 3.2 was interpreted to permit a price reduction after the full contract price had accrued. This is more so, the argument proceeded, in circumstances where the price reduction under clause 3.2 would purge Overhex's then extant and ongoing breach of contract, namely, its failure to pay the full agreed price by the deadline agreed *inter partes*.

⁵ 2012 (4) SA 593 (SCA) para 18.

⁶ 2004 (5) SA 248 (SCA) para 26.

⁷ This Latin expression is loosely translated to mean 'according to the discretion/judgment of a good man'.

⁸ 1999 (4) SA 928 (SCA).

⁹ 2006 (3) SA 529 (T).

[67] The highwater mark of Adv Du Toit's opposition in this regard is his submission that clause 3.2 did not cater for a cut-off date to effect a price reduction. He argued that a reduction could be effected at any time after a harvest season. He also contended that there is nothing inherently insensible or unbusiness-like with a clause that permitted Overhex to purge its breach of contract by way of a price reduction.

[68] Finally, relying on the *Shifren* principle emanating from *Sentrale Ko-Op Graanmaatskappy Bpk v Shifren*,¹⁰ Adv Whitaker argued that the purported price reduction was intended to amend the 2019 agreement. Thus, so he reasoned, the non-variation (or *Shifren*) provision in clause 15.3 of the 2016 agreement was triggered.¹¹ As such, the thesis advanced by Adv Whitaker is that an amendment could be effected by Overhex, provided the formalities prescribed in clause 15.3 were met. It is common cause that they were not met. On this basis, Adv Whitaker hypothesised that the price reduction purported to be effected by Overhex is invalid and unenforceable in law. The pillar on which Adv Du Toit hinged his opposition to this argument is his submission that the non-variation provision in clause 15.3 found no application when clause 3.2 was applied. The lynchpin of Adv Du Toit's submission is that clause 15.3 applied to bilateral amendments effected by mutual consensus. It did not apply, so his argument proceeded, to unilateral amendments, such as those catered for in clause 3.2.

[69] In my analysis below, I assess and evaluate the different strands of both counsels' arguments so far as doing so may be necessary for this judgment.

Discussion (analysis)

[70] Central to this case is the question of the proper interpretation to be accorded to clause 3.2 of the 2016 agreement. That clause is not a model of drafting clarity. In its formulation, concepts are used for its purpose without any definition being given for their meaning (for e.g., 'market trends'; and 'harvest season'). Nevertheless,

¹⁰ 1964 (4) SA 760 (A).

¹¹ Clause 15.3 reads:

'It is hereby agreed that no amendment or cancellation or replacement of this agreement or any part thereof shall be of any force whatsoever, unless such amendment or cancellation or replacement is reduced to writing and signed by the parties hereto.'

clause 3.2 requires interpretation. To that end, the oft-cited *Endumeni* test is instructive.

General principles on interpretation

[71] Owing to the deficiencies identified above in relation to clause 3.2, the following warning by the Supreme Court of Appeal (“SCA”) bears repetition:

‘*Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.’¹²

[72] In *Coral Lagoon Investments supra*, the test for judicial interpretation of contracts and documents generally was usefully framed. The SCA held:¹³

It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised ..., ‘[t]he inevitable point of departure is the language of the provision itself.’

[73] Using these principles as a lodestar, I now interpret and apply clause 3.2 read in its proper context within the 2016 agreement viewed as an integral, cohesive whole.

Assessment of the non-variation (or *Shifren*) clause argument

[74] The express wording in clause 3.2 (see footnote 1 above) recorded that Overhex ‘is entitled ... to adjust the agreed purchase price, during and after a harvest season, after consultation with the Producer, in line with market trends, either upwards or downwards, according to the circumstances’. Clause 3.2 further

¹² *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 26.

¹³ At para 25. Also, see para 51.

recorded that this entitlement is conferred because 'Overhex is continuously exposed to annual fluctuating market trends, which play a significant role in contracts with its buyers'.

[75] The purpose served by the price adjustment clause is clear: broadly, clause 3.2 is designed to benefit Overhex. Inter alia, it provides protection against ill-effects arising from annual fluctuations in the wine market. To enable Overhex to offset the adverse impact of annual fluctuations in market trends, Saambegin agreed that Overhex may adjust the contract price agreed by them pursuant to clause 3.1.

[76] A price adjustment is permissible only 'after consultation' with Saambegin. This is a procedural pre-condition. Adv Du Toit submitted, correctly so, that the dictionary meaning of the word 'consultation' indicates that it does not equate to 'agreement'. Rather, consultation requires 'a full opportunity for views to be stated' in relation to the subject matter of the intended consultative process.¹⁴ I would add that, in line with the covenant of good faith and fair dealing that underpin our contract law,¹⁵ consultation entails the sharing of views through a constructive process of meaningful engagement.

[77] Overhex and Saambegin engaged in a consultative process. It comprised formal meetings, telephonic discussions, and correspondence. This is common cause.

[78] Owing to the legal concept of 'consultation' falling short of actual agreement, I endorse Adv Du Toit's submission that clause 3.2 authorises unilateral amendments. It would be absurd if clause 3.2 conferred, as it did, a discretion on Overhex to effect a price reduction without Saambegin's consent, but Overhex could not implement the reduction without Saambegin's agreement in writing pursuant to clause 15.3.¹⁶

[79] The ineluctable conclusion is that clause 15.3 was not intended to apply when a price adjustment is effected under clause 3.2. This is a coherent interpretation of the 2016 agreement that leads to sensible results on a practical level. For these

¹⁴ *S v Smit* 2008 (1) SA 135 (T) at 148J.

¹⁵ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57; *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) paras 24, 45.

