

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

Case No.: A 1333/04

Case heard: 2012-03-07

Date of Judgment: 2012-06-08

In the matter between:

ESSACK ISMAIL SULIMAN

APPELLANT

and

MOHAMED HANIF SULIMAN

FIRST RESPONDENT

SAMIRA SULIMAN

SECOND RESPONDENT

HANISH INVESTMENTS CC

THIRD RESPONDENT

REGISTRAR OF CLOSE CORPORATIONS

FOURTH RESPONDENT

JUDGMENT

HIEMSTRA AJ

[1] The appellant sought orders in the court a quo declaring the appellant to be a 50% member of Hanish Investments CC (the third respondent) and directing the fourth respondent to register the appellant's membership interest in the third respondent in its records, together with a cost order. This application was dismissed by Ginsberg AJ in a judgment dated 1 June 2004. The appellant was granted leave to appeal to the full bench of this division.

[2] For the sake of brevity, I shall refer to the first and second respondents as the "respondents" and to the third respondent as the "third respondent". Where I refer to the first or second respondent individually, I shall refer to them as such.

[3] The appellant and the respondents have been in dispute with each other for many years over the ownership of various assets and interests in several close corporations. The litigation that ensued culminated in a settlement agreement, concluded on 27 November 2001. Clause 11 of the agreement records that "the terms contained in this agreement are in full and final settlement of all and any claims that either party may have against the other" This agreement was made an order of court. The present case concerns the membership interest in the third respondent, Hanish Investments CC. The settlement agreement specifically distributes various assets between the parties. The third respondent is not mentioned in the agreement.

[4] Ginsberg AJ set out the facts and history of the matter comprehensively in his judgment and it will serve no purpose to repeat them here.

[5] The appellant alleged that he and the first respondent, his brother, had conducted business in partnership over many years. The third respondent is a property venture which was initially known as Hanish Investments (Pty) Ltd. It was later converted to a close corporation in which the appellant and the first respondent each held 50% membership. According to the appellant he had been a 50% owner of the business from its inception. This is, however, not borne out by the documentation. The third respondent was initially a private company and because of the Group Areas Act, the sole shareholder was a certain Arthur Resnick, as nominee for the first appellant. Mr M.S. Ebrahim, the third respondent's auditor,

wrote a letter to Hanish Investments (Pty) Ltd on 10 August 1992, which reads as follows:

"As auditors of the above company we confirm the following:

(1) The total issued share capital of the company was registered in the name of Arther Resnick in his capacity as nominee for Mohamed Hanif Suliman. These shares were transferred to M.H. Suliman during Dec. 1991.

(2) We have today lodged a CM2 reflecting Mohamed Hanif Suliman as sole director of the company with effect from 21.05.8T'.

[6] The respondents' case is that the appellant was an employee of the third respondent and not a member.

[7] After the conversion of the company to a close corporation, the first respondent was reflected as the sole member in the Founding Statement. At some stage the second respondent also became a member. The appellant became a 50% member during November 1993 for reasons that are not clear. However, an Amended Founding Statement, dated 1 February 1995, reflects the first respondent as a 60% member and the second respondent as a 40% member. Under the heading "PERSONS WHO CEASE TO BE MEMBERS" appears the name of the appellant together with his signature. When confronted with these documents, the appellant said that they did not reflect the true state of affairs. He said that the first respondent had always done the paper work and that he had trusted him.

[8] The appellant's case is that the first respondent had defrauded him into transferring his 50% interest in the third respondent to the respondents. The respondents denied that they had defrauded the appellant as alleged. In the alternative, they contended that the dispute

regarding the third respondent had been settled as part of the settlement agreement mentioned above.

[9] According to the appellant, the second respondent had perpetrated the fraud in the following manner: The first respondent had induced him to sign several CK2 forms in blank. These are statutory forms that are used for the purpose of transferring the membership interest of a member in a close corporation to another person. According to the appellant, the respondents presented these blank forms to the chartered accountant, Mr Ebrahim, to be used to transfer the appellant's 50% membership interest in the third respondent to the respondents.

[10] According to the appellant, he had signed a blank CK2 form for the purpose of transferring 10% of his membership interest in another close corporation, NSR Motors CC, to the first respondent. He said that the next day, the first respondent told him that his children had spoiled the form by spilling water on it and asked him to sign two more forms. In his evidence-in-chief, the appellant said that he had accepted the first respondent's explanation about the spoiled forms. His verbatim evidence on this score was the following:

"The form that I signed, the CK2 form got spoiled in water. He says 'you know how is the children,' so I said 'yes, I know how is your children, I know what happens at home' His in his house he has a courtyard which they used to eat there in the kitchen and the kids were running around and could understand and I believed him."

