IN THE HIGH COURT OF SOUTH AFRICA

Delete whichever is not applicable

(1) Reportable Yes / ~~No~~
(2) Of interest to other Judges Yes / ~~No~~
(3) Revised.

Date: 12 June 2014

Signature..........

12/6/2015

GAUTENG DIVISION, PRETORIA

17146/13

In the matter between:

K CARRIM COMMERCIAL PROPERTIES (PTY) LIMITED Applicant

and

URBAN HIP HOP HOTELS (PTY) LIMITED Respondent

JUDGMENT

Ismail J:

[1] This is an application which was referred to for oral evidence.

[2] The issues which the court had to determine, by way of oral evidence, in terms of a draft order were twofold, namely:

(i) did the respondent's standard memorandum of agreement form part of the contract between the parties ?

(ii) did the three memorandum of understandings constitute the exclusive memorial of what was agreed between the parties ?

[3] On behalf of the applicant Mr Z Carrim testified. He stated that he was the director of the applicant company which was engaged as a property rental and development company. Its portfolio was worth R1, 2 to R1, 5 billion. One of the properties which the applicant was involved in concerned 70 units. Fifty (50) units apartments and the remainder were commercial and retail units in a building called 'Icon' situated in Cape Town.

[4] Initially a concern called V I P Living [V I P] managed the apartments in the building on behalf of the applicant. The respondent managed other apartments in the same building on behalf of other parties. Mr Kobus Botha [Mr Botha], a director of respondent and Mr Carrim, were both trustees of the Icon which was a sectional title scheme.

Background

[5] The applicant was not happy with the service which VIP rendered. A meeting was held on the 8 March 2011 where Mr Carrim, Mr Putter, Mr Botha and another director of the respondent met in order to negotiate the respondent taking over the management of the applicant's units. Mr Carrim testified that he was prepared to hand over the management to the respondent on certain conditions. Firstly that he was only prepared to pay an amount of R1 250,00 per unit as monthly expense . Secondly he was not prepared to pay the standard 20% commission to the respondent and it was agreed that the respondents would charge the applicant 14% as opposed to their standard rate of 20%.

[6] On behalf of the respondent, Mr Botha testified. He in essence confirmed the arrangement between himself and Mr Carrim. He stated that

he sent the respondent's standard management agreement to the applicant as evidenced by the e-mail dated 9 March 2011.

[7] Pursuant to the meeting of the 8 March 2011, the respondent sent its management agreement to the applicant . It requested that the applicant remit the signed agreement to it. This agreement was not signed by the applicant nor was it ever signed by the respondent.

[8] Pursuant to Mr Carrim and Mr Botha testifying, the following aspects appear to be common cause:

1. That the Memorandum of Understanding was signed on behalf of the applicant and the respondent;

2. That neither party signed the respondent's standard agreement and/or varied agreement;

3. Mr Carrim during the meeting, which was held on 8 March 2011, was clearly negotiating from a position of strength, as the respondent was desirous and keen to be the exclusive management agent in the building;

4. Mr Carrim insisted that he could sell some of the units if he needed to do so;

5 Mr Botha during cross-examination conceded that the suggestion to obtain the applicant's apartments into the respondents rental pool emanated from him;

6 The keenness on the part of the respondent to acquire the applicant's business into its rental pool concomitantly resulted in the respondent deviating from the terms of its own standard agreement in the following manner:

(i) It reduced the standard management fee from 20% to 14%;

(ii) It permitted the applicant to pay a standard levy of R1 250.00;

(iii) It did not insist on the applicant signing its standard agreement, however it signed the memorandum of understanding which the applicant desired;

(iv) It permitted the applicant to sell units out of the rental pool;

(v) It deviated from its standard five year period and entered into the MOU for a shorter period;

(vi) It agreed to carry out the repairs and maintenance to the applicant's units itself;

(vii) It did not insist on a proxy for body corporate meetings.

[9] The applicant's view is that the MOU is the sole and exclusive memorial of the agreement on the part of the parties and that it is the agreement which binds them. The respondent's contention on the other hand is that the MOU as amplified by the memorandum of agreement or its standard agreement applied.