¹⁶ Compare *Knoetze v Saddlewood CC* [2001] 1 All SA 42 (SE).

reasons, I reject the argument that the price adjustment effected by Overhex is an invalid amendment for want of compliance with clause 15.3 of the 2016 agreement.

Assessment of the *arbitrio boni viri* argument

[80] Did Overhex exercise its discretion under clause 3.2 *arbitrio boni viri*? Viewed objectively, the answer is ‘no’. My reasons are enumerated in the ensuing discussion.

[81] It is necessary to recount some guiding legal principles. A contractual discretion must be exercised reasonably and with reasonable judgment (i.e., *arbitrio boni viri*).¹⁷ The objective standard of reasonableness applies when assessing whether a discretion was properly exercised.¹⁸ The exercise of discretion reasonably accords with the notion of good faith that mediates our contract law.¹⁹ In *Botha v Rich NO supra* para 46, the apex court held:

‘Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. *Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party’s interests.* Good faith is the lens through which we come to understand contracts in that way.’ (My italics added for emphasis)

[82] Saambegin did not complain that the price adjustment of R622 960,04 is, *per se*, unfair or unreasonable. It assailed the price adjustment by asserting that Overhex exercised its discretion unreasonably. Saambegin contended, inter alia, that Van Wyk used objective and subjective considerations, rather than purely objective ones. The subjective elements are contended to be Van Wyk’s experience in, and knowledge of, the wine industry, and the adjustment being an ‘estimate’ computed by Van Wyk.

[83] As a matter of law, the use of the objective standard of reasonableness when deciding if a contractual discretion was properly exercised does not mean that the

¹⁷ *Juglal v Shoprite Checkers supra* para 26.

¹⁸ *Unilever South Africa Ice Cream (Pty) Ltd (known as Ola South Africa (Pty) Ltd) v Jepson* 2008 (2) SA 456 (C) at 461.

¹⁹ *NBS Boland Bank v One Berg River Drive supra* para 28; *Erasmus v Senwes supra* at 538.

actual exercise thereof may not involve some subjective elements. Parties to a contract may, for e.g., stipulate criteria that would guide the exercise of a contractual discretion.²⁰ Nothing precludes contractants from intending to permit criteria that would involve some subjectivity. Doing so is part and parcel of their contractual freedom.

[84] The following *dictum* reinforces my view that an objective standard has long been used to assess contractual decision-making that involves subjective elements:

‘Even where a provision in a contract gives a party a discretion or *allows a party’s opinion or satisfaction* to determine the parties’ rights and obligations, it is either interpreted as importing the standard of the *arbitrium boni viri*, or at least as precluding such party from making an unreasonable decision. *In both classes of case, an objective standard is taken to be implied* and the decision is justiciable by the Court.’²¹

(My italics added for emphasis)

[85] For these reasons, the submission that Overhex’s discretion was exercised unreasonably because it entailed subjective elements does not, in law, hold water.

[86] Importantly, the considerations relied on by Saambegin (see para [82] above) are not subjective in nature. Van Wyk’s experience in, and knowledge of, the wine industry are objectively verifiable facts. Van Wyk’s background and expertise allowed him to forecast the likely trend in wine prices. In that way, and using available data of actual selling prices yielded, Van Wyk was able to estimate the possible future selling prices for wines produced with Saambegin’s 2020 grapes that were still unsold when the price adjustment was calculated.

[87] An issue that was not debated before me, nor addressed by counsel in their heads of argument, is whether, as a matter of law, the *onus* rests on Saambegin to prove the unreasonableness of Overhex’s exercise of discretion; or whether the *onus* rests on Overhex to prove the reasonableness thereof. While this question was left open in *FW Knowles (Pty) Ltd v Cash-In (Pty) Ltd*,²² it appears to have been

²⁰ *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 (1) SA 704 (C) at 708.

²¹ *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* 1990 (3) SA 373 (C) at 383.

²² 1986 (4) SA 641 (C) at 650H.

answered in *Koumantakaris Group CC v Mystic River Investment 45 (Pty) Ltd*.²³ Without the benefit of counsels' submissions on this question of law, I will merely assume, but without definitively deciding, that the *onus* rests on Saambegin as the plaintiff.

[88] For purposes of the *arbitrio boni viri* standard, the exercise of a contractual discretion would be unreasonable if the impugned decision, when viewed through an objective lens, exceeds the bounds of what would be reasonable or equitable in the particular case.²⁴ A reasonable discretion entails an honest judgment arrived at fairly and in good faith. To determine whether these benchmarks are met, relevant considerations emerging from case law are: (i) the circumstances prevailing when the discretion was exercised;²⁵ (ii) the intention when the particular contract was concluded;²⁶ (iii) the agreed terms in the contract (for e.g., the criterion to be used when the discretion is exercised);²⁷ and (iv) whether the impugned decision is commercially rational.²⁸ I would add that consideration should also be given to whether any relevant consideration was overlooked in the process of exercising the discretion. The above list is not a *numerus clausus* for assessing a discretion's reasonableness.

[89] I find that Overhex did not exercise its discretion *arbitrio boni viri*. This finding is based on several grounds. First, Overhex's decision to reduce the agreed purchase price was aimed at offsetting Overhex's estimated loss of R622 960,04. When the ban on wine sales and exports was lifted, Overhex sold wine made with Saambegin's 2020 grapes at prices substantially lower than Overhex anticipated when Van Wyk prepared his projections during November 2019. There is nothing in the contract indicating that clause 3.2 was intended to insulate Overhex against losses incurred in the abnormal market conditions that prevailed in 2020 arising from the Covid-19 pandemic.

[90] In a supplementary note, Adv Du Toit conceded that if Overhex exercised its discretion under clause 3.2 for the purpose of passing a 'loss of *profit*' to Saambegin,

²³ 2007 (6) SA 404 (D) para 38.