Under cross-examination the appellant admitted that the above could not be true because the first respondent had only one child who at the time was six months old.

[11] The appellant said that he had discovered during December 2001 that the first respondent had caused his 50% interest in the third respondent to be transferred to himself and his wife, presumably by means of the blank CK2 forms bearing his signature. This date cannot be correct. It appears from correspondence with which I deal later in this judgment, that the appellant must have known at the latest during November 2000 that he was not reflected as a member.

[12] The court a quo rejected the appellant's claim that he had been defrauded. It further found that the dispute regarding the membership interest in the third respondent had been settled between the parties by virtue of clause 11 of the agreement, quoted above.

[13] The reasons of the court a quo for rejecting the appellant's allegations of fraud are unassailable. Apart from the glaring untruth as to what happened with the CK2 form, it appears overwhelmingly clear from the documentary evidence that, apart from the period between November 1993 and January 1995, the appellant had not been a member of the third respondent. Furthermore, the appellant's former attorney, Mr Mahmood Mia, who represented him at the time of the litigation and settlement negotiations referred to above, contradicted the appellant's version in most material respects. In addition, the appellant called Mr Ebrahim to testify on his behalf. Mr Ebrahim denied that he had received blank CK2 forms, signed by the appellant, in order to effect the transfer. He testified that he had completed the CK2 forms himself and had handed them to the first respondent to have them signed by the parties to the transfer. The first respondent brought them back with the signatures of the appellant and the second respondent. He denied that he had ever filled in CK2 forms that had already been signed by any party.

[14] The documentary evidence contradicting the appellant's version includes the following:

[15] The first respondent's attorney, Mr Dollie, wrote a letter to the appellant's former attorney, Mr Mia, on 7 November 2000 in which he inter alia said the following:

11 As your client is aware my client and his wife are the registered members of various close corporations. For a short period of time, i.e. from November 1993 up until January 1995 your client was reflected as being the beneficial holder of 50% of the members' interest of Resfam Investments CC, Hanish Investments CC (the third respondent) and NSR Motors CC. I am advised by my client that your client was registered as a member of the close corporation on the advice of the accountant handling my client's affairs, a certain Mr MS Ebrahim. Upon my client realising that there was no underlying causa for your client having become a member of the various close corporations, your client was requested to transfer those interests, which were erroneously transferred to him, back to my client, which he had done."

(I must interpose here to mention for the sake of completeness that Mr Ebrahim denied in his testimony that he had given any advice regarding the transfer of the membership interest, as alleged in the letter. However, as I set out below, it is not relevant whether Mr Ebrahim had given such advice, since the appellant never challenged the allegations in the letter when he had the opportunity to do so.)

[16] This letter is entirely inconsistent with the appellant's version. Mr Mia responded, as the appellant's attorney, to this letter on 16 November 2000. It is a detailed letter in which he made certain settlement proposals. Significantly he did not dispute the allegations in Mr Dollie's letter. Instead, he made it clear that he did not wish to respond to them. When

confronted with the fact that his attorney had not disputed these contentions, the appellant said that he had told Mr Mia that he was a 50% owner of the third respondent and that he had instructed Mr Mia to dispute the contents of the letter and to inform the first respondent's attorney of the correct position. Mr Mia denied this and said that he had discussed Mr Dollie's letter with the appellant and that he had written his letter on the appellant's instructions. He also said that he and the appellant had seen documentary evidence which showed that the appellant did not own a 50% interest in the third respondent.

[17] The appellant was confronted during cross-examination with a number of draft settlement agreements in the larger dispute between the parties relating to the redistribution of assets between them. These drafts were prepared during the latter part of 2000 and it is common cause that Mr Mia had drafted them. The draft agreements recorded that the first respondent would "retain ownership" of, or "retain as his sole and exclusive property", the third respondent. The appellant sought to distance himself from these drafts and testified that he had not seen them and that his attorney had drafted them without his instructions. It is simply not credible that the appellant's attorney would have conjured up in his own mind that the second respondent would "retain" the third respondent as his sole and exclusive property if that had not been his instructions.

