IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

Case no. 631/2014

In the matter between:

BECK TRADING CC	**Applicant**
And	
THE GOOD HOPE TEXTILE CORPORATION (Pty) Ltd t/a DA GAMA TEXTILES	**First Respondent**
DA GAMA INTERNATION TEXTILES (Pty) Ltd	**Second Respondent**

JUDGMENT

STRETCH J:

[1] This is an application for an order for specific performance compelling the first respondent to comply with its obligations in terms of a written agreement entered into between the applicant and the first respondent on 16 November 2006 ("the agreement").

[2] The agreement is in two parts. The first part governs the sub-letting by the first respondent to the applicant of a certain portion of land described as farm number 2280 in the administrative district of King Williams Town ("the land").

[3] The second part of the agreement is for the sale of this land for an agreed price by the first respondent to the applicant, which sale would become effective upon the date of registration of transfer of the land from the previous owner (the Government of the Republic of South Africa) to the first respondent.

[4] The second respondent was joined due to its interest in a mortgage bond registered over the property, and does not oppose the application.

[5] Clause 4.4 of the agreement provides that the parties, upon registration of transfer of the property to the first respondent, would take all necessary steps to effect transfer of the land to the applicant, and that the purchase price would be payable upon the date of registration of transfer of the land from the first respondent to the applicant.

[6] Considerable unforeseen delays were experienced by the first respondent to procure registration of transfer of the land to it by the Government, resulting in this court compelling it to do so on 9 December 2010. Notwithstanding this, registration of transfer of the land to the first respondent only took place on 6 May 2014. None of these delays are attributable to any conduct on the applicant's part.

[7] The applicant's case is that the sale became effective on 6 May 2014 (when transfer from the Government to the first respondent was registered) whereupon the first respondent became obliged to transfer the property to it in terms of the agreement. The applicant accordingly demanded transfer on 12 September 2014.

[8] The first respondent's response to the demand was that:

8.1 The condition at clause 3.2 of the agreement (which the first respondent claimed was a suspensive condition which applied to the whole of the agreement and not just to the sale portion thereof) had not been fulfilled.

8.2 The applicant had not obtained all the necessary consents and permission to build commercial premises on the land.

8.3 A lapse of almost eight years since the date that the agreement had been entered into was more than reasonable time for the fulfilment of the suspensive condition.

8.4 Accordingly, the agreement had fallen away.

[9] The application before me is essentially about the interpretation of the agreement, and particularly clause 3.2 thereof. Clause 3.2 of the agreement reads as follows:

> 'Da Gama [the first respondent] acknowledges that Beck [the applicant] intends to build commercial premises on the land and this agreement is subject to Beck obtaining all necessary consents and permission from all relevant authorities of whatsoever nature to enable it to build commercial premises it desires on the land and Da Gama furthermore shall be obliged to assist Beck in obtaining all necessary consents and permission to so build.'

[10] The applicant denies that this is a suspensive condition. It contends that at best the clause conveys a recording and a term of the agreement.

[11] In the alternative, the applicant contends that if this court finds that the clause reflects a true condition, then that condition firstly relates only to the sale of the property, secondly, that it is not suspensive and thirdly, that it was included for the applicant's benefit. If this is the position, it is then the applicant's case that the condition can either be fulfilled or waived within a

reasonable period of time after 6 May 2014 (being the date on which the first respondent took transfer), which time had not elapsed by the time the applicant broached the issue of onward transfer of the land to it during September 2014.

[12] The effect of the first respondent's contention that the clause contains a suspensive condition, is that unless that condition is fulfilled there is no sublease or sale agreement between the parties, due to the fact that a suspensive condition usually suspends the operation of obligations under a contract (either wholly or partly) until the condition has been fulfilled.

[13] The applicant's counter-argument is that the only obligations which were suspended in terms of the agreement are firstly, that of the first respondent to transfer the property to the applicant, and secondly, that of the applicant to pay the balance of the purchase price upon transfer, but that neither of these obligations were postponed pending the fulfilment of any of the terms contained in the clause. On the contrary, it is argued that the obligations are expressly postponed until the sale to the applicant becomes effective, which would be on the date of registration of transfer of the land from the Government to the first respondent.