²⁴ *Koumantakaris Group CC supra* para 50.

²⁵ *Ibid* para 39.

²⁶ *Ibid* para 39.

²⁷ *Ibid* para 49.

²⁸ *Ibid* para 42.

then that discretion would not be *arbitrio boni viri*. The distinction drawn between a loss of profit and an ordinary commercial (or business) loss is disingenuous.

[91] It is absurd to contend, as Adv Du Toit does, that Overhex's discretion would be unreasonable if it passed a loss of profit to Saambegin, but that the unreasonableness thereof would disappear if the loss passed is of a different kind. I hold that the nature of the loss passed is of no legal consequence when determining whether, viewed objectively, the discretion under clause 3.2 was exercised (un)reasonably.

[92] At any rate, Van Wyk's testimony is that the lockdown rules in 2020 caused Overhex to incur losses of sales and of profits. The prices of wines plummeted in the abnormal market conditions that followed the ban on wine sales and exports. Overhex sold its wine at substantially lower prices than it forecasted when Van Wyk negotiated grape prices for the 2020 harvest season. The profit losses were not of the kind referred to in para [47] above which Overhex was prepared to absorb. Its management decided to take steps to protect Overhex and its business interests. They decided that Overhex would pass its losses to suppliers, including Saambegin. The exercise of Overhex's discretion to achieve that goal was, in my view, unreasonable in this case.

[93] A second reason for my view that Overhex's discretion was exercised unreasonably also relates to its use of clause 3.2 for a purpose and in a manner inconsistent with the parties' intention. Overhex is empowered to unilaterally adjust the agreed price for grapes. This is a significant power that may not be misused. Moreover, Overhex must satisfy the agreed criteria for the proper exercise of its discretion.

[94] Overhex exercised its discretion to protect itself against losses flowing from the trading restrictions that were imposed during March 2020 due to Covid-19. See paras [55] to [56], and [60] above. Overhex did not exercise its discretion to counter 'annual fluctuating market trends' and 'in line with market trends'. These are stipulations expressly recorded in clause 3.2. When viewed objectively, the agreed price was adjusted in line with Overhex's losses and its projected break-even point. Doing so is unreasonable. In my view, it is a misuse of the enormous power

conferred by clause 3.2. As such, it does not rise to the legal standard of a reasonable, honest judgment.

[95] Since Overhex's management was focused on offsetting the losses suffered by Overhex, Van Wyk's attention, at material times during the price adjustment process, was on Overhex's internal data of its own wine sales. Consequently, no attention was given to external markers (i.e., indicators) of market trends prevailing at the relevant time. Overhex's conduct in this regard does not accord with the stipulation in clause 3.2 that a price adjustment must be effected 'in line with market trends'. On this basis too, I find that Overhex's discretion was not exercised *arbitrio boni viri*.

[96] In dealing with the requirement under clause 3.2 of consideration to market trends, Adv Du Toit argued that Overhex's sales figures are representative of the general market trends because, so he reasoned, Overhex was involved in the wine industry for many years and traded with regular buyers of bulk wine, both locally and internationally. I disagree. Overhex's internal sales data is self-serving information.

[97] Clause 3.2 imbued Overhex with significant power to unilaterally adjust a key aspect of the 2019 agreement and one which was important to Saambegin: the agreed price. Therefore, when interpreting 'market trends' and 'fluctuating market trends' in the context of clause 3.2, I hold that it was never intended that Overhex's records would be reflective or determinative of trends in the wine market, nor of fluctuations in those trends for any purpose arising under clause 3.2. A contrary interpretation is unmoored from the text and structure used in the design of clause 3.2.

[98] Moreover, an objective assessment of reasonableness in relation to the discretion exercised by Overhex must, of necessity, include evidence of the trends in the broader wine industry at the relevant time. Those trends are reflected in sources of information that are independent of, and external to, Overhex's own sales data.

[99] While Overhex's internal sales records may serve as evidence that, for e.g., negative trends in the marketplace were mirrored in its sales figures at a particular time, I hold that Overhex's sales data does not, in and of itself, constitute objective evidence of the broader market trends; nor did the parties intend that Overhex's own

sales figures would serve that function. In these circumstances, the reliance on Overhex's internal sales data to the exclusion of any external data of the prevailing market trends, both locally and internationally, rendered the discretion exercised by Overhex, in my view, as not satisfying the standard of *arbitrio boni viri*.

[100] A final reason militating against a finding that Overhex exercised its discretion reasonably lies in its failure to give any consideration to the Fairtrade provisions in the 2019 agreement, read with clause 2 of the 2016 agreement (and annexure D thereto). Overhex failed to give Saambegin any benefit in the price adjustment calculation for sales before and after 1 October 2021 that occurred as part of the Fairtrade scheme. On this basis too, I find that Overhex did not exercise its discretion *arbitrio boni viri*.

[101] As regards Fairtrade, the 2019 agreement expressly stipulated as follows:

‘Payment terms: Total grapes must comply with Fairtrade standards and be Fairtrade certified as a whole. If not Fairtrade certified, other terms will apply.

...

Fairtrade: Overhex will actively strive to sell as much grapes/wine as possible as Fairtrade.’

[102] The common cause evidence is that there is a financial benefit to Saambegin being registered for Fairtrade and having wine produced with its grapes that are sold as part of Fairtrade. Neethling explained that the reward for Saambegin is that, in addition to payment for the cost of its grapes, Overhex is contractually obliged to pay Saambegin a premium in accordance with the Fairtrade International Premium Table.

