



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### JUDGMENT

**Not reportable**

Case number: 1262/2022

In the matter between

**REMO VENTURES (PTY) LTD**

**FIRST APPELLANT**

**EKUZENI SUPPLIES (PTY) LTD**

**SECOND APPELLANT**

**NTHABISENG SEGOALE**

**THIRD APPELLANT**

and

**CECILE VAN ZYL**

**FIRST RESPONDENT**

**SUSAN LEONORA MEINTJIES**

**SECOND RESPONDENT**

**JUDGE NEELS CLAASEN**

**THIRD RESPONDENT**

**Neutral citation:** *Remo Ventures Pty Ltd v Cecile Van Zyl and Others* (1262/2022) [2023]  
ZASCA 09 (26 JANUARY 2024)

**Coram:** MOCUMIE, MOKGOHLOA, CARELSE and GOOSEN JJA and TOKOTA AJJA

**Heard:** 6 November 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down are deemed to be delivered on 26 January 2026

**Summary:** Arbitration – interpretation of the Sales of Shares agreement – interpretation of the arbitration agreement – whether the purported arbitration agreement concluded between the parties and the resultant steps and proceedings are void as a result of the Sale of Shares agreement upon which it is predicated being a nullity.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Molefe J, sitting as a court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and replaced with the following:
  - ‘(a) It is declared that the arbitration contract entered into between the applicant and second to fourth respondents is a nullity.
  - (b) It is declared that the purported appointment of the first respondent in terms of Annexure A [the arbitration contract] is a nullity.
  - (c) It is declared that the resultant purported arbitration proceedings, including the purported award by the first respondent dated 10 May 2021 Annexure C, is a nullity.
  - (d) The costs of the application are to be paid by the second and third respondents.’

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## JUDGMENT

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**Mocumie JA(Mokgohloa, Carelse and Goosen JJA and Tokota AJA concurring)**

### Introduction

[1] This is an appeal against the judgment and order of the Gauteng Division of the high court, Pretoria (Molefe J) sitting as a court of first instance. The matter concerns the validity of an arbitration agreement to which it related. The arbitration agreement purported to amend an arbitration clause contained in the Sale of Shares Agreement in circumstances where that agreement was void, where, unbeknown to the parties the Sale of Shares Agreement had already lapsed. Arbitration proceedings were conducted in terms of the arbitration agreement and an award was issued. The appeal is with leave of the court a quo.

### Factual matrix

[2] The appellant is Remo Ventures (Pty) Ltd, a private for-profit company, duly incorporated and registered in terms of the company laws of the Republic of South Africa. The second appellant is Ekuzeni Supplies (Pty) Ltd, a private for-profit company (previously Segoale Supplies (Pty) Ltd), duly incorporated and registered in terms of the company laws of the Republic of South Africa. The third appellant is Mr Nthabiseng Segoale (Mr Segoale) a business person and director of the first and second appellants. The first respondent is the retired Judge of the Gauteng Division of the High court, Judge Neels Claassen who has since passed on. The second respondent is Ms Cecile Van Zyl, a business person and entrepreneur. The third respondent is Ms Susan Leonora Meintjies, a business person and entrepreneur. The fourth respondent is Suceco Partnerships of which the second and third respondents are the partners.

[3] The facts are largely common cause. On 3 April 2017, the appellants and the second and third respondents (the respondents) concluded a written Sale of Shares Agreement (the SoS agreement). In terms of this SoS agreement, the purchase price of R50 million was payable in tranches, with the first tranche of R10 million being paid on 16 March 2017. The second tranche of R20 million was payable on the effective date, described as 21 June 2017. However, on 20 July 2017, after the agreement had already lapsed, the parties concluded a so-called 'Date Agreement', in terms of which the date for payment of the second tranche was extended to 26 July 2017. Payment of the second tranche was effected on 31 August 2017, and accepted by the respondents. Transfer of the shares was effected on the same day.