[18] Further documents that contradict the version of the appellant are the Founding Statement of the third respondent and subsequent Amended Founding Statements. The Founding Statement bears the date stamp of the Registrar of Close Corporations with the date 25 October 1993. The appellant is reflected therein as a 50% member. An Amended Founding Statement, dated 1 February 1995, reflects the first and second respondents as the only members. On the last page, under the heading "PERSONS WHO CEASE TO BE

MEMBERS", appears the name of the appellant together with his signature. This confirms the statement in Mr Dollie's letter of 7 November 2000 to the effect that the appellant had only been a member from November 1993 to January 1995. The appellant's signature as a "person who ceases to be a member", bears out the contention that the appellant had voluntarily disposed of his membership interest. As stated previously, when confronted with these documents the appellant said that his brother had always done the paper work and that he had trusted him. His brother often brought him documents to sign and he had signed without reading them.

[19] Finally, there is a "Request to open or to continue the operation of a Close Corporation Account", dated 25 October 1996. This request was made by the third respondent to Standard Bank. The form lists the first and second respondents as "Present members of the Close Corporation". Under the heading "Full names of Persons other than Members authorised to sign" appears the name and signature of the appellant. This bears out the respondents' version that the appellant had merely been an employee of the third respondent.

[20] The conclusion of the court a quo that the appellant had failed to discharge his onus to prove that he had been defrauded, is therefore clearly correct.

Settlement of the dispute

[21] This brings me to the Respondents' alternative defence, namely that the dispute between the parties had been settled. As I have mentioned, clause 11 records that the agreement is in full and final settlement of all and any claims that either party may have against the other. The parties had been in dispute with each other for many years regarding the ownership of various assets and membership of close corporations. The third respondent is one of those

assets. It is a property investment company of considerable value.

[22] The settlement agreement is in respect of another action instituted by the appellant against the respondents relating to various properties and assets. Several assets are specifically mentioned in the settlement agreement, whereas the third respondent is not mentioned at all. The literal meaning of this clause is that the agreement settles all claims of whatsoever nature which the parties may have against each other. There is no restriction. The fact that certain disputes are specifically mentioned does not mean that it excludes any other disputes.

[23] Mr Omar argued on behalf of the appellant that the agreement constitutes the whole agreement between the parties and that it contains a non-variation clause. He submitted that in order to include the settlement of the dispute concerning the third respondent, the respondents would have to apply for rectification of the agreement. This is a circuitous argument. The golden rule of interpretation is that the words must be given their ordinary grammatical meaning. The ordinary grammatical meaning of the clause is that all, and not only some, of the claims between the parties are settled. This must naturally include the claim relating to the third respondent. If there is any party that required rectification of the contract, it is the appellant. If it had been the intention of the parties to exclude the third respondent from the agreement, they would have mentioned that specifically.

[24] The learned judge in the court a quo referred to the well-known authority on the interpretation of contracts, namely *Coopers & Lybrand and Others v Bryan?* in which Joubert JA dealt with the correct approach to interpretation of contracts. He said:

"The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract;
- (2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted;
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.¹¹

[25] Applying this approach to the facts, Ginsberg AJ found that both parties had always been aware that the third respondent had been a major cause of disagreement between them. It was an important income-generating asset and the jewel in the crown of the assets in dispute. He found that against this background, the parties must have been mindful of this asset when they agreed to settle all and any dispute between them.

[26] This reasoning is unassailable. No contract can be viewed hermetically. It must always be interpreted within the context of the surrounding circumstances. Rumpff CJ said in *Swart en In Ander v Cape Fabrix (Pty) Ltd*²:

¹¹ Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my

vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel.¹¹

[27] This does not mean that extrinsic evidence is introduced to add to or to vary the contents of the agreement. It is only used for the purpose of determining the context of the agreement in order to establish what was probably present in the minds of the parties when they contracted. Without that knowledge, interpretation of contracts could lead to absurd conclusions devoid of reality.

[28] In his Heads of Argument, Mr Omar, for the appellant, referred to the judgment granting leave to appeal in which the learned judge a quo identified five issues that require scrutiny by the court of appeal. These are the following:

1. The effect of the failure of the first respondent to testify;
2. The effect of the finding of the court a quo that the Respondents had failed to prove an 'oral agreement' as it had pleaded;
3. The effect of the respondent's attorney, Mr Dollie perjuring himself during the trial;
4. The effect of the appellant's former attorney, Mr Mia, testifying in breach of attorney and client privilege;
5. The effect of the fact that the third respondent is not mentioned in the settlement agreement.

I shall deal with these issues seriatim.