[103] Saambegin's 2020 grapes met the Fairtrade standards. As a result, Neethling testified that Overhex paid Saambegin the premiums it earned on wine sold as part of Fairtrade before the price adjustment was effected. However, in the price adjustment calculation, no allowance was made for premiums that Saambegin would earn when Overhex sold wine produced with Saambegin's 2020 grapes that were still unsold when the price adjustment was calculated. The failure to make such allowance represents a financial saving in Overhex's hands and a further revenue loss to Saambegin. The effect of all this is both unfair and unreasonable.

[104] Van Wyk failed to explain his failure to make allowance for any Fairtrade premiums. Based on Overhex's case at the trial, it was obliged to allow for an estimate of Fairtrade premiums that it may well have become contractually obliged to pay Saambegin on wine sales that occurred after 1 October 2021. On this basis too, I conclude that Overhex's discretion was, on its case, not exercised *arbitrio boni viri*.

[105] Although Neethling accepted that the price adjustment clause applied to wine produced by Overhex with Saambegin's 2020 grapes that were not sold under the Fairtrade scheme, he objected to Overhex applying clause 3.2 to all Fairtrade grapes purchased. For the reasons adduced here, I find that Neethling's objection is merited.

[106] Properly interpreted, the contract was to the effect that all wine sold as part of Fairtrade, whether prior to or after 1 October 2021, was not subject to price adjustment.

[107] Price adjustments were limited to the purchase price of grapes determined in terms of clause 3.1. Clause 3.2 did not apply to the purchase of grapes regulated by clause 2 of the 2016 agreement. The subject of the latter provision is indicated in its heading, namely, 'Fairtrade'. Clause 2 in its entirety read: 'See Annexure "D"'.

[108] Clause 3 of annexure D regulated the determination of the price for Saambegin's grapes that fell within the Fairtrade scheme. Clause 3 of annexure D was similar in material respects to clause 3 of the 2016 agreement. There was one material difference: clause 3 of annexure D did not include a price adjustment clause. Put differently, properly understood in its entirety, the 2016 agreement did not confer on Overhex any discretion to effect a price adjustment for grapes used by Overhex to produce wine that it later sold as part of the Fairtrade scheme.

[109] I hold that when Overhex exercised its discretion under clause 3.2, it was contractually obliged to exclude from the price adjustment all grapes purchased in the 2020 harvest season that were sold as part of Fairtrade. Overhex was contractually obliged to pay the agreed price thereon in full. Under our law, Overhex is obliged to honour the contractual obligations entered into by it freely and

voluntarily. *Pact sunt servanda*, a ‘profoundly moral principle on which the coherence of any society lies’.²⁹

[110] Overhex treated all Saambegin’s 2020 grapes as being subject to price adjustment. See paras [58] to [59] above. In doing so, Overhex acted contrary to the parties’ agreed contract terms. When this conduct is viewed objectively, it is evident that Overhex exercised its discretion in a manner that did not satisfy the standard of *arbitrio boni viri*.

[111] As concerns wine produced with Saambegin’s 2020 grapes that were unsold when the discretion was exercised, a reasonable discretion necessitated that Overhex should have estimated a fair percentage of grapes which would, after 1 October 2021, be sold in Fairtrade. It was contractually obliged to strive to sell wine in Fairtrade.

[112] In these circumstances, Overhex should have made provision for a further exclusion from the price adjustment. It did not do so. Overhex treated all Saambegin’s 2020 grapes as if none were subject to exclusion under annexure D. On this basis too, I find that Overhex did not exercise its discretion *arbitrio boni viri*.

[113] I reiterate that, for reasons explained in paras [105] to [111] above, Overhex had no discretion to adjust the price agreed for classes of grapes used to produce wine that was later sold in the Fairtrade scheme. They are excluded from clause 3.2. As a result of this fact, it was necessary for Overhex to lead evidence on precisely which classes of grapes delivered in the 2020 harvest season were used to produce wine that was sold in the Fairtrade scheme, and the tonnage thereof. That information fell squarely and exclusively within Overhex’s knowledge. It did not lead that evidence.

[114] Overhex needed to establish what amount of the purchase price in the 2019 agreement was regulated by clause 2 of the 2016 agreement (read with clause 3.1 of annexure D thereof) and, thus, excluded from the price adjustment mechanism in clause 3.2 of the main agreement. That evidence would enable a court to properly

²⁹ *Beadica 231 CC and Others v Trustees of the Oregon Trust and Others* 2020 (5) SA 247 (CC) para 35.

adjudicate Overhex's defence by, inter alia, determining what amount of the agreed price was regulated by clause 3.1 and, therefore, subject to possible adjustment.

[115] Without clarity about the quantity and value of the grapes that were subject to price adjustment and those which were not, Overhex's defence cannot succeed. This basis for my dismissal of its defence is separate from my finding that Overhex's defence cannot succeed because its discretion was not exercised *arbitrio boni viri*.

Assessment of the price adjustment timing argument

[116] Even if I am wrong in my findings expressed under the previous subheading, I am satisfied that, for the reasons advanced in this part, Overhex's defence must fail. Concomitantly, judgment should be granted in Saambegin's favour.

[117] Clause 3.2 did not fix a time by which the discretion was to be exercised. Did this mean that Overhex was free to exercise its discretion at any time? In my view, 'no'. When a contracting party is conferred discretion to unilaterally adjust an agreed price, then time is of the essence for the exercise of that power. An interpretation of clause 3.2 that permits a price adjustment to occur at any time of Overhex's choosing would create an unhealthy dose of uncertainty in the parties' commercial relationship about the price due. It would also create obstacles to Saambegin's ability to enforce payment. These are unbusiness-like results that could not have been intended.

[118] If the prerequisites are met for the legitimate use of clause 3.2, then it is an implied term that the discretion be exercised within a reasonable time. Determining what constitutes a reasonable time is a fact-intensive enquiry. Relevant considerations would include the nature and terms of the parties' contract; the circumstances of the case; any delay in the exercise of the discretion and, if so, its reasonableness.