[10] During the course of this judgment I will deal with both contentions in order and deal with each layer of the proverbial onion in justifying the conclusion arrived at. In doing so I will deal with the respondent's contention first, even though it may appear to place cart before the horse. This is done with the view of approaching this matter on the *Plascon Evans (Pty) Ltd v Van Riebeeck Paints,* principle1984 (3) SA 632 (A) at 634E-635A.

[11] The respondent submission is premised on the argument that the MOU whilst it forms part of the agreement between the parties it fails to specify the manner in which the agreement would be processed from an accounting point of view. This is done through the standard agreement which deals with issues such as the rental net income; the manner in which the 'turnover' is to be calculated as well as what income is apportioned to the applicant in term of the participation interest expressed as its percentage interest in the rental pool. For these reasons it was contended that the MOU cannot be the exclusive memorial of what was agreed between them as it is silent on these aspects.

[12] Mr Gauthi SC, acting for the applicant, submitted that if that was true, which he disputed, the two agreements, MOU and standard agreement could not exist side by side. The reason being that there were material differences between the two agreemen*ts*. In this regard the differences were tabulated in the heads of arguments presented to me. These differences would inevitably beg the question regarding which agreement prevailed and would result in an absurdity. I have not mentioned the differences in this judgment , however I have taken note thereof. The differences are tabulated at par 14.2.1 up to 14.2.9 of the applicant's heads of argument.

[13] The pivotal issue which the respective parties differed on was paragraph 4.3 of the MOU. That clause reads as follows:

" 4.3 Expenses Contribution

The parties agree that the levy rate of R1 250.00 per rentable unit will apply for the duration of the agreed initial term of the arrangement based on the number of units made available by KCarrim Commercial Properties and defined in the monthly residential list to be supplied by Carrim for the month in advance. <u>No other expense or payment would be allowed</u> (my underlining) **and any deviation or adjustment thereof must be recorded in writing with reference to this provision, dated and signed by both parties."**

It is the words underlined in clause 4.3 above, namely ".. **No other expenses or payments would be allowed"** which the parties have interpreted differently, which gave rise to this matter. The interpretation given to those words by the applicant is that it should be given its literal meaning as it is unambiguous, and those words means exactly what it says. Mr Swarts SC, acting for the respondent, on the other hand submitted that those words should be read in conjunction with the word levy. In other words the " no other expenses or payments would be allowed" - is only in relation to the Levy.

Those words do not have any restrictions to other expenses such as operating expenses.

[14] Clause 4.4 of the MOU is headed Management Fee. It stipulates:

" The parties agreed that the monthly management fee payable to Urban Hip wi l (sic) be calculated on a rate of 14% of the turnover, excluding Vat and will be recorded on a VAT Invoice submitted to Carrim for payment not later at (sic) the 25th of each month of operation"

[15] It was put to Mr Carrim during cross examination that the phrase no other expenses would exclude the management fees referred to in clause 4.4 of the MOU. The applicant's counsel submitted that the MOU should be read in the context of the whole agreement. The phrase should not be read in isolation. In this regard the court was referred to the judgment of *Natal Municipal Pension Fund v Endumeni Munic*ipality 2012 (4) SA 593 (SCA) at 604 F-G, where Wallis JA writing for the court stated:

" 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 attended upon its coming into existence."

[16] The respondent's counsel submitted that the court should follow the approach set out in *Swart v Cape Matrix (Pty) Ltd* 1979 (1) SA195 (A) at 202 C. That a disputed clause in a contract cannot be interpreted by cutting

it out of the contract and pasting it on a clean sheet of paper. The correct approach would be to interpret disputed words or clauses in a contract in the context which includes:

(a) Other clauses in the contract; and

(b) The factual matrix evidence of facts that preceded the conclusion of the agreement.

[17] Having considered the two matters referred to by the protagonists, in this matter, I am of the view that the two cases do not gainsay or contradict each other. They both suggest that the disputed words should be seen in the light of the remaining clauses contained in the agreement , and that the factual manner in which the agreement was concluded should be considered.

