Republic of South Africa

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

Case No. 16839/2018

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 3 March 2020
Date of judgment: 11 March 2020

In the matter between:

MAREMMANA HOME OWNERS' ASSOCIATION	Applicant

and

MELNIC WINE SOLUTIONS CC	First Respondent
STRATOVEST 117 (PTY) LTD	Second Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	Third Respondent

JUDGMENT

BINNS-WARD J

[1] The applicant is a homeowners' association. It was constituted as a body corporate with the object of promoting, advancing and protecting the communal interests of the owners of property in a housing development known as Maremmana at Bot River in the Western Cape. It was established in fulfilment of a condition imposed by the Theewaterskloof Municipality for the subdivision, at the instance of Stratovest 117 (Pty) Ltd, of Portion 5 of Farm No. 781 in the Division of Caledon for the purpose of proceeding with the housing development. The applicant is the registered owner of Portion 56 of Farm No. 781. It will be convenient for the purposes of this judgment to refer to it as 'the MHOA'.

[2] Stratovest 117 (Pty) Ltd (hereinafter referred to simply as 'Stratovest') was the developer of the Maremmana housing development. It is the second respondent in these proceedings. It is the registered owner of Portion 57 of Farm No. 781.

[3] In terms of a deed of sale dated 17 December 2009 Stratovest sold the Remainder of Portion 4 of Farm No. 781 (hereinafter referred to simply as 'Portion 4') to Roderic Hall and Taryn Laura Hall. The deed recorded that the property thus sold was '*currently in extent 48,8561 (forty eight comma eight five six one) hectares but … will, on subdivision in accordance with Annexure 1 attached hereto, be reduced by the deduction of not more than 7,57 (seven comma five seven) hectares (Portion A on Annexure 1) result in a Remainder of approximately 41,2861 (forty one comma two eight six one) hectares*'. The land involved is '*agricultural land*' as defined in s 1 of the Subdivision of Agricultural Land Act 70 of 1970, and therefore, by virtue of s 3 of that Act, may legally be subdivided only with the written consent of the Minister of Agriculture. At the time of sale of Portion 4 to the Halls, the required ministerial consent for the contemplated subdivision had not been obtained. Planning permission for the contemplated subdivision would also have to be obtained from the local authority. For that purpose application would have to be made in terms of s 24 of the Land Use Planning Ordinance 15 of 1985 (Western Cape) that was still in force at that time.

[4] The subdivision contemplated in the aforementioned definition of the *res vendita* was dealt with in clause 17 of the deed of sale, which provided as follows:

> **TRANSFER OF PORTION "A" ON ANNEXURE 1 HERETO**
>
> 17.1 The parties agree that the Seller shall be responsible for obtaining the requisite approvals in respect of the sub-division of the land described as Portion "A" on the Sketch Plan, marked annexure 1 hereto, (approximately 7,57 hectares in extent) from the Remainder of Portion 4. Upon receipt of the said approvals, the Purchaser or his successors in title shall be bound to transfer the said Portion "A" to the MHOA, no consideration whatsoever being payable by the MHOA to the Purchaser in respect of such transfer.
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> 17.2 The costs of such transfer shall be borne by the MHOA.

The copy of the deed of sale that is attached to the founding papers does not have annexed to it the 'Annexure 1' referred to in the contract, but that is of no consequence.

[5] Portion 4 was duly transferred to Mr and Mrs Hall pursuant to the deed of the sale. Some years later they sold the property to Melnic Wine Solutions CC, which is the first

respondent in the current proceedings. The first respondent is currently the registered owner of Portion 4. The subdivision contemplated in terms of the deed of sale between Stratovest and the Halls had not yet been effected at the time that Portion 4 was sold and thereafter transferred to the first respondent.

[6] Clause 6 of the sale agreement between the Halls and the first respondent addressed the unfinished business of the subdivision and consolidation of Portion A by providing as follows:

> 6. **SUBDIVISION OF PORTION A**
>
> 6.1 The parties agree that the previous owner of the property, Stratovest … is responsible for obtaining the requisite approvals in respect of the sub-division of the land described as Portion "A" on the Sketch Plan, marked Annexure B hereto, (approximately 7,57 hectares in extent) from the Remainder of portion 4.
>
> 6.2 The Purchaser undertakes to co-operate fully with Stratovest … to effect such sub-division and undertakes to sign all such documents and give all such consents as may be required to effect such sub-division.
>
> 6.3 Upon receipt of the said approvals, the Purchaser or his successors in title shall be bound to transfer the said Portion "A" to the Merammana Home Owners' Association [i.e. the applicant], no consideration whatsoever being payable by the Merammana Home Owners' Association.
>
> 6.4 The costs of such transfer shall be borne by the Merammana Home Owners' Association.

