THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Reportable/ **Not Reportable**

Case no: 1745/2018

In the matter between:

PETRUS JOHANNES CRONJE 1st Plaintiff

AMCRON TRADING & LOGISTICS (PTY) LTD 2nd Plaintiff

and

KURU EARTH LOGISTICS CC Defendant

Neutral citation: *PJ Cronje and Another v Kuru Earth Logistics CC* (1745/2018) 27 February 2026.

Coram: Lever J.

Heard: 19 June 2024.

Delivered: 27 February 2026.

Summary: Contract – Enforcement – Specific performance – Agreement subject to suspensive condition – Suspensive condition not fulfilled – Claim unsuccessful.

ORDER

1. The plaintiffs' claim A and its alternative claim B are dismissed.

2. The first and second plaintiffs are jointly and severally liable for the defendant's taxed or agreed costs. The one paying the other to be absolved. Such costs are to be taxed on scale B.

JUDGMENT

Lever J

[1] The plaintiffs in this action instituted a claim against the defendant wherein they claimed for certain relief in favour of the second plaintiff. The primary relief, Claim A, was for the defendant to render to the second plaintiff an account supported by the relevant documentation for all transport work the defendant carried out for the Sedibeng mine ("the mine"), together with an order to debate such account and certain ancillary relief. Claim B, is claimed in the alternative to Claim A, if this Court fails to find the defendant liable to the second plaintiff for the relief claimed or any part thereof, then and in that event, the first plaintiff claims identical relief to that claimed under Claim A to be granted to the first plaintiff under Claim B.

[2] This claim arises from an agreement entered into on 15 March 2017 between one Nel representing the defendant and one Cronje, the first plaintiff, who also represented a company yet to be formed at the time, being the second plaintiff. The agreement is alleged by the plaintiffs to have been partly written and partly oral. The written portion of the said agreement is contained in a letter annexed to the Particulars of Claim as annexure "A". The said letter is dated 14 March 2017, but the parties agree that they signed it on 15 March 2017.

[3] The subject of this agreement was for the parties to pursue the possibility of entering into a contract with the mine to provide the mine with transport over certain routes for the mine's iron ore.

[4] The substantive part of the said letter reads as follows:

"Vir Aandag: Pieter Cronje

Insake: Sedibeng Iron Ore/Wentzel Vervoer

Geagte Pieter

Ek som die verloop van hierdie transaksie op:

1. Ek Jan Nel die ondergetekene kry die trokke by ene Wentzel Long Haul.
2. Jy Pieter Cronje kry die werk by Sedibeng Iron Ore.
3. Wentzel Vervoer kontrakteur direk onder Sedibeng Iron Ore of Kuru Earth Logistic kontrakteur direk by Sedibeng Iron Ore.
4. Kuru Earth Logistic gaan 'n kommissie van 'n aard bv R1.00 per ton of meer.
5. Kuru Earth Logistic faktureer vir Wentzel Long Haul vir die kommissie waarna Kuru Earth Logistic 50% van die kommissie deel met jou Pieter Cronje. Ook kan dit wees dat Kuru Earth Logistic net Wentzel Long Haul se transport koste moet uitbetaal.
6. Jy Pieter Cronje kom so vining moontlik by 'n auditeur wat vir jou 'n maatskappy of trust kan oprig.

7. Jou 50% kommissie is dan betaalbaar aan jou nuwe maatskappy/trust of aan jou auditeur of aan jou. Maar dit moet so vinig moontlik geskied anders word jy in jou privaathoedanigheid belas met inkomste belasting ens.
8. Verdermeer sou ek afsterwe dan neem Pieter Cronje die transaksie oor met Wentzel Long Haul en betaal weer 50% van die wins of kommissie uit aan Kuru Earth Logistic.
9. Sou die kontrak jaarliks hersien word kan nie ek of Pieter Cronje uitgesny word nie. Op voorwaarde ons gebruik nie Wentzel Long Haul en raak dan van hom ontslae nie.
10. 'n Aanhegsel aan hierdie document of dan aanhegsels moet insluit:
    10.1. Aanhegsel A: Skriftelike ooreenkoms tussen Kuru Earth Logistic en Wentzel Long Haul ten opsigte van die kommissie wat gevorder moet word asook die Rand waarde per ton.
    10.2. Aanhegsel C: Afskrif van jou instruksie aangaande jou 50% van die kommissie.
    10.3. Aanhegsel D: Oprigtings dokumente van jou nume maatskappy of trust.