[18] The common cause fact of this matter is that Mr Carrim was in a position of strength when he negotiated with Mr Botha. Mr Carrim was primarily responsible for drafting the MOU. Mr Botha sought the applicant's business or units to be under the respondent's rental pool. To that extent he agreed on behalf of the respondent to deviate from many aspects of the respondent's standard agreement.

The draft management agreement, notwithstanding it being sent to the applicant, was never signed by either the applicant or by the respondent. In addition thereto the standard agreement was never mentioned in the MOU, nor was it dealt with in the respondent's attorneys letters, or for that matter when Mr Botha sent the signed MOU to the applicant on 1 April 2011.

[19] The respondent wants us to believe that the standard agreement spelt out the manner the accounting would be formulated. One would expect that the MOU would refer to the standard agreement with the proviso that management fees would be as stipulated in the MOU and in the case of any disputes regarding expenses the MOU would prevail over the standard agreement. The e- mail dated 24 March 2011 setting out the terms of the agreement was sent to the respondent, by Mr Putter on behalf of the applicant. The respondent within 7 minutes of receiving the MOU accepted the terms thereof. The alacrity in accepting the applicant's offer clearly demonstrated the eagerness of the respondent to secure the applicant's 'business'.

[20] The applicant's submitted that the parties agreed that the MOU would be the agreement between them. Where the parties agreed to reduce their agreement in writing, such a document becomes the sole

memorial of the agreement between them and their previous statements are of little or no effect.

Integration rule

[21] In actions between contracting parties, as in this matter, when a contract has been reduced in writing, in general, is regarded as the exclusive memorial of the transaction and in a dispute between them no evidence to prove its terms may be given apart from the document or secondary evidence of its contents. Nor may the contents of such a document be contradicted, altered, added to or varied by parole evidence. See: *Union Government v Viannini Ferro- Concrete (Pty) Ltd* 19412 AD 43 at 47 and *National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel* 1975 (3) SA 16 (A) at 27A-B.
The Principles of the Law of Contract , A J Kerr, 6the edition at p348.

[22] In *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 195 at para [13] the court referred to the well known statement of Watermeyer JA in *Vianni Ferro* matter

" This *court has accepted the rule that when a contract has been reduced in writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the* *document or secondary evidence of its contents, nor may the contents of such document be contradicted altered, added or varied by parol evidence."*

Further on at para [15] of the judgment Barochowitz AJA continued and stated:

" A court may look to surrounding circumstances, including the relevant negotiations of the parties, in order to determine whether the parties intended a written contract to be an intergration of their whole transaction or merely a partial integration. See Johnston v Leal [1980 (3) SA 927 (A)] at 945 D-E...."

[23] I will therefore have to look at the surrounding circumstances and the relevant negotiations which took place between the parties in this matter in order to determine whether the MOU was intended to be the sole memorial between the parties. In addition thereto I would have to interpret the agreement in the light of the authorities cited by the parties, in para [15] and [16], *supra.*

[24] The aprties agreed and intimated that should any amendments or variations be required, it would be done in terms of clause 6.2 of the first MOU. The second and third MOU's contain the same non-variation clause.

[25] Both the MOU and the standard pool agreement contain non-variation clauses. The MOU at clause 6.2 is headed Variation and it

reads as follows:

" No variation or consensual cancellation of this MOU shall be of any force or effect unless reduced to writing and agreed upon by all the parties"

The pool agreement at clause 14 thereof is headed Variation, Cancellation or Waiver- it reads as follows:

" No variation, addition to, deletion from or cancellation of this agreement, and no waiver of any right under this agreement shall be of any force and effect unless reduced into writing and signed by or on behalf of the Parties."

As previously stated that the pool or standard agreement of the respondent was not signed by either party. Furthermore nothing was mentioned about the standard pool agreement by the attorneys in correspondence between them, as referred to in para [17], *supra.*

The MOU and the standard pool agreement of the respondent have a non variation clause which requires that amendments or variations should be reduced in writing and signed by both parties.
The standard agreement can only be part of the agreement if it was signed by the parties, which was not. It cannot co-exist with the MOU

because there are contradictory clauses between the MOU and standard agreement, as referred to earlier in the judgment. In the absence of the agreements specifying which agreement will prevail where there are contradictions it would result in an absurdity.