[4] In terms of Clause 3.1 of the SoS agreement the sale was subject to a number of conditions precedent which included that the purchaser, Mr Segoale was to cede a life insurance policy on his life to the sellers (the first and second respondents) to the value of R15 million (fifteen million rand) on or before the effective date being 21 June 2017. Clause 3.4 of the sale agreement provided that if any conditions precedent is not timeously fulfilled for any reason whatsoever, and is not waived in terms of clause 3.3, then the whole sale agreement shall be of no force or effect. Clause 22 had a dispute resolution/arbitration clause which made provision for arbitration under the rules of the Arbitration Foundation of South Africa (AFSA) and for the arbitrator to be appointed by AFSA.

[5] By 21 June 2017, Mr Segoale had failed to pay the balance of the purchase price in full and final settlement and to cede his life policy. As a result of this breach, the suspensive condition in clause 3.4 was triggered. *Ex lege*, the SoS agreement became a nullity. Notwithstanding the above non-fulfilment, the parties acted under the belief that the SoS agreement was still in force and valid and continued to implement it. On 31 July 2018, the respondents demanded payment of the third tranche of R10 million.

[6] During 2018 and 2019, various disputes on performance obligations of the contracting parties in terms of the SoS agreement arose, which the contracting parties believed was still in force. However, as a result of the non-fulfilment of the suspensive condition, the SoS agreement had already fallen away and lapsed. On 20 February 2019, the parties concluded an arbitration agreement which was predicated and dependent upon the existence and validity of the SoS agreement and purported to:

‘12.1 Amend clause 22 of the SoS agreement but substituting such clause in its entirety with the provisions of the arbitration contract; and

12.2 Refer the disputes that had arisen aforesaid to the arbitration in terms of clause 22 as purportedly amended in terms of which the arbitrator, the late retired Judge Claassen (‘the third respondent’), was by agreement between the parties appointed to conduct the arbitration in accordance with a different procedure outside the AFSA rules. In essence, the parties entered into privately conducted and administered arbitration proceedings and appointed the third respondent as their own arbitrator.’

[7] Clause 4.2 of the arbitration agreement provides:

‘The parties, to the extent that it is necessary, and for the purposes of the current arbitration proceedings, substitute the provisions of this Arbitration Agreement for clause 14 of the Sale of Business Agreement, and clause 22 of the Sale of Shares Agreement, and all the arbitration clause contained in any other ancillary agreement entered into between the parties, which will form part of the Disputes to be adjudicated by the Arbitrator.’

[8] On the basis of the arbitration agreement, and unaware of the SoS having lapsed; in a later arbitration, the respondents claimed specific performance, ie payment of R20 million, such being the balance of the purchase price. The appellant in the Statement of Defence and Counter claim, pleaded that the respondents had breached their

performance obligations in various respects under the agreement and were entitled to withhold payment, alternatively to apply for set off. The respondents tried to effect amendments to their Statement of Claim and also unsuccessfully applied for the recusal of the arbitrator. Only in the amendment introduced in April 2020 was the non-fulfilment of the suspensive condition and the resultant lapsing of the SoS raised for the first time. The appellant claimed that the SoS agreement had been reinstated but without the suspensive condition.

[9] Before the high court, the parties argued the issue whether SoS agreement had been reinstated, as a separated issue on common cause facts. The main application before the high court was premised on the contention by the appellant that since it was common cause that the SoS agreement was a nullity due to the failure to fulfil the suspensive condition, it followed that the arbitration agreement was also a nullity. Therefore, the subsequent award delivered by the third respondent must also be a nullity and be declared as such. In the alternative, the third respondent did not have the power to issue the award, and the award therefore fell to be reviewed and set aside in terms of s 33 of the Arbitration Act 42 of 1965 (the Arbitration Act).

[10] The respondents' defence was that the arbitration agreement was a self-standing agreement extraneous to the SoS agreement. Therefore, it survived the SoS agreement.

