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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL - DURBAN

CASE NO: 9031/2012

In the matter between:

PAUL BUCKLE **Plaintiff**

and

CATHY MARY HUDSON **Defendant**

JUDGMENT

K PILLAY J

[1] The Plaintiff instituted action for an amount of R45 000.00 together with interest arising out of a loan agreement. The parties have agreed on the quantum being R97 485.55. The Plaintiff no longer pursues, rightly so, the rate of interest set out in the loan agreement.

[2] The facts giving rise to this claim are as follows.

[3] According to Plaintiff, he leased the Defendant's property at 35 Kirklington Estate (the property) during July 2008. He then decided to purchase the property and accordingly made an offer of R3.8 million. However, the Defendant still owed R550 000.00 on the Bond. The Plaintiff purchased curtains from the Defendant for an amount of R100 000.00 thus leaving a shortfall of R450 000.00.

[4] To address the shortfall, the parties entered into two loan agreements for R280 000.00 and R170 000.00. The R170 000.00 loan was repaid. To secure the outstanding loan of R280 000.00 the Defendant put up another property, situate at 20 Peatties Lake (the log cabin), as security. The Plaintiff testified that clause 5.3 of the agreement entered into in respect of the log cabin, simply meant that if the log cabin was not sold by 1 May 2011, which is the due date for the payment of the loan, then he would take ownership of the property at R1.00 or the advance could be settled in cash. It did not mean that the Defendant no longer had to repay the difference if the property was sold for less.

[5] In fact, it was emphasized that should the log cabin be sold for R350 000.00 (the price at which Defendant alleged it was valued), the surplus after the R280 000.00 plus costs were settled, would then be paid over to the Defendant.

[6] He stated that as a businessman (Plaintiff is the Head of Merchant West Asset Finance) it would be ludicrous to lend a person a sum of money, interest free, and not expect to get at least the full capital repaid in full. The log cabin was eventually sold for about R235 000.00.

[7] The Plaintiff was then referred to an e-mail dated 20 November 2011 which he confirmed he received from the Defendant wherein she states that she realised that she had to sell the log cabin and that any shortfall that resulted would be for her account. He says that it is clear that she accepted, as at that date, that she would be liable for the shortfall if the log cabin was sold for less than the loan amount.

[8] He was asked to comment on a letter dated 7 March 2012 sent to him by the Defendant's attorneys wherein the following was stated:

> *"........... Our client explained to the writer that when she signed this agreement accompanied by her sister Anick Hewitt it was agreed between the parties, and correctly recorded in the agreement, that if our client had not paid the loan to your client by the 1st May 2011 in cash then your client would take ownership of the log cabin and that would be in full and final settlement of the loan."*

[9] He disagreed with the contents and stated it differed from the e-mail of 20 November 2011. The reason he attributed to the difference was that the Defendant would by then have known that the offer for the log cabin was less than the loan amount and there would therefore be a shortfall. The Plaintiff was not seriously challenged in cross-examination.

[10] The Defendant testified that the Plaintiff felt comfortable in lending her the amount of R280 000.00, because an estate agent had indicated that the log cabin would fetch an amount of R350 000.00. Her understanding of Clause 5.5 of the agreement, was that the log cabin would be security for the R280 000.00 loan; that the Plaintiff would take ownership of the log cabin on 1 May. If the log cabin was sold for more than R280 000.00, she would be entitled to keep the balance.

[11] She was referred, to her e-mail to the Plaintiff dated 20 November 2011 wherein she stated *"I then realised that I had to sell Peatties Lake and, whatever shortfall was for my account ...."* This e-mail was sent before the sale of the log cabin. Her explanation of this e-mail was that what she *"heard"* and what she *"signed"* were two different things. It was put to her that the plain meaning of the words in her e-mail did not support her present explanation of the words in question.

[12] It also emerged that the aforesaid e-mail does not appear on the list of discovered documents. It was suggested to her that this omission was deliberate as the contents of the said e-mail would be detrimental to her defence. She gave a vague response about why the aforesaid e-mail was not disclosed. During her testimony she stated that it was her understanding that no interest was payable until she was referred to clause 6.2, which provided for interest.

[13] This was highlighted to demonstrate that there was dissonance in what she thought she had agreed to and what was in fact agreed upon. Questioned by the Court as to what the Plaintiff understood he would get from the sale of the log cabin, her response was that the Plaintiff understood he would receive R280 000.00.

[14] She also conceded that she did not, at any stage, tell the Plaintiff that he had to take transfer of the log cabin. It would appear that the Defendant places some reliance on Clause 3 of a mandate agreement which made reference to the sale of the log cabin. The Defendant agreed that the mandate agreement was separate from the loan agreement.

[15] That concluded the evidence for the Defendant.