[7] It is evident from the context described thus far that clause 6 of the agreement between the Halls and the first respondent was predicated on the obligation undertaken in terms of clause 17.1 of the agreement in terms of which the Halls had obtained registered title over the whole of Portion 4, but subject to its contemplated subdivision. Clause 6 imposed on the first respondent the obligation that the Halls had undertaken in terms of the first agreement, and which that agreement had contemplated would also be imposed on any of the Halls' successors who might take title from them before the contemplated subdivision was effected. The relationship between clause 6 of the second agreement and clause 17 of the first contract is confirmed by the role reserved in terms of clause 6.1 of the second agreement to Stratovest, which was not a party to the second agreement, to obtain the requisite approvals for the subdivision. In the absence of any evidence of a contrary intention by the Halls, it may be inferred, I think, that when they sold Portion 4 to the first respondent they would not have undertaken to pass any greater rights in the ownership of the property than they had purchased from Stratovest, nor would they have intended to burden the purchaser's ability to

deal with the property beyond the extent to which they had been burdened in respect of Portion A when they bought Portion 4.

[8] Both Portions 56 and 57 of the Farm No. 781 - owned by the applicant and the second respondent, respectively – share immediate borders with Portion 4 of Farm No. 781 and, more especially, with that part of it described as 'Portion A' in the aforementioned deeds of sale. Prior to the sale of Portion 4 to the Halls, Stratovest had effected certain improvements on Portion A. The improvements consisted of a club house and certain facilities related to the operation of a polo club on the land. The cost of these improvements had apparently been financed by what is referred to in the papers as '*the Stratovest loan*'. Stratovest was liable for the redemption of the loan. It is common ground between the applicant and the second respondent that at the time of the sale to the Halls it had been contemplated that the club facilities would be available to the members of the applicant homeowners' association, and that it was towards facilitating the realisation of that object that Mr Peter Stuart, who was, and remains, the sole member and director of Stratovest, caused the provisions of clause 17 to be included in the deed of sale between the company and the Halls.

[9] In these proceedings, Stratovest, represented by Stuart, alleges that it was intended that the contemplated transfer of Portion A to the applicant would occur after agreement had been reached between the company and the MHOA on the sum that would be paid by the latter to the former in consideration of the improvements that had been effected to the property and also on the terms of a lease between the MHOA and the second respondent, alternatively Stuart, in terms of which Stratovest, or Stuart, would be enabled to continue to operate the polo club on the property after the MHOA had become the owner. The question was discussed at a meeting of the trustees of the MHOA held on 29 September 2009, just over two months before the conclusion of the deed of sale between Stratovest and the Halls. Mr Stuart had been at the meeting in his then dual capacity as the representative of Stratovest and as a trustee of the MHOA. The minutes of the meeting, which were attached to the second respondent's answering affidavit, and the correctness or authenticity of which are not disputed, record the pertinent particulars as follows:

> 5.3 Club membership and open space
>
> Mr Stuart explained that the clubhouse is built on the Remainder portion 4, with 8ha of land surrounding it. It is not possible to register a lease in perpetuity as the lease law stipulates that the term must be less than 10 years (9,9 years) and a servitude is only allowed on an area not exceeding 250 m^2. The important issue is that the control of the clubhouse ideally should be

handed over to the owners of all the surrounding land to protect the facility in perpetuity. Therefore he had approached Mr Tertius Maree's office to assist him in finding the best solution as below.

Mr Stuart proposed that this 8ha of land and the clubhouse be consolidated into Portion 56 belonging to the Maremmana Homeowners' Association and be governed by inclusion of clauses in the constitution which would specify that cost and management would be the responsibility of members.

Mr Stuart proposed this conditional on the following:

- That the Club members would, through members fees, pay off the building cost of the clubhouse (ie a Stratovest loan) and contribute to the running cost of the club. An annual membership of approximately R5000 would be applied depending on membership uptake; 50% of which would be put toward the maintenance and running of the clubhouse, and 50% toward repaying the Stratovest loan over a 5-10 year period. Additional funds needed could be raised through fund raising events.
- The land surrounding the clubhouse would be leased to Mr Stuart and his appointed successors in perpetuity. A clause in the contract and the constitution would be that the land be leased to Mr Stuart at R1 per annum in order to establish and run a polo club. Mr Stuart would be responsible for the costs of maintaining the land and he would be prepared to include title deed restrictions that would limit any future land use to agricultural or recreational activities in line with the original concept of a quiet country lifestyle. This would have the effect of safeguarding the value the clubhouse and surrounding land.
- The clubhouse must be run as a professional business and would allow for opportunities to rent the facility as a venue for functions.