### **Findings of the high court**

[11] The high court considered clause 4.2 of the arbitration agreement and held that 'it is clear on a proper interpretation of the arbitration agreement that it was entered into intended to survive the voidness of the share agreement since it was intended to cover various agreements, which agreements remain valid and binding despite the fact that the shares agreement may be void. An example is the sale of a business agreement which is still alive despite the death of the shares agreement. The arbitration agreement cannot therefore lapse merely because the shares agreement has lapsed due to non-fulfilment of the conditions in that agreement.'

[12] It held further that 'clause 22.1 of the shares agreement provides that if the parties are unable to reach an acceptable settlement of any dispute . . . concerning any provision,

any party may submit the dispute to the AFSA for mediation in accordance with the terms set by the secretariat of AFSA.’

[13] Important to the determination of this appeal, the high court also held ‘ . . . on a proper interpretation, it was not therefore a referral to arbitration in terms of clause 22 of the shares agreement but a new referral to arbitration which superseded the original referral to arbitration in terms of clause 22. The only reasonable interpretation is that in so far as there is a dispute concerning the shares agreement, the arbitration agreement will ‘substitute’ for clause 22 of the shares agreement [in terms of clause 4.2 of the arbitration agreement].’

### **Issues for determination before this Court**

[14] The issue for determination before this Court is whether the arbitration agreement is a nullity on account of the SoS agreement being a nullity. In essence, the question was whether the SoS Agreement could be interpreted in such a manner as to allow for the existence of the Arbitration Agreement.

[15] Counsel for the appellant contended that the parties agreed to conclude several commercial agreements with reference to a number of business ventures, *inter alia*, the SoS agreement. The SoS agreement was subject to a number of suspensive conditions. The parties had in mind, one broad composite agreement with various sub-agreements; interrelated but separate contracts which were moored in the actual text of the contract. To the extent that these agreements formed part of one composite agreement, if one agreement (and in this instance the SoS agreement) fell through, then the *substratum* of the composite agreement disappeared; the SoS agreement accordingly becomes unenforceable between the parties. He relied on clause 12 of the SoS agreement which provides that ‘all of the transactions and arrangements contemplated by this Agreement constitutes a single and indivisible transaction.’

[16] He submitted that ‘the ineluctable conclusion from the language, context and purpose . . . is that the purported arbitration agreement was predicated and dependent on the existence and validity of the SoS.’ This is so, because the SoS agreement never existed, on account of non-fulfilment of the suspensive condition, nothing of the SoS

agreement can be used in the arbitration agreement. This would mean that the arbitration proceedings, as far as it applied to the SoS agreement, could not have taken place because the SoS agreement did not and does not exist.

[17] He argued on the strength of *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd*<sup>1</sup> that, upon proper interpretation, the SoS agreement and the subsequent arbitration agreement cannot be read in isolation from one another. Doing so, he argued, will disregard the context and the language of the agreement which the parties intended to be bound by.

[18] To the contrary, the respondents contend that clause 3.2 of the arbitration agreement makes specific reference to arbitration proceedings and that ‘any dispute that arises’ from the ‘said Agreements’, including the sales agreement, will be decided by private commercial arbitration. On a proper interpretation of the arbitration agreement, it was intended to be a self-standing agreement and extraneous to the SoS agreement. In addition, even if the arbitration agreement was not extraneous to the SoS agreement but became a term there, a proper interpretation of the SoS agreement (as amended) is that the arbitration agreement was intended to survive the invalidity of the SoS agreement to allow that very dispute to be decided in arbitration proceedings. This is so on the presumption that commercial people intend to litigate in one forum and to use arbitration as a ‘one-stop shop’ to resolve all their disputes arising out of the SoS agreement. The high court agreed with the respondents. Thus, this appeal is against the order of the high court.