[14] According to the first respondent the crisp issue is whether the agreement contemplated that the commercial premises which the applicant intended erecting were to be erected during the course of the sub-lease or only after ownership had been transferred.

[15] The agreement is divided into sections under various sub-headings in bold. Paragraph 2.4.2 appears under the heading "letting and hiring" and effectively lists the payment of rental in the following order:

15.1 a deposit of R50 000 payable upon signature of the agreement;

15.2 thereafter, one rand per month until the applicant occupies the land for commercial and trading purposes;

15.3 a second deposit of R50 000 when the applicant takes occupation for commercial and trading purposes;

15.4 after occupation, monthly rental of one million rand less any deposits, multiplied by the prime bank rate of interest and divided by 12.

[16] The first respondent contends that what emerges from clause 2.4.2 is that the agreement contemplated that the commercial premises which were intended to be erected were to be erected during the course of the sub-lease and not only when ownership had been transferred to the applicant.

[17] It seems from the manner in which the rental is structured that it may have been within the contemplation of the parties that the applicant would take occupation of the premises for commercial and trading purposes before taking ownership. To my mind the idea that there was a prospect, an expectation or even an intention of this happening, does not necessarily mean that if this did not come about during the existence of the sublease (for reasons which I shall presently traverse), the applicant is barred from purchasing the property. If this were the position I would have expected the parties to have clarified this when they dealt with the terms and conditions of the agreement of sublease, which, in terms of clause 4.5 of the agreement would be "applicable between the parties" until registration of transfer of the land from the respondent to the applicant. However, clause 2.4 setting out the terms and conditions of the sublease is silent on the issue of consents and permission to develop the land.

[18] It is not only the structuring of the rental agreement which leads me to this conclusion. Clause 3.2 is the second of two clauses under a heading which reads: "APPLICATION OF THE PRINCIPAL LEASE" (in other words between the first respondent and the Government). The clause preceding it reads as follows:

> '3.1 Da Gama warrants that it has the necessary permission or consent of the owner in title to the land to enter into this Agreement of Sublease with Beck and failing which Da Gama shall take all steps necessary to obtain the permission of the owner in title.'

[19] If clause 3.2 contains a suspensive condition, it means that the coming into operation of the sublease referred to in clause 3.1 is suspended pending the applicant obtaining consents and permission to develop the land with the assistance of the first respondent. This was clearly not the intention of the parties. Clause 2.4.1 states that the sublease shall come into operation on the date of the signature of the agreement by the first respondent, which the first respondent did as far back as 10 November 2006.

[20] It is furthermore common cause that the applicant has, since then, paid some of the agreed rental to the first respondent.

[21] In my view a commercially sensible analysis of clause 3.2, going no further than the application of the ordinary grammatical meaning of the words used and the style of language employed, is likely to lead the reasonable reader thereof to conclude that the clause reflects the following:

21.1 A recording that the first respondent acknowledges what the applicant intends to do with the land. The Shorter Oxford English Dictionary on Historical Principles (1980 4ed 17) defines the verb "acknowledge" as follows:

> '**1.** To own the knowledge of; to confess; to admit as true. **2.** To recognize or confess (a person or thing to be something); or, *simply*, to own the claims of. **3.** To own as genuine, or valid in law; to avow or assent to, in legal form. **4.** To own as an obligation; hence, to acknowledge (the receipt of) a letter.'

In essence the clause begins with the formality of recording that the respondent recognizes and admits that the purpose for which the applicant wants the land is to construct business premises.

21.2 A recording that the first respondent recognizes and admits that the applicant cannot simply go ahead and construct commercial premises, but that it needs to obtain the approval of various authorities to do so, stipulating that the obligation to do so lay with the applicant (and by implication not with the first respondent).