<u>Decision:</u>

The members agreed with the proposal and advised Mr Stuart to begin the process of subdivision and consolidation on the above conditions.

Action: P. Stuart

It is common ground that the '*8ha of land*' referred to in the minutes related to what was subsequently defined as 'Portion A' in the respective deeds of sale to which the Halls and, subsequently, the first respondent, subscribed as purchasers.

[10] In the answering affidavit to which he deposed on behalf of the second respondent, Mr Stuart averred that '*paragraph* (sic) *17.1 of the Halls' Deed of Sale was included (a) on the strength of the assurances finished by the Applicant at the meeting dated 29 September 2009, (b) in order to protect the Applicant in the event of it not being able to fulfill all of the pre-conditions referred to hereinabove and as recorded in the minute of the 29 September 2009 meeting (as per Annexure C hereto), and (c) in order to protect the Second*

Respondent's entitlement to compensation from the applicant in the event of these preconditions indeed being fulfilled (notably, paragraph 17.1 only exempted the applicant from having to pay a consideration to the Halls, as the new owners of portion A - it did not excuse them from their obligations vis-a-vis the Second Respondent)'. He proceeded '[t]*he Second Respondent was protected by the fact that only it (and not the purchaser, nor the Applicant) would be authorized to obtain the relevant approvals for subdivision and consolidation (but only in the event of the applicant meeting its end of the bargain)*'.

[11] It was minuted that the matters apparently agreed upon at the 29 September trustees' meeting were to be confirmed at the forthcoming annual general meeting of the applicant association. It is not evident on the papers what transpired at that meeting, but, in the event, no agreements of the nature contemplated at the trustees' meeting were ever concluded. Indeed, it appears from the narrative of subsequent interactions between the MHOA and Stratovest that as recently as 2014 a majority of the home-owning members of the MHOA indicated that they had no interest in the acquisition of the land, and certainly not on the basis that the MHOA would incur an attendant liability to compensate Stratovest for the cost of the improvements on it.

[12] According to Mr Stuart, it was in the context of the failure of the idea that the MHOA would enter into an arrangement whereby it would fund the redemption of the Stratovest loan and bind itself to enter into a long-term lease with the second respondent, that he subsequently obtained the requisite approvals to enable the subdivision of Portion 4 and the consolidation of the resultant Portion "A", *not* with Portion 56, as contemplated in the deed of sale with the Halls, but instead with Portion 57, which, as mentioned, is Stratovest's property. The approvals obtained for the subdivision of Portion A from Portion 4 were granted by relevant authorities, subject to the condition that Portion A, upon its separation from Portion 4, had to be consolidated with Portion 57. (Having regard to the provisions of s 4(1)(a)(i) of the Subdivision of Agricultural Land Act[1] and the definition of '*owner*' in

[1] Section 4(1)(a)(i) provides: '*Any application for the consent of the Minister for the purposes of section 3 shall—*

(i) *in the case where any act referred to in paragraphs (a) to (e) of that section is contemplated, be made by the owner of the land concerned*'.

(The contemplated subdivision was an act referred to in s 3(a) of the Act. The text of s 3 is set out in para. [32] below.)

s 4(1)(b),[2] Stuart would have needed the authority of the Halls to have been able to validly obtain the approval required in terms of that statute.)

[13] When the Halls sold Portion 4 to the first respondent by deed of sale dated 2 September 2016, they apprehended that the provisions of clause 17 of the contract in terms of which they had acquired that property obliged them to include in their contract with the first respondent the obligations stipulated in clause 6, quoted above. They were aware at the time, however, that the second respondent had obtained approval for the consolidation of Portion A with its property (Portion 57) instead of with Portion 56. In fact, Mrs Hall - whether wittingly or unwittingly is not clear - had signed a power of attorney authorising the second respondent to apply for such subdivision and consolidation. Ostensibly being concerned not to put themselves in a situation of legal jeopardy, the Halls took steps to apprise the trustees of the MHOA of the position at the time they sold their property to the first respondent. The Halls had also become concerned, even before their sale of Portion 4 to the first respondent, that the second respondent, which by then had ceased to operate a polo club on Portion A, might decide to utilise the land for further housing development. They considered any such development would detract from the rural character of the area to the detriment of both themselves and the members of the MHOA.