Daarna kan ander Aanhegsels ook aangeheg word om die transaksie so duidelik moontlik en transpirant te omskryf.

Na hierdie kontrak in plek kom moet beide ek en jy ons testament hersien om voorseining te maak vir hierdie kontrak.

Onder geen omstandighede is dit 'n vennotskap nie, maar juis 'n samewerkingsooreenkoms.

Hierdie skrywe is bindend en wettig.

U skriftelike Antwoord en verdere instruksies is te wagte."

(Provision is then made for the defendant to sign, which he did. Then the following clause appears:) "By die ondertekening van hierdie document verklaar ek dat ek toestem en dat ek skriftelik kennis gee indien ek veranderinge wil aanbring." (Provision was then made for the first plaintiff to sign, which he did.)

[5] The plaintiff did not plead the oral terms of the agreement *per se*, but pleaded *inter alia* that, the express, alternatively tacit, further alternatively implied terms of the agreement included the following:

"8.3 The First Plaintiff would introduce the Defendant and the proposed joint venture, involving First Plaintiff, to the management of Sedibeng in order to afford the Defendant the opportunity to tender for and or procure one or more contracts for the rendering of transport services to Sedibeng, for the benefit of the joint venture."

[6] The above quoted allegedly express, alternatively tacit or, further alternatively, implied term of the alleged agreement came closest to the evidence of Cronje on behalf of both plaintiffs as to what the oral term of the agreement entailed. According to the evidence of Cronje, the oral term of the agreement was that he would be responsible for introducing Nel, the defendant, and the joint venture to the mine management. This was so that the defendant could bid for transport work from the mine. Cronje further testified that he had no other duties or obligations to the joint venture other than that introduction.

[7] The defendant in the plea filed on its behalf denies the contention that there were any oral terms to the said agreement.

[8] It is important to set out how the defendant pleaded to paragraph 8.3 of the Particulars of Claim quoted above. The plea to the above quoted allegations reads as follows:

"**<u>AD PARAGRAPH 8.3 THEREOF:</u>**

6.1 The contents of this paragraph are denied as if each and every averment is specifically traversed.

6.2 The first plaintiff was obliged to do all the necessary steps to obtain a contract from Sedibeng, which entails actively assisting the defendant throughout the whole tender process and being actively involved until an agreement had been concluded with Sedibeng Iron Ore Mine."

[9] The written portion of the agreement contemplated a process for certain written annexures to be added to the agreement in certain circumstances. It also provided for a process to give written notice of a proposal to amend the agreement. The written agreement did not expressly exclude oral terms. This was also not a position taken by the defendant in the pleadings or in the trial. Accordingly, I will take this issue no further.

[10] Further, the Particulars of Claim provided that should a contract with the mine to provide transport be secured, the plaintiff would be entitled to payment of 50% of the gross commission and/or 50% of the gross profit. It is clear from the Particulars of Claim and annexure "A" thereof that on 15 March 2017, nobody knew the nature of the relationship that would eventually be created between the eventual provider of the trucks for the required transport and the mine. It is for this reason that the plaintiff claims either 50% of the gross commission or 50% of the gross profit.

[11] It follows from this that as at the 15th of March 2017, neither the plaintiffs nor the defendant knew precisely what they were dealing with. There were at least two main possibilities. Firstly, it would be a pure brokerage agreement if they could secure the work for Wentzel Long Haul (Wentzel) and if Wentzel contracted directly with the mine. Secondly, if the defendant contracted with the mine, it would be something different, more akin to running a transport company. The consequences that would flow from each of these respective possibilities would be markedly different, requiring significantly different management structures and input into the administration of both the transport and the agreement between Nel and Cronje.