[27] In the light of the *Swart* judgment, the court would not apply a 'cut and paste' approach in interpreting the agreement, however I am enjoined to look at the factual matrix of facts preceding the agreement and other clauses in the contract.

[28] The clause "no other expense would be allowed" in clause 4.3 of the MOU it was submitted on behalf of the respondents when read with clause 4.4 renders the expression meaningless as management fees were also to paid in terms of the MOU. It is clear that Mr Carrim negotiated the terms of the MOU which were favourable to him and that the respondent was prepared to deviate from their standard terms as they sought the formers "business". The factual background must be considered when interpreting the agreement , together with the other clauses in the agreement.
The phrase 'no other expenses' should not be interpreted to mean that management fees are to be excluded. When the agreement is viewed holistically it means that apart from management fees the only fees would be the amount of R1 250,00 in respect of levies.

[29] Clauses 4.3 and 4.4 are not mutually destructive clauses. When read in context of the agreement it makes complete sense.

[30] *R H Christie in The Law of Contract* 4th edition at page 218, *et seq* referred to the matter of *Johnston v Leal* 1980 (3) SA 927 (A) at 943 B where Corbett JA remarked:

" It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract...

To sum, up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of the integrated, contract in order to rely upon the contract as altered."

See also *Du Plessis v Nel* 1952 (1) SA 513 (A) at 539, where Van den Heever writing for the majority of the court stated:

What then is a collateral oral contract ......Even where the subject matter of an oral contract is so closely related to that of the written instrument that the conclusion of one is consideration for the other, the oral contract may be proved if truly extrinsic and therefore not in conflict with the written contract."

[31] In my view the standard pool agreement of the respondent contained clauses which contradict the MOU as set out in applicants heads of argument. The pool agreement is not consistent with the MOU which was duly negotiated and agreed upon between the parties.

[32] I am therefore of the view that the MOU was the sole memorial between the parties for the period that it existed, albeit for a short duration of time, and that the respondent's standard pool agreement did not form part of the agreement between the parties.

Costs

[33] On behalf of the applicant it was submitted that if the application was successful , costs should be granted for the use of two counsel. Mr Swarts' submitted that this was not a matter which required that two counsel should have been engaged. Should the court be of the view that the MOU was the sole memorial between the parties than in such an event costs should only be permitted for one counsel.

[34] The issue of costs is a matter for the determination of the court. The court must exercise its discretion in a judicious manner. See *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 68. In the matter of *Ferreira v Levin,*

Vreyenhoek v Powell 1996 (2) SA 621 (CC) at 624 Akermann J stated:

" [3] The Supreme court has over the years, developed a flexible approach to costs which preceeds from two basic principles, the first being that the award of costs , unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule , have his or her costs. Even the second principle is subject to the first….."

This matter concerned some commercial significance which required an enquiry into contracts and interpretations thereof. Although the amount involved is not astronomically high it cannot be argued that it was puny.

[35] I am of the view that the matter was of substantial importance to both parties and the fact that the applicant chose to utilise two counsel cannot be described as litigating extravagantly or on a luxurious scale. For that reason I am of the view that it would not be inappropriate to order costs of two counsel.

[36] Accordingly, I make an order in favour of the applicant in the following terms:

(1) The respondent is directed to pay the applicant the sum of R2 248 156,29;

(2) The respondent is ordered to pay interest on the amount of R2 248 156, 29 at a rate of 15.5% per annum from 26 March 2013 to date of payment;

(3) Costs of the application, such costs to include the costs of two counsel. The costs to include the costs reserved on the 5 March 2014.

Ismail J

APPEARANCES:

For the Applicant: Adv A Gautchi SC assisted by Adv J Myburgh instructed by Errol Goss Inc, Johannesburg c/o, Morris Pokroy Attorneys Pretoria

For the Respondent : Adv B Swarts SC instructed by Joubert Swart Attorneys Johannesburg; c/o Van Stade Van der Ende Incorporated , Pretoria.

Date of Hearing: 4; 5 & 6 May 2015

Judgment delivered: 12 June 2015.