[14] The applicant, maintaining that the provisions of clause 17 of the agreement between the second respondent and the Halls constituted an agreement for its benefit, which, upon acceptance, it was entitled to enforce against the Halls or their successor in title, thereupon took steps to have the relevant authorisations obtained earlier by the second respondent to permit the subdivision of Portion 4 and the contemporaneous consolidation of Portion A with Portion 57 amended to reflect approval rather for the consolidation of the dissected portion (by then formally designated as 'Portion 60') with Portion 56. It did not seek to procure the required approvals using the offices of the second respondent, however, as might have been expected if the applicant had by some means indeed become privy to clause 17 of the deed of sale to which the Halls were party, or clause 6 of the contract by which the first respondent had purchased Portion 4. It instead employed a firm of professional consultants to attend on making the required applications. In the event, written consent under the Subdivision of Agricultural Land Act was obtained by the applicant from the Minister of Agriculture on 15

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[2] Section 4(1)(b) provides: '*For the purposes of paragraph (a) "owner" shall have the meaning assigned to it in section 102 of the Deeds Registries Act, 1937 (Act No. 47 of 1937)*.' '*Owner*' is defined in s 102 of Act 47 of 1937 in the following terms insofar as relevant to the current case: '*... in relation to—*

(a) *immovable property, ... the person registered as the owner or holder thereof …*'.

December 2016, just over two months before the first respondent obtained registered title of Portion 4. But the required authorisation from the local authority that was sought in terms of s 15(2)(h) of the Theewaterskloof Municipality By-Law on Municipal Land Use Planning[3] could not be obtained without the cooperation of the first respondent, as registered owner of Portion 4.

[15] Section 15(2)(h) of the By-Law provides for an application by the owner of land or its agent for '*an amendment, deletion or imposition of conditions in respect of an existing approval*'. The amendment sought by the MHOA was to change the condition imposed by the local authority when it had approved the application for subdivision that had been submitted by Stratovest that the subdivided land be consolidated with Portion 57 to one providing for its consolidation with Portion 56. It is in dispute in this case whether there was in fact '*an existing approval*', but assuming that there was, only the owner of the land or its agent was competent to apply for its amendment. By virtue of the definition of '*owner*' in the Western Cape Land Use Planning Act 3 of 2014, which was applicable by virtue of s 1 of the By-Law, the word must be read to mean '*the person registered in a deeds registry as the owner of land or who is the beneficial owner in law*'. Hence the need for the MHOA to enlist the cooperation of the first respondent (or failing it, arguably Stratovest) if it were to achieve its object.

[16] The first respondent, represented by one Melissa Nelsen, was not willing to provide its endorsement of the applicant's endeavour to obtain an amended approval from the local authority. It did not wish to take sides in what it saw as a question in issue between the applicant and the second respondent. It was in particular concerned about the effect of any circumvention of the contractual provision that reserved to Stratovest the responsibility for obtaining the required approvals.

[17] In consequence of the first respondent's refusal to lend its assistance, the applicant instituted the current proceedings, in which, in terms of the notice of motion, it sought the following relief:

> … an Order … :
>
> 1. Ordering the First Respondent to take all such steps and sign such documents as may be necessary to enable the Applicant to, at its own cost, complete the process of sub-division of Portion 60, a Portion of Portion 4 of the Farm 781 in the Division of Caledon and the

[3] Promulgated in Western Cape P.N. 229/2015 published in the Province of the Western Cape Provincial Gazette Extraordinary 7429, dated 20 July 2015.

consolidation thereof with Portion 56, a Portion of Portion 4 of the farm 781 in the Division of Caledon including, but not limited to the following:

1.1 The granting of written consent by the First Respondent that the Theewaterskloof Municipality may consider and take a decision on the application for amendment of the conditions of approval for the subdivision of portion 4 of Farm 781, Caledon in terms of Section 15(2)(h) of the Theewaterskloof By-Law on Municipal Land Use Planning, 2015 and that Condition 2 of the Theewaterskloof Municipality approval dated 6 February 2013 … be amended to read as follows:

> "The consolidation of Portion A (±7.5 ha) <u>with portion 56</u> of Farm 781, Caledon District, be approved subject to the following conditions:"

1.2 In the event that the application for amendment of the conditions of approval for the subdivision of portion 4 of farm 781, Caledon as set out in 1.1 above is approved by the Theewaterskloof Municipality, that the First Respondent sign all further documents and take such further steps as may be necessary to enable the Applicant, at its own cost, to register the consolidation of the abovementioned properties in the office of the Third Respondent [the Registrar of Deeds, Cape Town].

