Reportable:	*Yes/No*
Circulate to Judges:	*Yes/No*
Circulate to Magistrates:	*Yes/No*

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

CASE NO.: 577/2014

Date heard: 10-12-2018
Date delivered: 17-05-2019

In the matter between:

Bernt Robert Honeth N.O — **1st Plaintiff**

Elizabeth Honeth N.O — **2nd Plaintiff**

And

Matsapa Trading 778 CC — **Defendant**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. Matsapa Trading 778 CC, the applicant in this application for an amendment to its plea, is the defendant in the main action between the parties. The respondents/plaintiffs are the trustees of the Valhalla Trust, cited in their official capacities and who shall be referred to herein as *"the Trust"*.

2. The Trust instituted an action against the applicant for essentially the payment of Value Added Tax (less transfer duty already paid) on an immovable property sale agreement (the agreement) entered into between the parties during October 2012.

3. The summons was served on the applicant, whereafter it filed its plea during July 2014. On 19 June 2018 the applicant filed a notice of intention to amend its plea whereafter a notice of objection to the proposed amendments was filed by the Trust on 3 July 2018.

4. To place this application in context it is necessary to reproduce the relevant portions of the pleadings.

5. Paragraphs 5 to 7 of the Trusts' Particulars of Claim reads as follows:

> *"5) On or about 17 October 2012 and at Kimberley, the parties entered into a written agreement of sale and a copy of which is attached hereto as Annexure "RH1".*
>
> *6) When entering into the said agreement, the trust was duly represented by Mr Van Tonder.*
>
> *7) The following were inter alia the express, alternatively tacit, alternatively implied terms of the said agreement:*

7.1 The defendant purchases from the plaintiffs the immovable property known as Erf 509, 4 Hemming Street, Belgravia, Kimberley.

7.2 The purchase price is the sum of R1, 995,000.00 which amount does not include Value Added Tax, if applicable to the transaction.

7.3 The purchase price will be payable by way of a deposit in the amount of R900,000.00 to be paid on the signing of the agreement, and the balance to be paid on registration of transfer of the property in the name of the defendant.

7.4 Value added tax, if applicable to the transaction, will be payable, together with the balance of the purchase price, on registration of transfer of the property."

6. In its plea the applicant admitted paragraphs 5 and 6 of the Particulars of Claim. With regard to paragraph 7 of the Particulars of Claim the following was pleaded:

"Ad paragraph 7 and 7.1 thereof:

2.1 The contents of the paragraphs under reply are admitted.

2.2 Defendant pleads that the Afrikaans version of the written agreement appended as "RH1" to the Particulars of Claim constitutes the whole agreement between the parties and *no representations made by any of the parties shall be of any force or effect unless contained in the agreement.*

3. *Ad Paragraph 7.2 and 7.3 thereof:*
The contents of the paragraphs under reply are denied in so far as it does not correspond with clause 1(a) and (b) of the agreement ("RH1) between the parties.

4. *Ad paragraph 7.4 thereof:*

4.1 *The contents of the paragraph under reply are denied and Plaintiffs are put to the proof thereof.*

4.2 *Defendant pleads that the parties expressly agreed that the Purchaser – the Defendant – should pay transfer Duty immediately when requested to do so by the Conveyancer appointed by the Seller – the Plaintiffs – namely Haarhoffs Attorneys.*

4.3 *Defendant pleads further that the parties expressly agreed that the Purchaser – Defendant – would be in breach if it fails to make any payment provided for in the agreement and/or fails to comply with any obligation to SARS which may delay the issue of a transfer duty receipt, and remain in default for seven day after written notice was given to remedy the breach."*

7. The applicant's Notice of Amendment deals with paragraphs 5 to 7 of the Trust's Particulars of Claim as follows:

"2. <u>*Ad paragraphs 5 and 6*</u>

2.1 *"The defendant admits that the parties, represented as alleged, entered into the written agreement embodied in Annexure RH1 on 17 October 2017 at Kimberley.*
(The date is obviously a typographical error)

2.2 *The parties were under the impression that transfer duty was payable and the written agreement was entered into on that basis;*

2.3 *The words "welke bedrag BTW uitsluit (indien van toepassing)" in clause 1 of the written agreement (the impugned words) should accordingly be treated as pro non scripto.*

2.4 *<u>In the alternative</u>, and in the event of the court's finding that the impugned words –*

a) *should not be treated pro non scripto, and*

b) *must be interpreted to either expressly, tacitly or impliedly impose a contractual obligation on the defendant to pay VAT if VAT and not transfer duty was payable*

the defendant pleads as follows:

2.5 *the written agreement, owing to a bona fide mutual error in the drafting of the document, did not correctly reflect the common continuing intention of the parties;*