[12] It is evident from the written agreement itself that the parties provided two mechanisms to cater for the different requirements that would flow from the different scenarios outlined above. Firstly, the written agreement made provision for 'annexures' (presumably agreed addenda) to be added to the agreement. Secondly, written notice of any desired or required amendment to the said written agreement.

[13] Clause 9 of annexure "A" to the Particulars of Claim is somewhat ambiguous regarding the special protection such clause provided applying to Wentzel. However, both Cronje (first plaintiff) and Nel (for the defendant) in their respective evidence agreed that the special protection afforded by clause 9 of the said agreement applied to Wentzel as well. That being so, a brokerage agreement was clearly what they envisaged and desired as a first option, although they acknowledged that there were other possibilities.

[14] The defendant admitted in its plea that an agreement was entered into on 15 March 2017 between the first plaintiff and Nel, representing the defendant. The defence raised in the plea was that, whilst there was an agreement, the joint venture or 'samewerkingsooreenkoms' would only come into existence if certain preconditions were met. In other words, the defendant relied upon a suspensive condition that needed to be fulfilled before the joint venture or 'samewerkingsooreenkoms' came into existence.

[15] It was the defendant's case that at least one such precondition had not been met. The suspensive condition that the defendant relied upon in its plea was that the first plaintiff was obliged, in terms of their agreement, to obtain the contemplated work from the mine. Apart from the introduction, the

defendant's position was that the first plaintiff took no other meaningful steps to ensure that the joint venture got the work. It is the defendant's pleaded position that, as a result of the first plaintiff's failure to secure the work from the mine, the joint venture itself never came into being.

[16] As it happens, the joint venture did not secure the contemplated work from the mine at that stage. Both Cronje and Nel in their respective evidence agreed that at that stage, it seemed as if another entity was awarded the work at the mine.

[17] Turning back to the facts of the matter as they emerged from the trial. Then after several months and in December of 2017, Mr Nel had a chance encounter with Mr Pretorius. Mr Pretorius was the transport manager at the mine that Cronje had introduced him (Nel) to. Nel and Pretorius greeted each other. Nel asked Pretorius how he was and Pretorius responded not good as he was struggling with transport at the mine. Nel responded jokingly that he should have given the defendant the transport work at the mine. Pretorius asked Nel to resend the defendant's company profile to the mine. Nel contacted Cronje and got Pretorius' contact number to ensure he sent the defendant's profile to the correct email address.

[18] Nel followed up telephonically with Pretorius who confirmed to Nel that the mine had received the defendant's company profile and that he had sent it on to their Head Office for consideration.

[19] Nel followed up with Pretorius from time to time. Until in February 2018, he begged Pretorius for a meeting with Pretorius' superior. It so happened that Pretorius had already arranged a meeting with a certain Bhushan Bhanotha for the following Friday.

[20] Nel then called Cronje and informed him of the meeting that had been arranged with Bhushan Bhanotha for the coming Friday, and asked Cronje to join him at that meeting. Cronje told Nel that he would not join the meeting as he left Crossmore, one of the other transport providers to the mine, under a cloud, and he did not want to jeopardise the obtaining of the contract. In fact, Cronje did not attend the meeting with Bhanotha.

[21] Nel attended the meeting with Bhanotha alone and explained to Cronje in detail what transpired at the said meeting, as well as the process that needed to be followed to secure the contract for the transport required by the mine. This process included the compilation of what has been described as a 'contractors pack', which would be audited by the mine. Nel, in his evidence, testified that everything had changed after this meeting with Bhanotha. From the context of his evidence, Nel was referring to the contemplated contractual relationship with the mine.

[22] It was clear that the 'contractors pack' was a vital part of securing the work from the mine and convincing the mine that the defendant could do the work required, and deal with the ancillary responsibilities of working on the mine.