[119] Overhex is empowered to adjust an agreed price 'during and after a harvest season'. The architects of clause 3.2 failed to clarify the meaning of 'harvest season' within the design of this provision. As such, 'harvest season' requires interpretation.

[120] Clause 1 of the 2016 agreement recorded its duration to be 'from and including the 2016 grape harvest season up to and including the 2021 grape harvest

season'. Clause 4 provided that payment by Overhex is 'for quality wine delivered in respect of each separate harvest season', of which 'the first instalment is payable before/on 7 April of the relevant harvest year and the 13 (thirteen) subsequent instalments before/on the 7th day of each following month'. Clause 5.3 stipulated that '[d]elivery of the grapes shall take place during the grape harvest season'. Clause 8.1 obliged Saambegin to deliver 'an IPW certificate before the start of the harvest'.

[121] When the term 'harvest season' is understood in the contexts of clauses 1, 3.2, 4, 5.3, 8.1, and other provisions in the 2016 agreement read as a whole, then it is clear that a coherent meaning of this term entails a finite period annually when Saambegin harvested the grapes cultivated by it for a particular season.³⁰

[122] The undisputed evidence is that Saambegin's harvest season for 2020 ran from 20 January 2020 to 10 March 2020. For the dispute before me, this period comprised the 'harvest season' for purposes of the price adjustment provision in clause 3.2.

[123] Consequently, the agreed price determined under clause 3.1 could be adjusted 'during and after' the period from 20 January 2020 to 10 March 2020, but only after due process was followed, namely, after proper consultation envisaged by clause 3.2.

[124] Clause 3.2 allowed Overhex to adjust the agreed contract price in circumstances where Overhex had been 'exposed to the annual fluctuating market trends' that 'play a significant role in contracts with its buyers'. Common sense dictates that, for this purpose, the parties intended to allow Overhex adequate time to monitor 'the annual fluctuating market trends' and then, if necessary, to react through a price adjustment 'in line with market trends' prevailing at the relevant time.

[125] A critical question here is this: how much time did the parties intend to give Overhex for monitoring 'market trends' and to exercise its discretion under clause 3.2?

³⁰ The interpretation accorded to 'harvest season' here aligns with the trite interpretive rule that the same word or term used in a contract or other instrument bears the same meaning throughout, unless its context indicates differently. See *3M South Africa (Pty) Ltd v CSARS and Another* [2010] 3 All SA 361 (SCA) para 25.

[126] When the expression ‘the annual fluctuating market trends’ is understood within its context in clause 3.2, and having regard to the purpose of clause 3.2 (see para [75] above), then it is evident that the parties intended the discretion to be exercised in response to the wine market trends that emerge in relation to a twelve-month period.

[127] Logic dictates that Overhex can only react to ‘annual fluctuating market trends’ if it is able to monitor the direction of the market trends over an affected 12-month window. This interpretation enables a price adjustment ‘in line with’ the market trends that precipitated the exercise of Overhex’s discretion in the first place.

[128] Considering the terms and context of the parties’ contract and their respective business operations, I opine that the 12-month monitoring period started when the 2020 harvest season commenced on 20 January 2020. It ended 12 months later.

[129] Overhex did not need to wait 12 months before acting under clause 3.2. It could act thereunder once the trends in the market became evident. Van Wyk testified that this is what happened. However, Overhex was obliged to follow due process. It needed to first engage in proper consultation with Saambegin. Consultation indeed occurred.

[130] The consultation process was aimed at achieving consensus. Once it ended, Overhex was obliged to decide, within a reasonable time, whether to exercise its discretion, or not. If yes, then it was obliged to act within a reasonable time.

[131] Three questions now arise: (i) when did the consultation process end? (ii) when did Overhex decide to exercise its discretion under clause 3.2? and (iii) did the exercise of that discretion occur within a reasonable timeframe after the end of the consultation process? I now turn my attention to answering these questions of fact.

[132] In mid-2020, Overhex was satisfied that it had enough information to undertake the processes intended by clause 3.2. On 3 September 2020, Overhex consulted with Saambegin. Overhex proposed a 20% price adjustment. On 16 December 2020, it revised that proposal downwards to 17%. Further consultations took place on 22 and 25 January 2021. Saambegin rejected both proposals. See paras [30] to [36] above.

[133] Overhex initially invoked clause 10 of the 2016 agreement and declared that its duty to pay Saambegin was suspended. During the consultation meetings spanning from mid-2020 to 25 January 2021, Overhex proposed a price reduction under clause 3.2. Overhex's aim was to offset the losses it sustained due to the ban on wine sales and exports, which ban had earlier prompted Overhex's invocation of clause 10.

[134] During Neethling's discussions with Van Wyk up to and including 25 January 2021, he made Saambegin's position abundantly clear: under no circumstance would its directors agree to a price reduction, no matter what the percentage. The directors of Saambegin were emphatic in their rejection of the very idea of a price reduction.

[135] As at 25 January 2021, Overhex and Saambegin were manifestly at an impasse. Unless Overhex capitulated, the only off-ramp was a unilateral imposition of a price reduction. For inexplicable reasons, Overhex failed to act. It delayed exercising its discretion under clause 3.2. It did so for an unreasonable period of time.

[136] After 25 January 2021, no consultation took place. On 1 October 2021, Overhex exercised its discretion. It made a final payment to Saambegin. These facts were communicated to Saambegin in an email sent on 1 October. The context and timing of Overhex's decision are important when evaluating if it acted in a reasonable time.

[137] In August 2021, Van Wyk sent an email in which he promised that Overhex would settle its debt by the end of August.³¹ Since there was no further discussion after 25 January 2021 on the price adjustment issue and Van Wyk's email did not mention any specific sum, Neethling expected Overhex would pay the full outstanding balance. However, Overhex only paid the sum of R214 384,35. See para [37] above.