21.3 A recording that the first respondent recognizes and admits a peremptory obligation on its part to help the applicant to get this approval without which the applicant cannot use the premises for the intended purpose.

21.4 A recording that the respondent recognizes and admits that the applicant's agreement to purchase the land was reliant on the applicant's success in obtaining the consents and permission, and to that end the first respondent was obliged to assist the applicant.

[22] To my mind, and if I were constrained to rely solely on the plain meaning of the words (which according to the first respondent is all that is really required) I would be inclined to prefer this interpretation over the view that the clause contains a suspensive condition. I say so because although the words 'subject to' or 'onderworpe aan' usually indicate a suspensive or even a resolutive condition these words do not *a priori* indicate an intention to create

such a condition. They may be inserted for various reasons. In certain circumstances, for example, they may be used to reflect a term of the contract.[1]

[23] The first respondent contends that the only interpretation open to clause 3.2 is that it contains a suspensive condition. The applicant, on the other hand, contends for various other interpretations, other than those incorporating a suspensive condition.

[24] A condition is an external fact on which the existence of an obligation or juristic act depends. A term of a contract, on the other hand, does not relate to the existence of an obligation but to its nature.[2] There is no contract between the parties pending the fulfilment of a suspensive condition.[3] If a suspensive condition is fulfilled after an unreasonable delay, there is no binding obligation between the parties.[4] The difficulty is that in the matter before me, the relevant clause neither makes reference to terms or conditions.

[25] The need for interpretation of contracts usually arises where the language used to express agreement is vague or capable of bearing more than one meaning. In this context interpretation indicates the process by which the meaning of the express terms of the contract is determined.[5]

[26] In principle then, in our law, the purpose of interpretation of a contract is to ascertain the common intention of the contracting parties. This has been referred to as the 'golden rule'.[6]

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[1] See *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) at 1187 – 1188.

[2] *Resisto Dairy v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A); *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695.

[3] *First National Bank of SA Ltd v Lynn NO* 1996 (2) SA 339 (A).

[4] *Dirk Fourie Trust v Gerber* 1986 (1) SA 763 (A)

[5] See: Van der Merwe, et al *Contract General Principles* (2012) 4ed Juta, Cape Town at 263

[6] *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) 768

[27] The first respondent contends that if it is found that the clause is not capable of interpretation as it stands (without incorporating extrinsic evidence), the matter ought to be referred to oral evidence or to trial. To my mind the adoption of such a course is likely to be an exercise in futility. I say so because there are no material disputes of fact between the parties that are not capable of resolution on the papers. All the relevant role players have deposed to affidavits to support the applicant's case. The deponent to the founding and to the replying affidavits ("Schroeder") is the applicant's director and the party who represented the applicant when the agreement was entered into. His version is materially supported by the first respondent's erstwhile financial director ("Leonard") and the first respondent's former managing director ("Funnel"), both of whom were involved in negotiations and the conclusion of the agreement.

[28] On the other hand, the answering affidavit delivered on the first respondent's behalf has been deposed to by one "Brent" who was appointed as a director of the respondent in July 2013 and has no personal knowledge of the events surrounding the agreement or the intention of the parties at the time. His affidavit is little more than an attempt at legal argument, best reserved for counsel. The respondent's confirmatory affidavit, deposed to by one "Breetzke", to my mind takes the matter no further.

[29] The first respondent is opposed to this court having regard to extrinsic evidence in order to establish what clause 3.2 intends to convey, and contends for the application of the parol evidence rule. In *Union Government v Vianini Pipes (Pty) Ltd*,[7] with regard to the parol evidence rule, the court held:

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[7] 1941 AD 43.