[23] Nel testified that on the same Friday that he met with Bhanotha, he started work on the 'contractors pack'. Nel's evidence was that he invited Cronje to assist him in compiling the required 'contractors pack', and even offered him accommodation at his home over the weekend so that Cronje could assist him. Cronje claimed he had other obligations and declined the invitation to assist Nel in compiling the said 'contractors pack'.

[24] When it was completed and submitted to the mine, the 'contractors pack' consisted of 5 lever arch files. Nel testified that it took him between five and six days to compile, working sixteen hours a day.

[25] Then Nel testified that he addressed a letter to Cronje dated 1 March 2018. This letter amounted to a new draft contract, which had many of the same features as the 15 March 2017 agreement. One of the main differences was that it now set out particulars of the profit margin the defendant would make on providing transport to the mine. Nel's evidence was that he sent the letter of 1 March 2018 because he got a second chance at securing the contract with the mine. That the whole scenario had changed and that if Cronje wanted to be involved, they needed to formalise their agreement to cater for the new factual situation that existed in regard to the contract with the mine. In this letter of 1 March 2018, Nel acknowledged that Cronje had assisted in obtaining the work at the mine. However, the proposed agreement encompassed by the letter of 1 March 2018 was never signed by either Nel or Cronje.

[26] It was Nel's position in his evidence that there was no 'oral' term to their agreement to the effect that all that was required of Cronje was an introduction to the mine management and nothing more. Nel's position was that the 15 March 2017 agreement clearly stipulated that Nel must get the trucks and Cronje must get the work.

[27] There was evidence that Nel wrote a further letter dated 17 April 2018 to Cronje. This letter purported to withdraw all offers previously made by Nel to Cronje, including the letter of 14 March 2017 (referred to herein as the 15 March 2017 agreement) as well as any offers made in the letter addressed to Cronje by Nel dated 1 March 2018. However, this 17 April

2018 letter also included an express invitation to Cronje to sit around a table with Nel to negotiate their respective positions.

[28] Cronje responded to Nel's letter of 17 April 2018 in an email dated 24 April 2018. Then on 24 April 2018, Cronje and Nel met in the Spur restaurant in Kuruman. In this meeting, Nel explained his position to Cronje, that Cronje cannot sit on the side and expect 50% of the profit while Nel carried all the expenses and did all of the work required to maintain the contract with the mine.

[29] During the said meeting, Cronje did offer to resign from his employment and come and work for the defendant. They then discussed the financial position of Cronje, Nel and the defendant. Nel concluded that he could not afford to employ Cronje and satisfy Cronje's financial obligations and requirements.

[30] Nel testified that Cronje visited him weekly and sometimes twice a week, but he did not help with the work involved in maintaining the contract with the mine. Nel testified that Cronje could have reconciled the load reports as well as the diesel reports, but that Cronje would not do so.

[31] There was a reference in Nel's evidence to two statutory appointments that needed to be in place in terms of the relevant (unspecified) legislation and the contractual requirements of the mine. The one was referred to as a section 292 appointment, responsible for the day-to-day operations on the mine. According to Nel, he would take on this position. The second statutory appointment would be a section 261 appointment. This would be the person responsible for the contract and such person would be required

to visit the mine once a week. It was Nel's position that Cronje would have been able to accept this responsibility.

[32] As alluded to above, it is not clear which legislation is being referred to by Nel. There was a vague reference to the Mine Health and Safety Act 29 of 1996. However, after consulting such legislation, I found no corresponding provisions in the said Act. Nothing turns on this, so for present purposes, I accept that such statutory regulation applies in circumstances where this seemed to be accepted by both Nel and Cronje.

[33] Nel testified that the mine required these two statutory offices to be held by two different persons. To the best of Nel's knowledge, the statutory provisions also required that the said appointments be held by two different individuals. Nel testified that the mine started pressuring him to comply with this requirement. The implication of Nel's evidence was that he needed Cronje to take on the "261 appointment".