[138] Neethling became aware of this payment during September 2021. Dissatisfied with the situation in relation to Overhex's substantial arrear account for 2020,

³¹ Van Wyk wrote: 'Ons betaal einde Augustus die laaste paalement tov die 2020 oes.'

Neethling requested a meeting to discuss Overhex's arrears. A meeting was arranged for 22 September 2021 at the farm Saamstaan. See para [38] above.

[139] Importantly, Neethling requested Gerhard's presence at the meeting. He is a director and co-owner of Overhex with whom Neethling had been doing business since 2006. Neethling hoped that he could bring the issue of Overhex's arrear account to an end by dealing directly with Gerhard. Neethling's hopes were soon dashed.

[140] Within minutes of the meeting having commenced, Gerhard walked out. Based on Neethling and Van Wyk's description, it is not an overstatement to say that Gerhard stormed out. Van Wyk left because Gerhard exited. Van Wyk explained that Gerhard refused to engage with Saambegin. Gerhard was angered by Neethling's statement upfront that Saambegin was owed the full price and expected full payment. Gerhard told Van Wyk that the trip to Saamstaan was a waste of his time. Against the backdrop of Gerhard's anger and attitude at that time, Overhex's next move is unsurprising.

[141] During his testimony, I understood Van Wyk to suggest that the meeting on 22 September 2021 was part of the consultation process envisaged by clause 3.2. If I understood him correctly on this aspect, then I record that the evidence does not support his suggestion. I will now briefly outline my reasons for this view.

[142] First, there is no link in time and context between the parties' engagements up to 25 January 2021 on the one hand, and the meeting on 22 September 2021 on the other. Whereas the engagement in January 2021 was part of the consultative process that was ongoing from, at least, September 2020 through to December 2020, the meeting on 22 September 2021 was isolated from any engagement process that occurred before then. I find that there is no evidence that establishes a correlation between the parties' engagements up to 25 January 2021 and the intended engagement on 22 September 2021. Adv Du Toit also did not contend otherwise.

[143] Secondly, the purpose of the parties' engagements up to 25 January 2021, as recorded in Van Wyk's emails sent on and before that date, is different to the

purpose of the meeting convened on 22 September 2021. See para [138] above. Whereas the engagements in January 2021 was part of a broader consultative process in which Saambegin and Overhex discussed the latter's proposal for a price adjustment, the meeting on 22 September 2021 had a purpose unrelated to the aims of clause 3.2.

[144] Thirdly, aligned with para [76] above, consultation within the framework of due process in a contractual or other setting is not a tick-box exercise in which a party merely goes through the motions (as it were). Due process requires meaningful engagement. For a meeting to bear the hallmarks of a proper consultation in a wider consultative process aimed at reaching consensus on any matter of mutual interest and/or concern, as dealt with in clause 3.2, attendees from the protagonists must afford each other the necessary time and space to express themselves fully and freely on any aspect requiring ventilation in that process. Only in this way can constructive engagement take place. If one party denies the other an opportunity to be heard, then the former has not engaged in good faith, a key value that underpins our contract law. In such event, due process was not followed. Without meaningful engagement, a proper meeting for 'consultation' purposes has not occurred.

[145] Owing to Gerhard and Van Wyk aborting the meeting on 22 September 2021 before any discussions could take place, the meeting on that day cannot qualify as a consultation for purposes of the consultative process contemplated by clause 3.2.

[146] If Overhex truly regarded the meeting on 22 September 2021 as part of the consultation process that Overhex was obliged to complete before it could validly exercise the discretionary power in clause 3.2, then I hold that Overhex's discretion was exercised prematurely on 1 October 2021 and it cannot have legal force. This is because Overhex aborted the meeting on 22 September. Flowing from that objective fact, the consultation process had not been completed. The meeting should have been reconvened to allow Saambegin a fair opportunity to be heard. That did not happen.

[147] In para [131] above, a trinity of questions are formulated that require answering for purposes of determining whether the exercise of Overhex's discretion on 1 October 2021 occurred within a reasonable period as intended by the parties.

For reasons that are evident from paras [132] to [145] above, I hold that the consultation process ended on 25 January 2021. On 1 October 2021, Overhex decided to exercise its discretion under clause 3.2. In the circumstances of this case, Overhex failed to exercise its discretion within a reasonable period after 25 January 2021. Consequently, I hold that the exercise of Overhex's discretion cannot validly bring about a price adjustment.

[148] My reasons for holding that Overhex's delay in the exercise of its discretion was unreasonable are set forth in the succeeding paragraphs.

[149] First, the delay from 25 January 2021 until 1 October 2021 is not insubstantial. It was almost 8 months. Some justification for the delay, and a plausible one at that, was required. Van Wyk offered none. Also, I can find no justification for Overhex's decision to delay effecting a price adjustment. The consultations that took place by 25 January 2021 was extensive. It yielded no fruit (speaking proverbially) and there was no reason to believe that Saambegin would acquiesce to a price reduction later.

[150] By 25 January 2021, Van Wyk knew Saambegin's position on the issue of a price adjustment. He also knew, or should reasonably have known, that its position was inflexible. Despite this knowledge and that an impasse had been reached after extensive consultations up to that time, Overhex elected not to effect a price change.

[151] Secondly, by 25 January 2021, the reduced wine selling prices and its impact on Overhex's business that precipitated Overhex's decision to invoke clause 3.2 and commence the consultation process were all known. Van Wyk used his knowledge and experience of the wine market and Overhex's internal sales data to formulate the initial price adjustment proposal of 20%. That proposal was made in September 2020. Later, in December 2020, after observing some improvement in Overhex's wine selling prices, Overhex reduced its proposed price adjustment to 17%. On 1 October 2021, Overhex exercised its discretion under the aegis of clause 3.2 and imposed the 17% price adjustment. No plausible reason exists, and none was given, for the delay until 1 October 2021 to effect the same price adjustment that was proposed on 16 December 2020 and that was the subject of engagement again in mid-January 2021.