The failure of the first defendant (respondent) to testify

[29] It is correct that the first respondent did not testify. The Respondents can be criticised for the failure of the first respondent to testify if an adverse inference can be drawn from that fact. However, if a dispute can be determined without the evidence of a party, there is no need for such a party to testify. As I have shown above, the appellant's version is so improbable and replete with inconsistencies with indisputable documentary evidence, that the evidence of the first respondent would have made no meaningful contribution.

Failure to prove an oral agreement, as pleaded

[30] The oral agreement referred to in the respondents' plea was allegedly concluded during or about January 1995. It was alleged that the parties had agreed that the appellant would transfer 40% of his member's interest to the first respondent and 10% to the second respondent (the first respondent's wife). The court a quo found that this oral agreement had not been established in evidence and that the respondents had in any event not pursued it during the trial. It is important to note that the court a quo did not reject the Respondents' evidence on that score as false. To my mind, nothing turns on this. It had been demonstrated conclusively that the appellant had been reflected as a 50% member since November 1993 and that he ceased to be a member in November 1995. As Mr Dollie said in his letter of 7 November 2000, the appellant had transferred his membership interest voluntarily at the request of the second respondent. Whether this was in terms of an oral agreement or not, does not matter. The Court rejected the appellant's evidence as to how the respondents came to own 100% of the third respondent, on convincing grounds.

Alleged perjury by Mr Dollie

[31] The alleged perjury concerns an alleged contradiction between the oral evidence of Mr Dollie and an affidavit deposed to by the appellant in summary judgment proceedings. Mr

Dollie had confirmed the contents of the affidavit under oath. The first respondent said the following in his affidavit:

"Notwithstanding the fact that no mention is made of the Applicant's alleged interest in the Third Respondent, it was always within the contemplation of myself, the Second Respondent and the Applicant that the settlement agreement encompassed a settlement of that matter as well, i.e. the issue relating to the Third Respondent (my underlining).

In his testimony in court, Mr Dollie said that his client, the first respondent, never had the intention that the third respondent be included in the agreement of 26 November 2001.

[32] Mr Omar, switching to Afrikaans, argued that "dit staan soos {n paal bo water"¹ that the foregoing two statements contradict each other and that the implication is that Mr Dollie had perjured himself. There is an apparent contradiction between these two statements, but I do not agree that it is indisputably so, as Mr Omar argued. The question was not whether the third respondent was intended to be covered by the settlement or not, but whether it was necessary to make specific reference to it in the settlement agreement. Mr Dollie explained that the agreement concerned ex gratia payments (or conferments) to the appellant. It had nothing to do with assets that belonged to the respondents. It is clear from a perusal of the agreement that it only deals with assets that would be conferred to the appellant. There is no mention of any assets that would by virtue of the agreement be awarded to the respondents. It was argued on behalf of the respondents that the issue around the third respondent is covered by clause 11, which says that the terms of the agreement are in full and final settlement of all and any claims that either party may have against the other. Therefore, if the appellant had any claim to an interest in the third respondent, he has waived it by agreeing to

clause 11. The agreement therefore "encompassed" a settlement of the issue around the third respondent as deposed to by the first respondent, and confirmed under oath by Mr Dollie. Mr Dollie's statement in his testimony only concerned whether it was intended that reference to the third respondent had to be "included" in the agreement.

Breach of privilege

[33] Mr Mia came close at times during his testimony to breaching the confidentiality of discussions between himself and the appellant as his former client. However, counsel for the appellant was alert to these possible breaches and objected invariably. Some of the objections were upheld by the Court a quo and others dismissed. On a reading of the testimony of Mr Mia, it does not seem that there had been any serious breach of confidentiality. Mr Mia testified regarding letters that he had written and agreements that he had drafted. It was the case of the appellant that Mr Mia had drafted these agreements and in particular his letter of 7 November 2000 contrary to his instructions. The appellant therefore introduced matters that are subject to attorney/client privilege himself. He cannot complain if Mr Dollie responded thereto.

The effect of the omission of mention of the third respondent in the settlement agreement

[34] This is the subject matter of the respondents' alternative plea, and has been dealt with.

For all the foregoing reasons I find that the judgment of the court a quo is patently correct. I propose that the appeal be dismissed with costs.

J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT I agree

J. KRUGER

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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H.SALDULKER

JUDGE OF THE HIGH COURT

Date heard:2012-03-07

Date of judgment:2012-06-08

Counsel for the Appellant:Attorney Zehir Omar

Attorney for the Appellant:Zehir Omar Attorneys

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