[34] Nel testified that for a person to be a "261 appointment", there were two requirements. Firstly, a prescribed medical examination and secondly, an induction at the mine. On Nel's version, he could not get Cronje to commit to a date for the medical examination or the induction at the mine. Cronje's version was that he was willing to take on such an appointment but that it was not that he would not commit to a date, but that Nel never approached him with a booked date for the medical examination and the induction. Cronje further testified that, if Nel needed a weekend off, then he would also help.

[35] Initially, under cross-examination, Cronje conceded that clauses 1 and 2 of annexure "A" to the Particulars of Claim were both preconditions to the

joint venture coming into existence. Later in cross-examination, he tried to retreat from this position but in reality, he only made his version less credible.

[36] Mr Olivier, who appeared for the plaintiffs herein, argued that properly construed, clause 2 of annexure "A" providing that the first plaintiff would secure the work for the joint venture, meant that the first plaintiff's only obligation was to provide the opportunity for the joint venture to obtain the work at the mine. In other words, to introduce Nel, the defendant and the joint venture to the mine and nothing more. Mr Olivier submitted that the introduction was the *sine qua non* to the joint venture obtaining the work.

[37] Accordingly, the plaintiffs' contention that either the first or second plaintiff was entitled to 50% of the gross commission or 50% of the gross profit rests on two legs. Firstly, Cronje's assertion for the 'oral' term to the 15 March 2017 agreement that his only obligation in terms of the said agreement was to introduce the joint venture to the mine management in order for his corporate entity (to be formed) or himself to be entitled to 50% of either the commission or the profit. Secondly, Mr Olivier's submission that, seen in its proper context, clause 2 of the 15 March 2017 agreement meant that Cronje only had to introduce the joint venture to the mine to be entitled to a 50% share of either the gross commission or the gross profit.

[38] The legal principles relating to legal interpretation are trite. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[1] the Supreme Court of

[1] 2012 (4) SA 593 (SCA) para 18.

Appeal (SCA) set out the approach to the interpretation of *inter alia* contracts in the following terms:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[39] The SCA in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*[2] expatiated on the interpretation of contracts in particular and held that:

"I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties- what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to

[2] 2016 (1) SA 518 (SCA) paras 27–29.

determine what their intention was in concluding it. *KPMG*, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded - the context - to determine the parties' intention.

'. . . A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

. . . Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise.'"

[40] Similarly, the law is settled in so far as suspensive conditions are concerned. The SCA in *Mia v Verimark Holdings (Pty) Ltd*[3] summarises the position as follows:

". . . The conclusion of a contract subject to a suspensive condition creates 'a very real and definite contractual relationship' between the parties. Pending fulfilment of the suspensive condition the exigible content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its terms. . . . If it is not fulfilled the contract falls away..."

[41] In light of the abovementioned principles, I turn to the analysis of the evidence in *casu*. Annexure "A", being the written portion of the 15 March

[3] [2010] 1 All SA 280 (SCA) para 1.

2017 agreement, by virtue of its provisions, shows a clear bias or preference for a pure brokerage arrangement. In other words, that the mine would contract with Wentzel directly. As already set out above, the said agreement did foresee other possibilities. It is vitally important to keep in mind that both Nel and Cronje foresaw other possibilities to a pure brokerage agreement. The terms of the said annexure "A" make this plain.

[42] Both contentions put forward by the plaintiffs to support their case, which have been outlined above, have their own difficulties which overlap to some extent. Each will be dealt with in turn.

[43] Turning to Mr Olivier's submission that, interpreted in context, what clause 2 of the 15 March 2017 agreement actually means is that all Cronje has to do is introduce the joint venture to the mine, to be the proximate cause or *sine qua non* of the joint venture obtaining the work.

[44] Firstly, that is not what clause 2 of the said agreement says. Secondly, Mr Olivier's contention can only be correct if the 15 March 2017 agreement provided only for a pure brokerage agreement. It is clear from the provisions of annexure "A" itself that both Cronje and Nel foresaw that ensuing agreement with the mine might not be a simple brokerage agreement.