> '[W]hen a contract has been reduced to 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 to or varied by parol evidence …'[8]

[30] It has been held however that although the document may well be preferred to oral and/or other evidence, it may happen that the document reflecting the agreement may have to be considered together with other documentary evidence which in turn could be considered subject to evidence of contemporaneous oral agreements.[9]

[31] The strict application of this rule has been criticised in the past as being formalistic, unnecessary and difficult, often resulting in "the blackest confusion".[10]

[32] Van der Merwe[11] expresses the view that the difficulties experienced in applying the parol evidence rule, and the criticism which has been levelled as to the validity of the theoretical basis advanced for it, raise serious doubt about the need for its continued recognition in our law. This is so because the rule limits the evidence admissible to determine the intention of the parties to written contracts – an anomaly in a system of law that, in principle, bases contractual liability on "the golden rule" of the intention of the parties. Van der Merwe is of the view that in the final analysis it is a matter of policy whether a legal system should accept the rationale advanced for the rule, which is that certainty of transactions should be enhanced, that the number of disputes should be

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[8] *Supra* at 47.
[9] See: *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (A); *B&B Hardware Distributors (Pty) Ltd v Administrator, Cape* 1989 (1) SA 957 (A).
[10] See Zeffertt & Paizes *Parol Evidence with particular reference to contract* 1986 at 30 and 55.
[11] *Supra* at 152.

decreased, and that the risk of perjury should be restricted. Applied on this basis, the parol evidence rule constitutes a normative restriction on what has been accepted as a basic principle of our law of contract, namely, that as far as is reasonably possible, effect must be given to the subjective intentions of the contracting parties. As it is, the technical complexity of the rule undermines the very certainty it seeks to achieve, and the justification for its continued existence has become doubtful.[12] I respectfully agree.

[33] The present state of the law relating to the interpretation of contracts has been succinctly summarised by the Supreme Court of Appeal in the judgment of Wallis JA.[13] The upshot of this judgment is that judges are encouraged to guard against the temptation to substitute what they regard as reasonable, sensible and business-like agreements with results that undermine the apparent purpose of the contract. In attributing meaning to the words used in a document, courts are invited to have regard to the context provided by reading the particular provisions (in this case those set forth in clause 3.2) in the light of the document as a whole and the circumstances attendant upon its coming into existence.

[34] In my view the incorporation of relevant and necessary extrinsic evidence to assist in the interpretation of what the parties intended leads, on a balance of probabilities, to the same conclusion as that which I have come to, had I applied only the plain meaning approach. I say so for a number of reasons.

[35] The agreement in question was signed on behalf of the parties on 10 and 14 November 2006. It is common cause that as early as 26 June 2007 the applicant made enquiries from the respondent (who in terms of clause 3.2 was obliged to assist the applicant to obtain consents and permission for

[12] *Supra* at 153.
[13] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at 603E-605B

development), about the zoning of the property. Leonard, who was the respondent's financial director at the time, had witnessed the signing of the agreement and had been actively involved on behalf of the respondent in the negotiation and the conclusion of the agreement, responded to the query. His reply (dated 26 June 2007) is significant and it is necessary to reproduce it in its entirety:

> 'Dear Angela
>
> Further to your query regarding the "triangle", we have established that this piece, together with the land on which the Da Gama factory is located, is zoned as Agricultural, but with a Right of Use for Industrial Purposes.
>
> It is our understanding that this Right of Use for Industrial Purposes clause also applies to the triangle.
>
> Please however note that we are currently engaged in a legal matter with the Department of Land Affairs regarding the transfer of title of this triangle and the land on which Da Gama is located. We have been advised that this process could be resolved by the Courts, by the latest October 2007, and our view is that it may be counter productive to us securing title should either yourselves or ourselves now pursue any rezoning of this land without the said Court Orders being in place (my underlining).
>
> Da Gama apologises for the delays in this matter and we understand that these delays are impacting your future business plans. We trust that you understand that we are in the hands of the law at present and assure you that we are doing everything in our power to meet our obligations to you in terms of the lease and sale agreement in place.
>
> We will keep you updated regarding the progress with the legal matter.
>
> Kind Regards
>
> Graham'

[36] I pause to mention that the undisputed contents of this letter alone, and assuming for the moment that the clause did contain a suspensive condition, would in any event support a compelling argument on the applicant's behalf that

due to the first respondent's conduct, the condition is deemed to have been fulfilled. This, referred to as the doctrine of fictional fulfilment of a condition, was formulated as follows in *Scott v Poupard*[14]:

> 'Where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him.'[15]

[37] Clause 3.2 creates a peremptory obligation or duty on the first respondent to assist the applicant to obtain the necessary consents and permission to build. In breach of this duty, and in response to the applicant's very first query in this direction, the first respondent reneged on this duty (apparently for fear of compromising its negotiations with the Government which deal was only effectively closed seven years later).