[152] Thirdly, on the facts before me, ‘the more natural or plausible conclusion’³² is that the cause, or the proximate cause, for Overhex exercising its discretion at the time when it did is the fallout of the aborted meeting on 22 September 2021. It led to Gerhard’s anger and change of attitude to Saambegin. It can hardly be coincidence that Overhex imposed a price reduction shortly afterwards.

[153] Fourthly, the timing of the price adjustment is prejudicial to Saambegin and its interests. In litigation, prejudice is usually a two-way street. Therefore, in general, prejudice is judicially considered from the vantage point of both sides to a dispute. A fair balance is then sought to be struck between competing interests. However, when considering prejudice as part of evaluating the reasonableness or not of a delay in exercising a contractual discretion, prejudice takes the form of considering the impact of a delay on an affected contracting party.

[154] When Overhex failed to exercise its discretion after more than a year had lapsed from the end of the trading ban during lockdown and after a series of consultations spanning from mid-2020 to January 2021, Saambegin was entitled to accept, as it did, that Overhex elected not to invoke a price reduction. Saambegin appears to have been influenced in that direction also by the fact that, on 22 January 2021, it released Overhex from the latter’s obligation to purchase grapes for the 2021 harvest season. Overhex’s release was a concession agreed to by Saambegin during a consultation meeting that formed part of the consultative process under clause 3.2.

[155] By 7 March 2021, Saambegin’s right to the full purchase price accrued. In the circumstances that prevailed at that time, Saambegin was entitled to accept, as it did, that Overhex was liable for the full agreed price contemplated by clause 3.1.

[156] In sum, viewed objectively, I find that Overhex’s decision to exercise its discretion under clause 3.2 at the time when it did was unreasonable. The exercise of its discretion did not occur within a reasonable time. The delay in the exercise of its discretion was, in the circumstances of this case, unreasonable. Consequently, Overhex’s defence rooted in clause 3.2 is bad as a matter of fact. In the premises, Overhex’s defence must fail and Saambegin’s action should succeed.

³² *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159D.

Assessing whether the prerequisites for clause 3.2's operation were met

[157] My findings under the previous subheadings are predicated on the assumption that clause 3.2 was applicable in the context of this case. Under this subheading, I deal with Adv Whitaker's argument that clause 3.2 was not triggered by the conditions in the wine market flowing from the lockdown rules that were implemented in March 2020 in response to the Covid-19 pandemic.

[158] For the reasons advanced in this part, I conclude that the circumstances in which Overhex found itself during 2020 are not covered by clause 3.2 of the 2016 agreement. Therefore, I hold that Overhex's defence rooted in clause 3.2 is misplaced.

[159] Although not strictly necessary, it bears mention that the situation which arose in 2020 appears to have been a 'force majeure' event within the meaning of this term as defined in clause 10 of the 2016 agreement.³³ Overhex expressed the same view. It communicated that message to Saambegin, both orally and in writing. See paras [21], [24] and [50] above. At the trial, Van Wyk testified that the situation in 2020 was a force majeure event. As this part of my judgment will also demonstrate, the net of clause 3.2 is not cast wide enough to encompass events of that kind, if it applied here.

[160] The question that begs asking is: what type of situations fall within the remit of clause 3.2? In other words, what is the intended scope of its operation? In that regard, the purpose and language of clause 3.2, as explained in para [75] above, are relevant. I will not repeat the contents of para [75], save to say that Saambegin agreed that Overhex may effect a price reduction to counter 'the annual fluctuating market trends'.

[161] The language used in clause 3.2 makes plain that the mechanism created therein is not available to counter every fluctuation in the wine market which adversely affects Overhex. Clause 3.2 is intended to apply much more narrowly.

[162] When the situation used by Overhex as its reason for effecting a price reduction is shorn of all its frills, then it is evident that the situation concerned did not

³³ Clause 10 is quoted in footnote 2 above.

fall into the agreed type that would entitle Overhex to enjoy the benefits of clause 3.2. The factual basis for this finding is explained in the ensuing paragraphs.

[163] In contracts of purchase and sale, an agreed price for a commodity is not only an essential term for the coming into existence of a valid contract, but it is a vital provision for sellers and buyers alike. As in most other instances, Saambegin's interest in the transaction with Overhex is purely financial in nature.

[164] Neethling pointed out that once Saambegin delivered the grapes, it had no further involvement in how they were used, or sold as wine. After delivery, Saambegin's sole interest was on receiving payment. Therein lay its profits. When viewed in this light, and considering the commercial context in which clause 3.2 functioned, the narrow remit of clause 3.2's net is logical and makes business sense.

[165] The nub of Overhex's case for its reliance on clause 3.2 boils down to this: in March 2020, its business, and that of all wine producers and retailers nationally, was shut down in a nationwide lockdown that was imposed to prevent the spread of Covid-19 . By law, trading in wine was prohibited. The ban on wine sales and exports brought Overhex's business, and the domestic wine industry generally, to a standstill. The ban interrupted Overhex's business. That interruption had a domino-effect for Overhex, namely, losses of sales, income, and profits; poor cash flow; high wine stocks on hand; and reduced wine prices. Although the ban was only of a limited duration in 2020, its effects cascaded into the rest of 2020 and into 2021. To counter the immediate effect of the trading ban, early in April 2020, Overhex declared the situation to be a force majeure. Overhex then enforced the contractual term dealing with force majeure. It suspended payment to all its grape suppliers. Sometime later, the extent of Overhex's losses became clearer. Its management decided to curtail the losses by enforcing the price adjustment clause in its standard form contract. All its suppliers agreed to a price reduction, except Saambegin. It refused, despite extensive consultation. On 1 October 2021, being more than a year after the ban on wine sales and exports was lifted, Overhex imposed a 17% price reduction amounting to R622 960,04.