[45] Whilst the relevant agreement showed a pronounced bias towards a brokerage agreement between all affected parties, it did foresee other possibilities. In providing for these other possibilities, both Nel and Cronje must have foreseen and accordingly did foresee that their respective inputs into the contemplated joint venture would be very different in each of the different eventualities they foresaw. Annexure "A" provides two

mechanisms to deal with such differences. Firstly, it was envisaged that the said agreement would be refined by adding annexures (or agreed addenda) to such agreement as the circumstances required. Secondly, if an amendment was desired or required, written notice of any proposed amendment was to be given.

[46] The evidence establishes that the agreement entered into between the defendant and the mine was not a simple brokerage agreement.

[47] The above conclusion is supported by the following: The evidence of Nel who testified that after the meeting with Bhanotha, everything changed; That the defendant had to compile a 'contractors pack' to secure the transport work for the mine; and That the defendant had to take responsibility for the two statutory appointments described above and as stipulated by the mine.

[48] In all of these circumstances, I cannot accept or uphold Mr Olivier's argument as to the proper interpretation of clause 2 of the 15 March 2017 agreement.

[49] Turning now to Cronje's contention that there was an additional 'oral' term to the 15 March 2017 agreement.

[50] Mr Steenkamp, who appeared for the defendant herein, argued that it was for the plaintiffs to plead and prove the term of the agreement that they relied upon. In this, Mr Steenkamp is undoubtedly correct.[4]

---

[4] See generally *Odendaal v Odendaal* 2002 (1) SA 763 (W) para 2; *HSM (Pty) Ltd v Volkswagen Motor Port* 1986 (4) SA 22 (C) at 25E–F; *Kriegler v Minitzer and Another* 1949 (4) SA 821 (A) at 826–829.

[51] The question is, have the plaintiffs established the alleged additional 'oral' term of the agreement?

[52] The alleged 'oral' term is simple enough. On the probabilities, if Nel and Cronje intended the agreement to be that Cronje's only responsibility in obtaining the work was for him to introduce the defendant and/or Nel and/or the joint venture to the mine, then the written portion of the agreement would have said precisely that in express terms. The 15 March 2017 agreement encompassed in annexure "A" does not do so.

[53] It is clear from his evidence that Cronje treats the whole transaction as comprising a simple brokerage agreement with the mine. This position adopted by Cronje is not supported by the facts. Firstly, Cronje signed a written agreement that clearly foresaw the possibility that the final agreement with the mine might not be a simple brokerage agreement.

[54] In such circumstances, both Cronje and Nel must have foreseen that the nature of the inputs required from the joint venture parties (or partners) would have been different. As set out above, they did in fact foresee such possibility and made provision for it in their agreement.

[55] Nel kept in contact with Cronje prior to and after the meeting Nel had with Bhanotha. Cronje knew that after the meeting with Bhanotha, the 'contractors pack' had to be compiled. This in and of itself showed that the agreement with the mine was no longer that of a simple transport broker.

[56] The simple truth is that, the agreement of 15 March 2017 did not deal with the respective duties of Nel and Cronje after the award of a contract to the joint venture. On the probabilities, the agreement did not expressly provide

for the delineation of their respective duties because they did not, as at the 15th of March 2017, know precisely what would be required of them *vis-a-vie* the final agreement with the mine. Clearly, the input required from both Cronje and Nel would have changed depending upon the final nature of the agreement with the mine. Both Nel and Cronje must have and therefore did foresee this. As set out above, they in fact made provision to cater for the potential of changing circumstances.

[57] Cronje made much of the argument that the 15 March 2017 agreement provided that it was not in fact a partnership. The relationship described in English in the pleadings was that a 'joint venture' was envisaged. In the Afrikaans agreement, it was described as a 'samewerkingsooreenkoms'. Both terms 'joint venture' and a 'samewerkingsooreenkoms' envisage a limited form of partnership. This argument is therefore not helpful and leads nowhere.