### **The law**

[19] As a point of departure, the following principles are highlighted: In *Africast (Pty) Ltd v Pangbourne Properties Limited*<sup>2</sup> in which this Court held:

‘A contract containing a suspensive condition is enforceable immediately upon its conclusion but some of the obligations are postponed pending fulfilment of the suspensive condition. If the condition is fulfilled the contract is deemed to have existed *ex tunc*. If the condition is not fulfilled, then no contract came into existence. Once the condition is fulfilled: “[T]he contract and mutual rights of the parties relate back to, and are deemed to have been in force from, the date of the

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<sup>1</sup> *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA).

<sup>2</sup> *Africast (Pty) Ltd v Pangbourne Properties Limited* [2014] ZASCA 33; [2014] 3 All SA 653 (SCA).

agreement and not from the date of the fulfilment of the condition, ie *ex tunc*.”<sup>3</sup>

[20] In addition to this, this Court has held in *Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch*<sup>4</sup> that ‘[a]n agreement of purchase and sale entered into subject to a suspensive condition does not there and then establish a contract of sale “but there is nevertheless created “a very real and definite contractual relationship” which, on fulfilment of the condition, develops into the relationship of seller and purchaser. . .” Upon fulfilment of the condition the contract thus becomes enforceable. Non-fulfilment of the suspensive condition, however, renders the contract void *ab initio* . . .’<sup>5</sup>

[21] With specific reference to arbitration agreements, this Court in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*<sup>6</sup> (*North East*), held:

‘If a contract is void from the outset then all of its clauses, including exemption and reference to arbitration clauses, fall with it. The principle was most recently enunciated by this Court in *North West Provincial Government and another v Tswaing Consulting and others* where Cameron JA said that an arbitration clause “embedded in a fraud-tainted agreement” could not stand. The court referred in this regard to *Wayland v Everite Group Ltd* which in turn relied on *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk*. That decision referred to *Heyman and another v Darwins Ltd* where Viscount Simon LC said:

‘An arbitration clause is a written submission, agreed to by the parties to the contract , and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void .’<sup>7</sup>

[22] This Court in *Capitec v Coral Lagoon* held:

‘Most contracts, and in particular commercial contracts, are constructed with a design in mind,

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<sup>3</sup> Ibid para 37.

<sup>4</sup> *Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch* [2010] ZASCA 92; [2010] 4 All SA 591 (SCA); 2011 (2) SA 525 (SCA) (*Paradyskloof*).

<sup>5</sup> Ibid para 17.

<sup>6</sup> *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA).

<sup>7</sup> Ibid para 12.



and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.’<sup>8</sup>

## Discussion

[23] It is common cause that the suspensive conditions set out in the SoS agreement were not fulfilled. As such, and following the approach outlined above, the agreement in question ought to be treated as if it never came into existence; it was never cancelled or resiled from. The SoS agreement certainly existed prior to the fulfilment of the condition, and the contract would have become enforceable upon the fulfilment of the condition. The parties, unfortunately, continued to act in terms of the agreement in the erroneous belief that all conditions had been properly and timeously fulfilled.

## Interpretation of the SoS and arbitration agreement in general

[24] This Court in *North East* held:

‘The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as whole and whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded.

. . .

In addition, a contract must be interpreted so as to give it a commercially sensible meaning . . . This is the approach taken to considering the ambit of an arbitration clause . . . We must thus examine what the parties intended having regard to the purpose of their contract.’ (Footnotes omitted.)<sup>9</sup>

[25] The respondents argued that the arbitration agreement, was intended to be a self-standing agreement and extraneous to the SoS agreement. As a result, the arbitration agreement was intended to survive the invalidity of the SoS agreement to allow that very dispute to be determined in arbitration proceedings. We must, they contend, assume that the parties intended that the lapsed SoS agreement would be substituted by the new

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<sup>8</sup> *Coral Lagoon* para 51.