2. Authorizing the Third Respondent to register the subdivision and consolidation in the deeds registry;
3. Authorizing and directing the Sheriff of this honorable Court to take all such steps and sign such documents on behalf of the First Respondent as may be necessary to give effect to the sub-division and consolidation described in paragraph 1 above in the event of the First Respondent failing to do so within a period of 7 days from the date of this Order
4. Granting the Applicant such further and/or alternative relief as may be appropriate in the circumstances
5. Ordering the First Respondent to pay the costs of this application
6. In the alternative to paragraph 4 above, and in the event of the Second Respondent opposing the Application, ordering the First and Second Respondents to pay the costs of this application jointly and severally, the one paying, the other to be absolved.

[18] The first respondent has given notice of its intention to abide by the judgment of the court. The third respondent, the Registrar of Deeds, has furnished a report to the effect that if the applicant were to succeed in showing an entitlement on the merits to the relief it seeks, there would be no reason in principle why the relief sought in paragraph 2 of the notice of motion should not be granted. Only the second respondent opposed the application.

[19] Stratovest's opposition to the application was advanced on a number of grounds in the papers. In argument, however, it was ultimately agreed by counsel on both sides that the crux of the case was whether, properly construed, the provisions of clause 6 of the agreement between the Halls and the first respondent constituted a contract for the benefit of the MHOA

(a *stipulatio alteri*), which, upon acceptance or adoption by the latter, would afford it the right against the first respondent to obtain the subdivision of the Remainder of Portion 4 and the consolidation of the subdivided portion (Portion 60) with the MHOA's land (Portion 56). Necessarily implicit in the approach of the MHOA was an acceptance that if the contractual provisions in issue did not evidence a *stipulatio alteri* that had been adopted by it, it would lack standing to seek the relief that it does. This follows because it would be only upon its adoption of the right or benefit conferred by such a contract that the applicant could have obtained legal standing to enforce the subdivision and transfer to it of Portion 60.

[20] The principles pertaining to *stipulationes alteri* are well established. In *Crookes NO and Another v Watson and Others* 1956 (1) SA 277 (A); [1956] 1 All SA 227, at 291C (SALR), Schreiner JA observed in regard to such agreements '*what is not very appropriately styled a contract for the benefit of a third person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two (cf. Jankelow v. Binder, Gering and Co., 1927 TPD 364)*'. In *Christie's Law of Contract in South Africa*, the reference to that observation is immediately followed by the following statement '*In Jankelow v Binder, Gering & Co, Greenberg J had accepted the analysis suggested from the Bar by the future judge of appeal: 'Now I think Mr Schreiner is right when he says the test whether the contract is made for the benefit of a third party is whether that third party, by adopting the contract, can become a party to it.*'[4] The commentary continues: '*Schreiner JA's statement of the law has been generally accepted as authoritative, is consistent with earlier cases, and was unanimously approved by the Appellate Division in Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* [1984 (3) SA 155 (A) at 172A-F]. ... *Following Hyams v Wolf and Simpson* [1908 TS 78], *what we have been accustomed to call the intention to benefit the third party is not, therefore, an intention to enrich that party but an intention to empower such party to adopt and become a party to the contract if he or she wishes. There must be a positive intention – it is not sufficient that it would be to the third party's advantage to adopt and become a party to the contract.*' (Footnotes omitted.)[5] The last sentence of the commentary that I have quoted from *Christie* is borne out by the reference with approval in *Joel Melamed* loc. cit. to the following dictum in *George Ruggier and Co v Brook* 1966 (1)

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[4] GB Bradfield (original text by RH Christie), *Christie's Law of Contract in South Africa* 7ed (LexisNexis, 2016) at p. 308.

[5] Id.

SA 17 (N) at 23H: '*It is entirely a question whether there is an intention that the third party can, by adoption of the promise, become party to the contract in which it is embodied*'.[6]

[21] There is nothing to suggest that by clause 6 of the second agreement, the Halls intended to do anything other than pass on to the first respondent purchaser the obligations that they had assumed in respect of the duty to give transfer of Portion A to the MHOA in terms of clause 17 of the contract pursuant to which *they* had taken transfer of the Remainder of Portion 4. The question is therefore whether clause 17 of the deed of contract in respect of the sale of the Remainder of Portion 4 was intended by the parties thereto to empower the MHOA to adopt and become party to a contract entitling it to obtain the subdivision of the land and the consolidation of Portion A with its land (Portion 56), subject only to it paying the costs of transfer. The answer must, of course, be found in the proper construction of clause 17.