[58] Mr Steenkamp argued that the plaintiffs had not established the alleged 'oral' term of the agreement.

[59] The plaintiffs did not plead the 'oral' term of the agreement *per se*. In his email of the 24 April 2018 responding to the issues raised by Nel in his letter dated 17 April 2018, Cronje did not raise the alleged 'oral' term of the agreement in circumstances where one would ordinarily have expected Cronje to do so. His failure to deal with the alleged 'oral' term of the agreement in such circumstances justifies an adverse inference being drawn against Cronje on this aspect. It would have been preferable and far simpler to just record the alleged 'oral' term of the agreement as part of the written agreement.

[60] The manner in which the plaintiffs pleaded that all Cronje had to do was to introduce the defendant and the proposed joint venture to the mine as set out in paragraph 8.3 of the Particulars of Claim (quoted above) does not correspond with Cronje's evidence in his testimony before this Court.

[61] It was Cronje's evidence that Pretorius was the mine's transport manager, but it became evident from the evidence placed before this Court that Cronje knew that Pretorius would not be awarding the contract on his own. Cronje also testified that he was acquainted with Bhanotha and one further senior at the mine. The facts showed that Bhanotha was instrumental in awarding the transport contract at the mine. In these circumstances, Cronje's version that all he had to do was introduce the defendant and the joint venture to Pretorius is improbable.

[62] Cronje's own evidence established that he and Nel had not determined who would be responsible for the day to day running of the transport venture. That they had only discussed this in general terms. Cronje acknowledged that the 15 March 2017 agreement does not deal with this in express terms.

[63] It is also improbable that Nel would have agreed to Cronje being a silent partner and sharing in 50% of the gross commission or gross profit in circumstances where Cronje made no capital contribution to the project and also where Cronje claimed he had no obligation for any input into the management of the project. Nel's assertion that they would have negotiated a different basis on which to share the proceeds of the commission or profit, is, in the circumstances, far more credible. On the probabilities, I have to accept Nel's assertion on this aspect.

[64] A literal translation of the title given to the agreement in annexure "A" is an apt description of what was required and what was envisaged by the agreement encompassed in annexure "A". It was a 'working together agreement', but from the facts before this Court, Cronje was not prepared to work with Nel to achieve the aims of their agreement.

[65] Taking all the above factors into account, on the probabilities as they emerged from the evidence placed before this Court, I find that Cronje and the second plaintiff have not established the alleged 'oral' term of the agreement. Clearly, they bore the *onus* of establishing this term of the agreement as they relied upon its existence to establish their case.

[66] I have already found that I cannot support Mr Olivier's contention on the proper interpretation of clause 2 of the 15 March 2017 agreement.

[67] In these circumstances, it must follow from the above conclusion that it has not been established that the condition precedent that Cronje obtain the work from the mine for the benefit of the joint venture had come to pass. Accordingly, the joint venture never came into existence.

[68] In these circumstances, the plaintiffs' claim A and its alternative claim B stand to be dismissed.

[69] The only remaining issue is the issue of costs. No reason was placed before this Court as to why costs should not follow the result. In the circumstances, the costs will follow the result. The first and second plaintiffs will be jointly and severally liable for the defendant's party and party costs. Having regard to the issues pertinent to this matter, I believe it would be appropriate for costs to be taxed on scale B.

[70] Accordingly, the following order is made:

1. The plaintiffs' claim A and its alternative claim B are dismissed.
2. The first and second plaintiffs are jointly and severally liable for the defendant's taxed or agreed costs. The one paying the other to be absolved. Such costs are to be taxed on scale B.

[redacted]

L.G. LEVER

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION, KIMBERLEY

Appearances

For 1st and 2nd Plaintiffs: Adv AD Olivier

Instructed by: PGMO Attorneys Inc.

For Defendant: Adv MDJ Steenkamp

Instructed by: Engelsman Magabane Inc.