2.6 *The common continuing intention of the parties, as it existed when the written agreement was reduced to writing, was that the defendant would pay transfer duty over and above the purchase price;*

2.7 *it was not the common continuing intention of the parties that if VAT and not transfer duty was payable, the defendant would be responsible for the payment of VAT;*

2.8 *The parties signed the written agreement in the bona fide but mistaken belief that it recorded the true agreement between the parties;*

2.9 *By virtue of the foregoing, the defendant is entitled to rectification of the written agreement, so as to make it accord with the parties' common intention, by deleting the words "welke bedrag BTW uitsluit (indien van toepassing);*

2.10 *The defendant prays that the court adjudicates upon the basis of the written agreement relied upon by the plaintiff as it stands to be corrected.*

3. Ad paragraph 7 (including 7.1 to 7.4)

4.1 The defendant repeats the averments in paragraphs 2.2 to 2.9 above and –

a) denies that it was an express – tacit or implied term of the written agreement, as it stands to be rectified, that VAT, if applicable to transaction, will be payable together with the purchase price on registration of transfer of the property;

b) denies in particular that it was an express – tacit or implied term of the written agreement, as it stand to be rectified, that VAT, if applicable to transaction, will be payable by the defendant;

4.2 The balance of the allegations, to the extent that they are in accordance with the express terms of the written agreement, as it stands to be rectified, are admitted."

8. The Trust objects to the proposed amendments as contained in paragraphs 2.1, 2.2 and 2.3 of the Notice of Amendment on the basis: (a) that it constitutes a withdrawal of an admission which would not be allowed without sufficient and proper explanation thereof; (b) that the proposed amendments contained in paragraphs 2.1, 2.2 and 2.3 of the Notice of Amendment clearly intend to contradict, vary or alter the terms of the written agreement in violation of the parol evidence rule; and (c) that paragraphs 2.1 to 2.3 of the proposed amended plea therefore do not sustain a defence and would render the plea excipiable.

9. As can be seen the proposed amendments have as its aim the deletion of the words *'welke bedrag BTW uitsluit (indien van toepassing)"* from the written agreement either by regarding it as *pro non scripto* or by rectification. Clause 1 of the agreement reads as follows:

"1. DIE KOOPPRYS IS
R 1995 000, 00
Welke bedrag BTW uitsluit (indien van toepassing),
En as volg betaalbaar is:
(a) kontant by aanvaarding van hierdie aanbod
R900 000,00
Welke bedrag by the Transportbesorger in trust inbetaal sal word, wie die voormelde bedrag onmiddelik daarna sal belê in 'n rentedraende rekening tot voordeel van die Koper.
(b) Die balans van
R1 095 000,00
Sal vry van bankkommissie in kontant betaalbaar wees te Kimberley teen registrasie van oordrag in die naam van die Koper en moet deur
Bankiers-of ander goedgekeurde waarborg/e ten gunste van sodanige person/persone verseker word as wat die Verkoper mag bepaal en sodanige waarborg/e moet binne
30 Kalenderdae van aanvaarding van hierdie aanbod aan die Verkoper se Aktebesorger gelewer word."

(own highlighting)

10. Mr Wian Steynberg, who is a member of the applicant and the deponent to the affidavit in support of the application for amendment, explains the reasons for the amendments as follows:

10.1 The immovable property was listed for sale at the price of R2.2 million;

10.2 The offer made by the applicant in the amount of R1995 000, 00 was, together with transfer costs and transfer duty, the absolute maximum that the applicant was willing and able to pay;

10.3 The possibility that VAT would be payable on the transaction was never discussed by the parties, much less that the applicant would be liable to pay VAT on the purchase price should it happen to be so payable;

10.4 Both parties were under the impression that transfer duty and not VAT was payable on the transfer of the property. To this effect the appointed conveyancing attorneys, Haarhoffs, called upon the applicant to pay transfer duty in the amount of R76 000, 00, which it in fact did.

10.5 It only emerged six months after registration of the transfer of the property into the applicant's name that VAT and not transfer duty was payable on the purchase price.

10.6 The applicant had been of the view that the core issue on the pleadings between the parties was whether it was an implied term of the agreement that if VAT was payable on the transaction the applicant would be responsible for payment thereof.

10.7 After the matter passed through several counsel, applicant's current counsel held the view that the words *"welke bedrag BTW uitsluit (indien van toepassing)"* could not simply be ignored but that the court must be asked to either consider the impugned words as pro non scripto or to adjudicate the matter upon the basis of the written agreement as it stand to be corrected; and

10.8 The intended amendment to the plea is simply to bring the written terms of the sale agreement in conformity with the true intention of the parties.

11. I deal first with the Trust's contention that paragraphs 2.1 to 2.3 of the proposed amendment constitutes a withdrawal of an admission which is not sufficiently explained.