<sup>9</sup> *North East* paras 24-25.

agreement, the arbitration agreement. This is so because when the dispute arose, it was on the interpretation of the new agreement: whether the substitution of the arbitration agreement was a reinstatement of the SoS agreement.

[26] For the determination of the issue before this Court several clauses of the SoS agreement and arbitration agreement are relevant. Clause 3 of the SoS agreement stipulates:

‘3.1 This agreement is subject to the following conditions precedent:

3.1.1 That both Sellers sign Executive Employment Agreements with the Company on or before the Effective Date, copies of which is annexed hereto as “Annexures D2-D3”

3.1.2 That Nthabiseng Segoale signs an Executive Employment Agreement with the Company on or before the effective date, a copy of which is annexed hereto as Annexure “D1”

3.1.3 The Directors of the Company of Segoale Supplies (Pty) Ltd, Registration Number: 2017/117592/07 authorising.

3.1.4 That Nthabiseng Segoale cede a life insurance policy on his life to the Sellers to the total value of R15 million (fifteen million rand) on or before the Effective Date. The original Policy shall be handed to the Sellers. Nthabiseng SEGOALE shall maintain payment of the Policy until such time as the full Purchase Price in terms of this Agreement

3.1.5 That the Company sign a Lease Agreement with KALFIELAND CC for the rental of Plot 22,WHEATLANDS,RANDFONTEIN,being the current Premises from where the business which forms the subject matter of this Agreement is being operated, for a period of not less than 7(seven) years calculated from the effective date, Annexure “E1”

3.1.6 . . .

3.1.7 . . .

3.4 If any condition is not timeously fulfilled for any reason whatsoever and is not waived in terms of clause 3.3 then:

3.4.1 This whole agreement shall be of no force or effect;

3.4. 2 The parties shall be entitled to be restored as near as possible to the positions they would have been, had this Agreement not been entered into; and

3.4.3 No party shall have any claim against any other party in terms of this Agreement except for such claims (if any) as may arise from a breach of any other provision of this Agreement by which the parties remain bound.

...

## 10 PURCHASE OF THE SHARES SUBJECT TO THE FULFILLMENT OF THE CONDITIONS.

10.1 Subject to the fulfilment of the Conditions Precedent and subject to the terms and conditions of this Purchase Agreement

...

'22.1 Save as specifically provided elsewhere in this Agreement, should any dispute arise between the parties concerning any provision of this Agreement, the parties shall use their best endeavours to resolve the dispute by negotiation. Any party may call upon the other party by written notice to [the other party] meet with the former for purpose of reaching a mutually acceptable settlement of the dispute within 7(seven) days after the date of such notice.

...

22.4 These provisions contained in this Clause 22 shall not preclude any party from obtaining interim relief, on an urgent basis.'

[28] Clause 4.2 of the Arbitration agreement provides:

'The parties, to the extent that it is necessary, and for the purposes of the current arbitration proceedings, substitute the provisions of this Arbitration Agreement, for clause 14 of the Sale of Business Agreement, and clause 22 of the Sale of Shares Agreement, and all the arbitration clauses contained in any other ancillary agreements entered into between the parties, which will form part of the disputes, to be adjudicated by the Arbitrator.'

[29] The high court was correct to find that the arbitration agreement was predicated and dependent on the existence and validity of the SoS agreement. It, however, erred when it then concluded that the arbitration agreement constituted a self-standing new arbitration agreement, separate and distinct from the SoS agreement and had survived the lapsing of the SoS agreement. These two findings are irreconcilable. To the extent that these are irreconcilable, it means they cannot be correct. It is either one or the other. In my view, the correct view is the one supported by the context of the agreement concluded by the parties which spells out their intention to have one umbrella agreement subsuming all others – if it falls foul and become invalid, all agreements thereunder are inevitably impacted.