[22] The oft cited synopsis provided in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 (16 March 2012); [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para. 18 gives a thumbnail reiteration of the proper approach to the interpretation of documents:

> The present state of the law can be expressed as follows. 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.

[6] Cf. also *Total South Africa (Pty) Ltd v Bekker NO* [1991] ZASCA 183 (28 November 1991); 1992 (1) SA 617 (A) at 625 D-G; and *Pieterse v Shrosbree and Others , Shrosbree v Love and Others* [2004] ZASCA 129 (23 September 2004); 2005 (1) SA 309 (SCA); [2006] 3 All SA 343 (SCA) at para. 9.

(Footnotes omitted.)

[23] It is helpful to read the summary of principles in *Endumeni* together with the remarks of Harms DP in *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7 (13 March 2009); 2009 (4) SA 399 (SCA) ; [2009] 2 All SA 523 (SCA) at para. 39:

> First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33 - 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B - C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23,[7] and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* 2008 (6) SA 654 (SCA) para 7.)

The reference by the learned Deputy President of the appeal court to *Masstores* is significant because it implies an approving endorsement of the dictum by Lewis JA in that case that *'…it is important to state that an ambiguity is not … a precondition for a court to interpret a provision by having regard to the context of the contract and the surrounding circumstances*'.[8]

[24] Now it is clear that the terms of the agreement by which the property was sold to the Halls were out of the ordinary in certain respects material to the matter currently in issue. The definition of the property being sold records unequivocally that although the purchasers

[7] This would appear to have been an intended reference to paras. 21 and 22.

[8] It is not altogether clear, but the context suggests that when Harms DP, despite endorsing *Masstores*, nevertheless reiterated the principle of the 'conservative use' of evidence to contextualise a document for the purposes of interpreting it, he meant that the use of such evidence should not detract from the strictly objective character of interpretation.

would take registered transfer of the entire cadastral unit, they would be doing so subject to the right of the seller (it being obviously implied with the assistance of the new registered owners or their successors in title, to the extent necessary) to subdivide Portion A from it with the purpose of enabling the transfer of that portion to the MHOA. It was also clear that the purchasers (and their successors in title, if applicable) would be obliged, when the seller had succeeded in obtaining the requisite approvals and had put the purchasers in receipt of them, to give transfer of the portion to the applicant with no consideration being payable thereupon to the applicant (or its successor in title, if applicable).

[25] It is not clear, however, whether the 'responsibility' undertaken by the second respondent to procure the requisite approvals gave rise to an enforceable obligation on it to do so; or, assuming that it did, whether the obligation would be enforceable by the purchasers (or their successors in title), or by the MHOA. Furthermore, although it is not a matter that falls to be decided in the current case, it is also not clear what the position would be, insofar as the further execution of the agreement was concerned, if the applications to be made for the requisite approvals were unsuccessful, or were granted subject to conditions that might be unacceptable to either the seller, the purchasers, or even the MHOA. It is also not clear whether the provision that contemplates that the applicant will be given transfer of the subdivided portion with '*no consideration whatsoever being payable by the MHOA <u>to the Purchaser</u> in respect of such transfer*' implies an intention that the MHOA would be entitled to transfer of the property for no consideration whatsoever; and, more particularly in that regard, whether the provision necessarily excluded any entitlement <u>by the seller</u>, *dehors* the contract of sale to the Halls, to any consideration from the MHOA for the transfer to it of the land that we know had, to the knowledge at the time of the contracting parties and the MHOA, been significantly developed by the seller.

[26] The uncertainty to which the provisions of clause 17 give rise in the latter respect is by no means academic because it is evident from the definition of the *res vendita* in the deed of sale[9] that the second respondent seller did not intend to give the purchasers beneficial ownership of the whole property, but only that part of it that would remain after the subdivision of Portion A, which it was contemplated would go the MHOA.[10] It would be

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[9] See paragraph [3] above.