[166] A survey of judgments reported on Saffli and in our law reports reveals that this dispute is not an isolated case having its origins in the trading ban imposed during the so-called 'hard' lockdown of March 2020. A distinguishing feature in casu,

however, is that Overhex seeks to recoup its losses by passing them onto a supplier. In other cases, businesses recouped, or tried to recoup, their losses from insurers. See, for e.g., *Café Chameleon CC v Guardrisk Insurance Co Ltd* [2020] 4 All SA 41 (WCC).

[167] Although Overhex had insurance for certain insurable risks (see para [58] above), it did not have insurance for business interruption. This is a logical conclusion. In para [53] above, I quoted Van Wyk's email sent on 25 March 2020. In that first salvo after the trading ban was announced, Van Wyk recorded that Overhex will implement a plan that would 'insure' its business against the economic impact of Covid-19.

[168] After considering the minutiae of the trial evidence and relevant documents in the trial bundle, the conclusion is inescapable that Overhex used its price adjustment clause as an insurance-like mechanism to recover losses suffered due to the trading ban that interrupted its business for a considerable period during 2020. There would, in principle, be nothing untoward in doing so if, in the exercise of their contractual freedom, Overhex and Saambegin contracted along those lines. They did not.³⁴

[169] Having regard to the language, purpose and context of clause 3.2, this provision is intended to provide Overhex with protection against the impact of adverse fluctuations in the prices of wine, but only so far as the fluctuations occurred due to ordinary, normal market forces. For this reason, clause 3.2 expressly referred to Overhex being 'continuously exposed to the annual fluctuating market trends'.

[170] The ban on wine sales and exports linked to Covid-19 is not a regular event. That ban was out of the ordinary. It interrupted free trade. The market conditions that flowed from that interruption was unusual. In the wake of the ban, Overhex itself described the conditions in the wine market as 'abnormal'. This is an appropriate label. It reinforces my view that the degree of fluctuation in wine prices was highly unusual.

[171] The abnormally low wine prices in the unusual market conditions that prevailed in 2020 were caused by a trading ban in extraordinary circumstances that was beyond the control of stakeholders and players in the wine industry (such as,

³⁴ *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] (3) All SA 295 (A) para 1.

wine producers). The market trend in 2020 for wine prices was not the result of the ordinary or usual market forces that influenced the annual fluctuation of prices. Accordingly, the market conditions did not fit the mould of the 'continuous', 'annual' market fluctuating trend contemplated by clause 3.2. These words have an important gravitational pull when interpreting clause 3.2 in its proper context and for its purpose.

[172] It is a settled principle that courts interpret contracts and do not make agreements for parties that they have not made for themselves. Therefore, courts do not transform or supplement contracts in a way contrary to their provisions.³⁵

[173] The situation described in paras [170] to [171] above is unmoored from the text and structure with which clause 3.2 was designed.³⁶ Consequently, an interpretation of clause 3.2 that renders its provisions applicable to such a situation would be tantamount to this Court engaging in the impermissible practice of divining an agreement for Saambegin and Overhex for which they had not bargained.

[174] The undisputed evidence of Neethling is that, from 2006 to 2019, Overhex never sought to effect any price adjustment. This is not because there were no price fluctuations during those years that occurred after Overhex agreed to a purchase price for grapes. Price fluctuations were experienced in the wine market. That is a natural occurrence on an annual basis, as Saambegin and Overhex recorded in clause 3.2.

[175] It is reasonable to infer that the usual, annual market fluctuations in the years from 2006 to 2019 did not swing wine prices so drastically that they caused financial pain which necessitated Overhex to effect a price adjustment. That begs the question: what made 2020 different from all the other years? The answer lies in the trading ban and the abnormal market conditions that followed from it (such as, the downward spiral in wine prices that resulted in significant financial losses for Overhex).

³⁵ *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO* 2006 (3) SA 488 (SCA) para 9.

³⁶ In *Coral Lagoon Investments supra* para 51, the SCA held that '[t]he proposition that context is everything is not a license to contend for meanings unmoored in the text and its structure'.

[176] For all the foregoing reasons, I hold that it was not open for Overhex to use clause 3.2 of the 2016 agreement in the circumstances that prevailed in 2020. Therefore, its defence must fail and it should be ordered to pay the undisputed balance of the agreed price for grapes purchased from Saambegin in the 2020 harvest season.

Costs

[177] Both Adv Whitaker and Adv Du Toit submitted that costs should be awarded to the successful litigant and on a party-and-party basis, with counsel's fees to be awarded on scale B. I agree. I find no sound, rational basis for not doing so in casu.

Order

[178] In the result, the following orders are made:

- (a) The Plaintiffs' claim succeeds with costs;
- (b) The Defendant shall pay to the Plaintiffs jointly the sum of R622 960,04 together with interest thereon at the prescribed legal rate computed from 7 March 2021 until the date of final payment, both days included
- (c) The Defendant shall pay the Plaintiffs' costs on a party and party scale, such costs to include counsel's fees on scale B.

F. MOOSA

ACTING JUDGE OF THE HIGH COURT

Appearances

For Plaintiffs: J Whitaker

(First to Fourth Plaintiffs)

Instructed by: TSP Attorneys Inc (N van der Merwe)

For Defendant: HL Du Toit

Instructed by: Van Der Spuy Cape Town (CH van Breda)