[30] It is evident from the common cause facts that there was no dispute over the non-

fulfilment of the suspensive condition between the parties. The parties knew what was referred for arbitration: a dispute on who had breached the contract (breach of contract and specific performance). The arbitrator instead went beyond what the parties sought to be determined on the basis that he had the wide powers to determine what the real issue in dispute was between the parties, contrary to what the parties expressly referred to him for arbitration. That is why the appellant raised an application for his recusal, which he dismissed.

[31] In its counter claim, the appellant introduced a reinstatement of the SoS agreement. The contention for the respondents was that the conduct of the parties showed that they considered the arbitration agreement as a reinstatement of the SoS agreement. But this cannot be correct because once it is accepted that, despite the conduct of the parties after the SoS agreement had lapsed, the truth is, the SoS agreement lapsed. That should be the end of the matter. In other words, it should mean that whatever the parties did subsequent to the lapsing of the SoS agreement cannot resuscitate the SoS agreement in the context of the express provisions of the SoS agreement that: (a) if any condition is not timeously fulfilled for any reason whatsoever and is not waived in terms of clause 3.3 then this shall be of no force and effect (3.4.1); the parties shall be entitled to be restored as near as possible to the positions in which they would have been, had this agreement not been entered into (3.4.2); and no party shall have claim against any other party in terms of the agreement except for such claims (if any) as may arise from a breach of any other provision of the agreement by which the parties remain bound (3.4.3); (b) the parties agreed that all the transactions and arrangements contemplated by the agreement constituted a single and indivisible transaction. This means that, if one agreement fell through due to non-fulfilment of the suspensive condition, all other agreements fell through. Had the parties intended otherwise, when they concluded the arbitration agreement, they would have expressly said so.

[32] Even on a cursive reading, the arbitration agreement gives no such impression. In any event, the SoS agreement makes no provision for the arbitration agreement the parties concluded outside of what they contemplated under clause 22, under the rules of the AFSA and for the arbitrator to be appointed by AFSA. If anything, even if it is accepted that clause 22 was purportedly substituted by clause 4.2 of the arbitration agreement; this

is contrary to the express provision of clause 29 of the SoS agreement that 'this agreement constitutes the whole agreement between the parties as to the subject matter hereof, and no agreement, representations or warranties between the parties other than those set out herein are binding on the parties.'

[33] The argument that the parties agreed that the arbitration agreement is severable and can survive outside the SoS agreement, is of no assistance to the respondents as well because, although clause 25 of the SoS agreement specifically provides that each provision of the SoS agreement is severable from all of others, this is with reference to the SoS agreement. To accept, as the respondents contend, that the arbitration agreement revived the lapsed SoS agreement, means that the other agreements will continue to exist and impose on the parties a contract they did not contemplate. This interpretation will disregard the context and the language of the agreement which the parties intended to be bound by. This is a dispute as defined by the parties even under the purported arbitration agreement which means, under definitions, clause 2.10 of the Arbitration agreement, 'disputes as framed in the statement(s) of claims, defences, counter claims, and counter defences, filed as part of these Arbitration Proceedings.'

[34] This is so because, the SoS agreement is but one composite agreement comprised of several other agreements which should fall by the wayside because one agreement fell through. Contrary to what the respondents submitted, it would be 'unbusiness-like' for commercial people to agree to have a single composite agreement comprising of more than one agreement subject to one suspensive condition, to continue with others when one agreement falls through or has lapsed. The agreements are interrelated. That is the expected domino effect.