[10] Having regard to the abstract system that applies in respect of the transfer of property in South African law, one might even question whether there was a real agreement (i.e. the mutual intention) between Stratovest and the Halls in respect of passing from the former to the latter of the real rights to Portion A; cf. *Legator McKenna*

understandable in the circumstances that the purchasers would have no expectation to be paid for property that in terms of the agreement they had no right to keep for themselves. But what about the position of the seller who undertook the responsibility of rendering Portion A of the cadastral unit amenable to transfer to the MHOA? Was it effectively undertaking an exercise whereby it, or the purchasers would donate the subdivided land to the applicant?

[27] It is because of these uncertainties that it is necessary in this case, if the true, import of the agreement is to be ascertained, to examine the language of the contract in a wider context; that is, beyond the context of the language of the clause itself read in the deed as a whole, but also with regard to the factual matrix within which the agreement was concluded, including 'the circumstances attendant upon its coming into existence', and 'the apparent purpose to which it is directed and the material known to those responsible for its production'.[11] When that is done, the understanding between the second respondent and the applicant recorded in the minutes of the trustees' meeting of 29 September 2009 is obviously significant. The minutes make it clear that the intention by the second respondent to procure the subdivision and transfer of Portion A to the applicant was conditional upon counterprestation by the MHOA. It had to put in place arrangements that would permit the repayment by the second respondent of the loan it had obtained to finance the development of the clubhouse and that would also secure long-term leasehold rights for the second respondent over the property upon which the second respondent was then operating a polo club and equestrian centre. It therefore becomes clear when regard is had to the factual matrix that any notion of the applicant becoming entitled to obtain the property entirely free of consideration would be at odds with Stratovest's intentions, and there is nothing to suggest that Halls, when they purchased the property as defined in the deed of sale, had any independent intentions with regard to the portion of the cadastral unit of which they would not be obtaining beneficial ownership.

[28] The MHOA can hardly be heard in those circumstances to say that the proper import of the agreement was to empower it by notice to the purchasers (or their successor in title) to

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Inc and Another v Shea and Others [2008] ZASCA 144 (27 November 2008); 2010 (1) SA 35 (SCA); [2009] 2 All SA 45 (SCA) at para. 22. The seller's intention appears to have been to pass ownership of Portion A to MHOA, not to the Halls, which is explained by Stratovest assuming responsibility to obtain the necessary approvals for the subdivision required to achieve that. The question was not addressed in argument, however, and, as will appear, it has not been necessary to answer it.

[11] Cf. *Endumeni* supra, loc cit.

obtain transfer of the property free of consideration. Yet that, in essence, is what it seeks to achieve by means of the relief sought in this application.

[29] And it seeks to do so by usurping the role reserved to the seller in terms of the agreement to be in charge of the approval application process. The reason for the 'responsibility' being placed by clause 17 on the seller to obtain the requisite approvals might not be clear from the language of agreement read in abstract, but it does become clear when the clause is interpreted with reference to the factual matrix. The context bears out Mr Stuart's averment that the responsibility was reserved to the seller so that (as recorded in paragraph [10] above) '[t]*he Second Respondent was protected by the fact that only it (and not the purchaser, nor the Applicant) would be authorised to obtain the relevant approvals for subdivision and consolidation (but only in the event of the applicant meeting its end of the bargain)*'.

[30] The question as to what is to become of Portion A now that it has become evident that the arrangements contemplated in terms of the understanding recorded in the minutes of the 29 September 2009 trustees' meeting will not be realised is not addressed by the provisions of the agreements, and whether clause 17 effectively provided all of the protections that Mr Stuart contends it was directed towards is also far from certain. But those are not questions that require to be answered in the current proceedings. It is sufficient to hold only that the agreement between the Halls and the second respondent, and clause 6 of the subsequent agreement between the Halls and the first respondent, did not enable the applicant, by its election, to become party to a contract entitling it to require the current owner of Portion 4 to cooperate with it to obtain the subdivision of Portion A and its attendant consolidation free of any consideration with its own property, Portion 56.

[31] But even were I wrong that the clauses in issue did not constitute a *stipulatio alteri*, I consider that construed in the manner for which the applicant contends they would offend against the prohibition in s 3(e) of the Subdivision of Agricultural Land Act against the granting of a right to an undivided portion of agricultural land without ministerial consent, and on that account fall to be regarded as void. This was not a point taken by the second respondent, but it occurred to me in the course of preparing the judgment. As it went to an issue of legality I considered that the court was duty bound to address it *mero motu*,[12] even if

[12] Cf. *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15 (18 September 2008); 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para. 68.

it arises for consideration only as a fallback position in support of the conclusion at which I have arrived primarily along other lines. Counsel were accordingly invited to make written submissions on the point, which have been gratefully received and duly considered.