[38] Leonard, who deposed to an affidavit for the applicant, in any event confirms that it was contemplated that the applicant would become obliged to perform its obligations in terms of the agreement only after the respondent had obtained transfer of the land in its name. In my view the probabilities are that this was indeed the position, particularly in that it appears not to have been envisaged at the time that the agreement was entered into, or when this response was written, that there would be a further delay of three years, and not three months, before the court order would be in place.

[39] If clause 3.2 contained a suspensive condition, and once it became clear that litigation was becoming protracted, I would have expected some action on the part of either or both parties to vary the clause to comply with Leonard's

[14] 1971 (2) SA 373 (A).

[15] *Supra* at 378H.

view that the obtaining of consents and permission with the assistance of the respondent would be held in abeyance pending the transfer of title into the respondent's name, or at the very least, a court order to that effect. This however, did not happen. On the contrary, even after the court order had been granted, the first respondent made no effort to at least accelerate its rental income to the next level by addressing the question of consents and permission afresh. The inescapable inference to be drawn from the first respondent's silence in the face of the receipt of nominal rental is because the clause was not intended to contain a suspensive condition.

[40] A further undisputed communication of particular importance is the email dated 12 September 2014, sent by Schroeder to Brent (who had substituted Leonard as the respondent's financial director in 2013). It reads as follows:

> 'Hi Ryan
>
> Thank you for your mail.
>
> <u>As discussed</u> (my underlining) the property has now been transferred to da Gama and this will trigger the transfer to us.
>
> I have copied Ashley Kretzman in on the mail so that he can get working on the transfer for us.
>
> Kindest regards
>
> Kevin Schroeder'

[41] Brent, in his answering affidavit, does not dispute that this mail was sent. He is however silent on the correctness thereof. I have little doubt that if clause 3.2 contained a suspensive condition, he would have seized this opportunity to remind Schroeder that the "trigger" for the transfer of the property to the applicant was not the transfer of the property into the respondent's name, but the obtaining of consents and permission by the applicant (with the respondent's assistance), to build, and that this had not happened. Indeed, it is not disputed

by the respondent that, as at 22 September 2014, there was still no talk of a suspensive condition that had not been fulfilled. At best, all that was conveyed to the applicant was that the respondent's new shareholders appeared to have been in the dark regarding the agreement and were in the process of "reviewing" it. The main thrust of this communication appears to have been a complaint regarding the identity of the conveyancer and not the fact of conveyancing.

[42] On 1 October 2014 the applicant's attorneys addressed a letter to the respondent demanding that the respondent takes the necessary steps to transfer the land to it in compliance with the terms of the agreement. The respondent's attorneys replied on 9 October 2014. On the evidence before me it is in this legal communication that the term "suspensive condition" is alluded to for the first time. It is also abundantly clear from the contents of the letter that the concept that clause 3.2 contained a suspensive condition which had not been complied with had not been raised in compliance with the respondent's instructions and/or as a result of having obtained such instructions from the role-players who had represented the respondent at the time that that agreement was entered into, but rather as a considered legal opinion from the lawyers themselves. I am not surprised.

[43] It is clear from the affidavits of the respondent's former representatives who had been steeped in the atmosphere of the agreement negotiations and who had been working at the very coalface of what had been agreed upon before, during and after the agreement had been entered into, that clause 3.2 was, at all relevant times, intended at best to be a recording of the purpose for which the applicant intended using the premises, and with that in mind, that the applicant (and not the first respondent) had assumed the duty to ensure that the relevant formalities for development purposes had been complied with and that the

relevant consent had been granted for it to use the land for this intended purpose.