As a starting point it must be noted that a withdrawal of an admission is not in a different position from an ordinary amendment. The court's powers are limited only by considerations of prejudice and injustice to the aggrieved party to the extent that a special order as to costs will not compensate him. In *President-Versekeringsmaatskappy Bpk v*

Moodley 1964(4) SA 109 (TPD) at 110H – 111A the following is said:

> *"The approach is the same, but the withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the Court of the bona fides thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence."*

12. Neither the *bona fides* of the applicant in seeking the amendment or any prejudice resulting therefrom have been seriously argued by Mr Van Niekerk SC for the Trust – and with good reason. The proceedings are still in its early stages and no great disruption would be caused by such an amendment. The withdrawal of the admission that the Afrikaans version of the written agreement *"constitutes the whole agreement between the parties and no representations made by any of the parties shall be of any force or effect unless contained in the agreement"* can also hardly come as a surprise to the Trust. In the plea as it stands the applicant has denied the assertion made by the Trust in paragraph 7.4 of the Particulars of Claim and has specifically pleaded that the parties agreed that transfer duty be paid by the applicant (as opposed to VAT).

13. Similarly in its plea to the Trust's paragraph 11 of the Particulars of Claim where it is stated that *"The plaintiffs aver*

that in law and in accordance with the contractual terms the defendant was obliged to pay Value Added Tax in respect of the transaction as pleaded hereinbefore", the applicant has pleaded as follows: *" The contents of the paragraph under reply are denied. . . . . The agreement between the parties does not provide for the payment of VAT by the defendant to the plaintiffs. The agreement expressly provides for the payment of transfer duty and further that the defendant would be in breach if it fails to comply with any obligation to SARS which may delay the issue of transfer duty receipts."*

14. The explanation for the withdrawal of the admission cannot in these circumstances be said to be insufficient where it appears to be for the purpose of aligning the plea with the real issues in dispute between the parties. In *Whittacker v Roos*; *Morant v Roos 1911 TPD 1092* at 1102 – 1103; Wessels J remarked:

> *"This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it.* ***But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in***

pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real **position is between the parties."** *(Own highlighting)*

15. In my view the real mischief is not that the amendment constitutes the withdrawal of an admission but rather the effect of the inclusion of paragraphs, 2.2 and 2.3 of the Notice of Amendment on the proceedings. At this stage it must be mentioned that paragraph 2.1 on its own is not objectionable in view of my findings herein and there is no reason why such amendment cannot be granted.

16. What is envisaged with the amendments contained in paragraphs 2.2 and 2.3 (read with 2.4) is that the court is called upon to first decide whether the impugned words referred to should be treated as *pro non scripto*, and only thereafter in the event of this defence failing, that rectification be considered.

17. The Trust has no objection to the proposed amendments relating to rectification of the written contract. The approach by the applicant, however, would inevitably entail the reception of extrinsic evidence to prove the true version of the contract as alleged by the applicant, while the contract stands unrectified – an approach which is contrary to the parol evidence rule.

18. Intrinsic to the parol evidence rule is the rule that aside from claims for rectification of a contract, no evidence may be given to alter the clear and unambiguous meaning of a contract.

While it has been held that evidence may be admissible to establish the context or factual matrix of a contract – which must be used as sparingly as possible, the parol evidence rule remains part of our law. See *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009(4) SA 399 at 409 G-J where Harms DP said the following:

> *"[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) para 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 Corp [1985] ZASCA 132 (at www.saflii.org.za), 1985 Burrell Patent Cases 126 (A)). 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)."*

See also *Sakhiwo Health Solutions (Limpopo) (Pty) Ltd v MEC Health, (Limpopo) Provincial Government [2015] JOL 33718 (SCA)* at paragraph 32 thereof.

19. It follows thus that to allow the amendments sought in paragraphs 2.2 and 2.3 of the Notice of Amendment would render the plea excipiable. These amendments can therefore not be allowed.

20. Consequent upon the amendments contained in paragraphs 2.2 and 2.3 being refused, paragraph 2.4 of the notice of amendment will become superfluous if not non-sensical. Although the objection was not aimed towards paragraph 2.4 it makes no sense to allow this amendment and it is consequently also refused.

21. The Trust's opposition to the proposed amendments being mainly successful there is no reason why costs should not follow the result.

The following order is made:

a) Save for the amendments contained in paragraphs 2.2, 2.3 and 2.4 of the Notice of Intention to Amend, dated 12 June 2018, which are not allowed, the proposed amendments are granted.

b) The applicant is ordered to pay the costs of the application.

CC WILLIAMS
JUDGE

For Applicant:	Adv WA Van Aswegen
	Duncan & Rothman Inc
For Respondents:	Adv JG Van Niekerk SC
	Haarhoffs Inc