[32] Section 3 of the Subdivision of Agricultural Land Act provides:

> **Prohibition of certain actions regarding agricultural land.**—Subject to the provisions of section 2—
>
> (*a*) agricultural land shall not be subdivided;
>
> (b) no undivided share in agricultural land not already held by any person, shall vest in any person;
>
> (c) no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;
>
> (d) no lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years, shall be entered into;
>
> (e) (i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act No. 27 of 1956); and
>
> (ii) no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for periods aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956;
>
> (*f*) no area of jurisdiction, local area, development area, peri-urban area or other area referred to in paragraph (*a*) or (*b*) of the definition of "agricultural land" in section 1, shall be established on, or enlarged so as to include, any land which is agricultural land;
>
> (g) no public notice to the effect that a scheme relating to agricultural land or any portion thereof has been prepared or submitted under the ordinance in question, shall be given,
>
> unless the Minister has consented in writing.

Paragraph (e) falls to be read mindful of the definition of 'sale' in s 1 of the Act, viz. '*"**sale**" includes a sale subject to a suspensive condition; and "**sold**" shall have a corresponding meaning*'.

[33] The history of the provision was discussed in *Geue and Another v Van Der Lith and Another* [2003] ZASCA 118 (20 November 2003); [2003] 4 All SA 553 (SCA); 2004 (3) SA 333 (SCA) and *Adlem and Another v Arlow* [2012] ZASCA 164 (19 November 2012); [2013] 1 All SA 1 (SCA); 2013 (3) SA 1 (SCA). The section comprised originally of only paragraphs (a) to (c). The supplementary provisions in paragraphs (d) to (g) were introduced

by way of a series of statutory amendments during the period from 1972 until 1981. It is evident from the character of those amendments that the legislative intention was to considerably widen the limitations in respect of any dealings with undivided portions of agricultural land without the prior written consent of the Minister. This much was highlighted by the amendment of the Act by way of insertion of the additional paragraphs in s 3 and also the insertion, in 1981, of the special definition of 'sale' (quoted in the preceding paragraph) to include a sale subject to a suspensive condition.[13] The effect of the latter amendment was to exclude the ability to contract to sell an undivided portion of agricultural land subject to the Minister's consent being obtained, thus negating the effect of the judgment in *Corondimas v Badat* 1946 AD 548.[14] In *Geue* at para. 15, Brand JA noted that it became clear that the purpose of the legislation was not only to prevent alienation of undivided portions of land; its '*target zone*', said the learned judge of appeal, was actually '*much wider*'. He remarked that it was purposeless, when the wording of the provision expressed the legislature's intention very clearly, to speculate why it should have wanted to cast the net so widely.

[34] The construction of the contractual clauses contended for by the applicant necessarily implies an agreement between Stratovest and the Halls, alternatively, between the Halls and the first respondent, intended by those parties, upon adoption by the MHOA, to grant a right to the latter to obtain ownership of Portion A, subject only to certain statutory approvals, including that required in terms of s 3 of Subdivision of Agricultural Land Act. I have rejected that contention, but were I wrong in that conclusion, the purported granting of such a right would fall foul of the prohibition in s 3(e)(ii) of the Act in my judgment.

[35] Section 3(e)(ii) permits the grant, without written consent from the Minister, of a right to an undivided portion of agricultural land for a period less than 10 years, or to the same person for any number of periods 'aggregating' less than 10 years. It also permits the grant of a right to such a portion for the purpose of a mine. But the grant of any right to such a portion which does not fall into any of those categories cannot be made without ministerial

[13] The definition was inserted into the Act with effect from 4 March 1981 in terms of s 1(c) of the Subdivision of Agricultural Land Amendment Act 18 of 1981.

[14] *Corondimas* was concerned with the legality of a contract of sale that was subject to the Trading and Occupation of Land (Transvaal and Natal) Restriction Act 35 of 1943 (since repealed) and might validly be concluded only with ministerial permission. The Appellate Division held that a contract concluded subject to a suspensive condition that the required permission be obtained did not offend against the statutory restriction and was valid.

consent. It follows that a *stipulatio alteri* of the nature contended for by the applicant, one that granted the applicant a *ius ad rem acquirendam*, could not be made legally without the prior written consent of the Minister. On this basis too, the right that the applicant purports to exercise in seeking the relief it does in these proceedings could not be recognised.

[36] In the result, the following order is made:

1. The application is dismissed.

2. The applicant shall pay the second respondent's costs of suit.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

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