[16] It is common cause or not in dispute that:

a) The Defendant did not repay the loan amount of R280 000.00 by 1 May 2011, being the due date;

b) The log cabin was sold and realized a net amount, after commission, of R235 000.00 which was paid to the Plaintiff thus leaving a shortfall of R45 000.00;

c) It was agreed between the parties that interest would be payable at the rate of R15.5% per annum.

[17] The issue in this case is the interpretation to be afforded to clause 5.5 of the loan agreement. This clause is set out as follows:

> *"Should 20 Peatties Lake not be sold by the 1st of May 2011 the lender shall take ownership of the aforementioned property at R1.00 (One Rand) or the advance can be settled in cash."*

[18] Clause 2.1.5 of the loan agreement which falls under the heading *"Interpretation"* defines *"the capital"* as R280 000.00 (Two Hundred and Eighty Thousand Rand only) It is also instructive to set out Clause 5.3 of the loan agreement.

> *"It is recorded that Cathy is in the process of arranging for the sale of 20 Peatties Lake and it is agreed that the Lender shall be pay the proceeds of this sale "R280 000" into the Lenders account 48 hours after it shows in Cathy's account."*

[19] It is clear from this clause that what was envisaged was that the sale of the log cabin would generate no less than the R280 000.00 which was the outstanding amount of the loan.

[20] The Plaintiff submits that clause 5.5 is plain and unambiguous in that it creates a very simple contractual consequence namely that if the loan was not repaid on the due date then the Plaintiff would take ownership of the log cabin as security. The alternative to that was that if the Defendant did not want the Plaintiff to take the log cabin, then she had to settle the advance (R280 000.00) in cash.

[21] The construction placed by the Defendant on the aforementioned clause is somewhat different. The Defendant contends that the clause, sensibly interpreted, meant that once the Plaintiff took ownership of the log cabin on 1st May 2011, her indebtedness to him would be discharged in its entirety.

[22] The recent case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] aptly illustrates the present state of the law on the construction of documents.

> *"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 content 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."*

[23] It is clear from the above that this court should interpret the impugned clause in the context of the contract as a whole and in a manner which yields businesslike and sensible results.

[24] In my view, the clause in question is clear and unambiguous. As correctly submitted it creates a very simple contractual consequence. That consequence is that if the loan was not repaid on the due date then the Plaintiff would take ownership of the log cabin. The alternative to that is the advance, could be settled in cash.

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[1] 2012 SA 593 at 603 para 18

[25] There is no reference in the clause to the effect that the indebtedness of the Defendant shall be discharged in full if the Plaintiff took the log cabin as security. As aptly held by the *Supreme Court of Appeal* in *HNR Properties CC and Another v Standard Bank of SA Ltd* [2].

> *"It is therefore not permissible to import into the writing, whether by reference to background or surrounding circumstances or any other source, an intention to release which is otherwise not ascertainable from the actual language of the document relied upon. If the position were otherwise the very object of the requirement of writing would be frustrated."*

The Defendant, as Plaintiff submits, has neither sought rectification nor contended for an implied or tacit term to that effect.

[26] In my view the interpretation contended for by the Plaintiff gives business efficacy to the clause and yields commercially sensible results. In fact on the undisputed evidence of the Plaintiff, if the log cabin was sold for more than R280 000.00, any surplus over that amount would be credited to the Defendant. From a business perspective it could hardly make sense for the Plaintiff then to be liable for any shortfall if the log cabin were sold for less than R280 000.00. It is not in dispute that the whole purpose of the loan to the Defendant was that the Plaintiff would be repaid the monies loaned. It is clear to this Court that the log cabin was indeed intended to be regarded as security for payment and not a substitute for repayment of the full amount of the loan.

[27] I accordingly hold that the plain meaning of the impugned clause, considered in the above context, gives effect to the Plaintiff's interpretation and must therefore be favoured. Correctly argued, there is no ambiguity and consequently no need to resort to extrinsic evidence to resolve any difficulties in interpretation.

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[2] 2004(4) SA 471 SCA Para 16

[28] In view of the amount of this claim, I have not been persuaded that the Plaintiff is entitled to costs on the High Court scale or even on the Regional Court scale.

[29] I therefore grant judgment against the Defendant as follows:

(a) Payment of the sum of R97 485.55;

(b) Interest thereon from 25 June 2013 to date of payment at the rate of 15.5% per annum;

(c) Costs of suit on the Magistrate's Court scale.

K PILLAY J

Date of Judgment	:	15 October 2013
Plaintiff's Counsel	:	Advocate A Boulle
Instructed By	:	Larson Falconer Hassan Parsee Inc Plaintiff's Attorneys 2nd Floor, 93 Richefond Circle Ridgeside Office Park Umhlanga (Ref: P Falconer/dr/lm/17B093022)
Defendant's Counsel	:	Advocate C Jaipal
Instructed By	:	L Swart & Company Incorporated Defendant's Attorneys 227 Mathews Meyiwa Road Morningside Durban (Ref: KS/AH/01/Hudson)