[35] I agree with counsel for the appellant that when the SoS agreement is considered as a whole with the background of what the parties intended – conclusion of various agreements as one single and indivisible transaction – the arbitration agreement cannot be interpreted in isolation from that intention and context. The many contracts under one umbrella were 'constructed with a design in mind, and their architects choose words and concepts to give effect to that design.' Courts' approach to interpret such contracts cannot construct such contracts in piece-meal, but as whole, particularly where there is no possible ambiguity in their meaning. Assuming that the respondents are correct in their

contention that the parties intended the arbitration to be a new agreement, distinct from the SoS agreement, to the extent that even where the SoS agreement became null and void, the arbitration agreement concluded subsequently, survived the SoS agreement; in line with the authorities cited above, this would fly in the face of what the parties clearly intended. The context is clear; the parties intended that all the agreements be one indivisible agreement which lapsed. The arbitrator simply went beyond what the parties agreed should be arbitrated. He deviated from his mandate of the parties. Thus, the parties could not be bound by that decision which was in essence *ultra vires*. It is obvious that if this Court holds that the SoS agreement lapsed and that the subsequent arbitration agreement could not have survived its death, the arbitration award ought not to have been granted.

[36] Finally, if consideration is given to the words used by the parties even in the subsequent Arbitration Agreement, such as ‘any dispute that arises from the said Agreements’, cannot be taken to mean any dispute, but that which the parties have agreed upon as defined under the contractual definitions. Clause 2.10 of the purported Arbitration Agreement referred to private commercial arbitration read with AA1 to AA7. This means that the dispute referred to the arbitrator; not the arbitrator’s unilateral decision was the issue for determination, contrary to the parties’ mandate. The respondents know this but are evidently latching on this technicality, the purported decision of the arbitrator, well aware of what the parties actually intended. Apart from this, as is trite and in line with judgments such as *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*, if one party to the alleged contract contends that it is void *ab initio*, the arbitration clause cannot operate, for on this view the clause itself is also void.

## Conclusion

[37] In conclusion, the question posited was whether or not the arbitration agreement which was predicated on the existence and validity of the sales agreement, which in turn purported to amend the SoS agreement and purported to include it being as part of the arbitration agreement, was void. From the brief exposition above, the answer must be ‘yes’. It is clear that the SoS agreement ought to be treated as having never existed as it lapsed upon the non-fulfilment of the suspensive condition. The whole SoS agreement was moored in the understanding and purpose of the ‘suite of interrelated and interdependent ancillary contracts to give effect to the broad transaction and structure of

one business contract.’ As such, any reliance placed on any provision in the lapsed contract is without basis and cannot stand on the simple basis that in our law ‘non-fulfilment of the suspensive conditions renders the contract void *ab initio*. . .’<sup>10</sup> In the absence of any ambiguity in the meaning of the words used in the SoS agreement read with the arbitration agreement, the factual matrix (or context) in which the agreement was concluded, I am satisfied that the arbitration agreement did not substitute the SoS agreement in terms of clause 4.2 thereof to revive the SoS Agreement (See *Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch*). The SoS agreement also did not survive after the effective date which had come and gone without the fulfilment of the suspensive condition. It therefore follows that the arbitration agreement is a nullity as a result of the SoS agreement being a nullity. For these reasons the appeal ought to succeed.

[38] In the result, the following order issues.

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and replaced with the following:
  - ‘(a) It is declared that the arbitration contract entered between the applicant and second to fourth respondents is a nullity.
  - (b) It is declared that the purported appointment of the first respondent in terms of Annexure A [the arbitration contract] is a nullity.
  - (c) It is declared that the resultant purported arbitration proceedings, including the purported award by the first respondent dated 10 May 2021, Annexure C, is a nullity.
  - (d) The costs of the application are to be paid by the second and third respondents.’

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B C MOCUMIE  
JUDGE OF APPEAL

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<sup>10</sup> Ibid para 17.

For the 1<sup>st</sup> to 3<sup>rd</sup> appellant.

Instructed by:

Adv MC Maritz SC

Pierre Marais Attorneys, Pretoria

Phatsoane Henney Attorneys, Bloemfontein

For the 1<sup>st</sup> to 3<sup>rd</sup> respondent:

Instructed by:

Adv G Kairinos SC

HJ Can Rensburg Inc Attorneys, Vanderbijlpark,

AP Pretorius Attorneys, Bloemfontein