[44] To elevate the recording to a condition precedent for the sale of the property when the wording of the clause does not say so, compounded by the fact that the conduct of the first respondent in particular, supports the contrary, and further compounded by the fact that the respondent's own representatives at the time do not support such an interpretation, to my mind would result in a meaning being given to the clause which is unreasonable, insensible, unbusinesslike and out of context. In the words of Sir Anthony Mason CJ quoted with approval in *Endumeni*:

> 'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, <u>especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise'.</u>[16] (my emphasis.)

[45] As I have mentioned, it has been stated on the first respondent's behalf that its approach to the agreement is that it is capable of interpretation from the words therein contained without resorting to a consideration of the intention of the parties to the agreement and their conduct between 2006 and 2014. If this approach is a salutary one in these circumstances, I have some difficulty in understanding the approach which was adopted by the first respondent's attorneys at the time when they conveyed to the applicant's representatives that it was the respondent's intention to review the agreement, not with respect to an unfulfilled suspensive condition, but "with particular reference" to whether the entire agreement had been properly sanctioned by the first respondent. Indeed,

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[16] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HLA 48 (1985) 157 BCLR 309 at 315.

it is the attorneys who, having considered the agreement, make reference for the first time, to a suspensive condition which had not been fulfilled by the applicant for an unreasonably lengthy period of time, resulting in the entire agreement simply falling away.

[46] In my view it is more likely that the respondent's new representatives (who were not party to the agreement and were taken by surprise when the applicant sought to enforce the terms thereof) were somewhat anxious to find a loophole to resile from the agreement, particularly in that the first respondent had burdened the land forming the subject matter of the agreement together with additional property for the sum of R92,5 million.

[47] Brent, during the course of making various legal submissions on oath, has pointed out that what emerges from clause 2.4.2 (the rental escalation clause which I have already referred to), is that the agreement contemplated that the commercial premises which were intended to be erected by the applicant were to be erected during the course of the sub-lease and not only once ownership of the property had been transferred to the applicant. This may have been the idea at the time, particularly if a process had to be followed before development could commence. An idea however, is a far cry from a suspensive condition. If clause 3.2 indeed contains a binding suspensive condition as contended for by the first respondent, the first respondent itself is unlikely to have waived the so-called conditions contained therein, in favour of maintaining happy relations with the erstwhile landlord, which is exactly what the first respondent did without further ado.

[48] For all these reasons I am of the view that the applicant has succeeded in showing, on a balance of probabilities, that it is entitled to transfer of the land into its name, and I accordingly make the following order:

ORDER:

1. **The first respondent is directed to take all steps necessary to effect and register the transfer to the applicant of Farm Number 2280 (in extent 7, 8986 hectares) situated in the district of King William's Town, Province of the Eastern Cape and held by the first respondent under deed of transfer number T1853/2014 ("the land").**

2. **In the event of the failure of the first respondent (within 30 days from the date of this order), to sign the documentation necessary to effect the transfer of the land into the name of the applicant, the sheriff of this court is authorised to sign the documentation on the first respondent's behalf.**

3. **Without derogating from the order in paragraph 1:**

   3.1 the first respondent is directed to assist the applicant to the extent necessary to obtain all consents and the permission required for the construction of commercial premises on the land;

   3.2 the first respondent is directed to perform all acts necessary to procure the cancellation of the mortgage bond in favour of the second respondent, registered over the land on 6 May 2014.

4. **The first respondent is directed to pay the costs of this application.**

I.T. STRETCH **28 August 2015**
Judge of the High Court

APPEARANCES:

For the applicant:

I Miltz SC

Instructed by Darryl Ackerman Attorneys

Locally represented by:

Gordon McCune Attorney

King William's Town

For the first respondent:

A J Troskie SC

Instructed by Morris Fuller Walden Williams Inc

Locally represented by:

Smith Tabata Inc