25/9/2009 NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
25/9/09
DATE
SIGNATURE

Case No: 35127/2009

Date heard: 22/09/2009

Date of judgment: 25/09/2009

In the matter between:

XANTIUM TRADING 250 (PTY) LIIMITED	Applicant
and	
VAALBEND ESTATE (PTY) LIMITED	1st Respondent
REGISTRAR OF DEEDS, FREE STATE PROVINCE	2nd Respondent

CASE NO: 35127/2009

In the counter-application of:-

VAALBEND ESTATE (PTY) LIMITED	Applicant
and	
XANTIUM TRADING 250 (PTY) LIIMITED	1st Respondent
NTSU BOERDERY CC	2nd Respondent
ABSA BANK LIMITED	3rd Respondent

NEL, HENDRIK	4th Respondent
REGISTRAR OF DEEDS, FREE STATE PROVINCE	5th Respondent

JUDGMENT

DU PLESSIS J:

Under case number 35127/09 Xantium Trading 250 (Pty) Ltd launched an urgent application against Vaalbend Estates (Pty) Ltd as first respondent and the Registrar of Deeds, Free State as second respondent. Only the first respondent opposed the application.

The first respondent launched a counter application citing Xantium as the first respondent in therein. In the counter application Vaalbend cited certain further respondents who did not oppose the counter application. Xantium, however, opposes the counter application. In the result the only parties that appeared in these proceedings are Xantium to whom I shall refer as the applicant and Vaalbend to whom I shall refer as the respondent.

It is common cause that on 1 April 2008 (or possibly in June 2008) the applicant and the respondent entered into a written agreement in terms whereof the respondent sold the farm Knopfontein to the applicant. On 27 November

2008 the parties signed a written addendum to the contract of sale, thereby varying the latter. I shall refer to the two documents collectively as "the final contract".

In its application the applicant seeks an order aimed at compelling the respondent to transfer to it the farm Knopfontein against payment of the purchase price in terms of the final contract. The applicant seeks further relief in the alternative but it is unnecessary now to give details thereof.

In the counter application the respondent essentially seeks an order setting aside the final agreement. The respondent seeks certain ancillary orders but at this stage detailed reference thereto is unnecessary. As regards the further parties that the respondent cited in the counter application, I am not convinced that they were properly cited. As they did not oppose the application no more need to be said about that. It is convenient to deal first with the application and thereafter with the counter application.

The final contract was entered into in the following factual context. At all relevant times until sometime between 2004 and 2008, the controlling minds of the applicant was the late Mr Jacobus Kits and his brother Tinus. Thereafter, until January 2009 it was only the late Mr Kits. He passed away in January 2009. The controlling mind of the respondent is Mr RM Joubert. The late Mr Kits was an accountant and had for many years been employed by a company in which

Mr Joubert was the major role player. There is some dispute as to the exact nature of their relationship, but it may be accepted that the two men became friends. In the middle nineties Mr Kits became involved in another business venture and resigned his employment. The men remained friends.

In 2003 the company through which Kits and his brother were conducting business needed farm land. Kits approached Mr Joubert and the company leased the farm Knopfontein from the respondent with an option to purchase it. Against the background of the lease and the option, the applicant, being Kits's company, purchased the farm in January 2004. (I shall refer to this contract as "the first sale"). The purchase price in terms of the first sale was R4 155 446,26 of which the applicant had to pay a deposit of R1 million. The balance, for which the applicant was to register a bond over the property in the respondent's favour, was payable in 120 monthly instalments commencing on 1 February 2004. The balance was to bear interest at a rate 4% less ABSA Bank's prime lending rate.

Although the first sale provided that the applicant would take transfer of the property against payment of the deposit and registration of the bond, this did not happen. The property remained registered in the respondent's name and the applicant continued to pay the monthly instalments and the interest.

The applicant apparently had difficulty to pay the transfer duties on the first sale. In January 2008 its attorney suggested to the respondent's attorney that a new contract of sale be drafted in terms whereof the purchase price would be the balance owing under the first sale and in terms whereof the farm would be sold to the applicant as a going concern, zero rated for purposes of Value Added Tax. (Whether this scheme can in fact result in a reduction of duties payable is something that the South African Revenue Services will determine.) It is as a result of these suggestions and negotiations that followed thereon that the sale agreement of 1 April 2008 ("the second sale") was concluded.

In the course of the negotiations leading up to the second sale, the parties discussed the bottling of pure water found on the property. Following that discussion the following clause 12 forms part of the second sale:

"**As die partye sou besluit om 'n besigheid te begin deur ondergrondse water te bottel en bemark, sal die VERKOPER 'n 50% (vyftig persent) aandeel in die besigheid, en die KOPER 'n 50% (vyftig persent) aandeel in die besigheid hê**"

Under the first sale the respondent was to retain the mineral rights to the farm. In view of the provisions of the **Mineral and Petroleum Resources Act, 28 of 2002** this was also discussed. Resulting from these discussions the following clause 13 forms part of the second sale:

"**Indien die VERKOPER mineraalregte wil ontgin, sal die KOPER sy aansoek om sodanige mynregte te bekom, ondersteun, aangesien die eiendom oorspronklik sou verkoop gewees het met behoud van**

mineralregte en die KOPER sal in die gees daarvan optree, al het die hele mineraalregte bedeling intussen verander."

In 2008, after the second sale had been signed, the late Mr Kits needed R1 million which the respondent, after negotiations between Kits and Joubert, lent to the applicant. The applicant was to repay this amount together with pre-calculated interest on 27 July 2011. The amount so repayable was R1 568 550,95. The parties agreed to structure the loan as an increase of the purchase price in terms of the second sale, and to structure the repayment thereof as payment of the purchase price. This was reflected in a written addendum to the second sale which was signed on 27 November 2008. (There are obvious typing and drafting errors in the addendum. Although the applicant initially sought rectification in respect thereof, the respondent does not dispute that the errors that the applicant identifies are such and the applicant did not persist in the claim for rectification.)

After the death of Mr Kits, his widow was appointed the sole director of the applicant. For reasons that are relevant only to the question of urgency, Mrs Kits felt constrained to sell the property. The applicant's attorney phoned the respondent's attorney and asked whether the respondent (Mr Joubert) had any objection to the resale of the property. The parties exchanged correspondence and had discussions. Ultimately the respondent objected to the applicant's resale of the property and hence this application.

It is common cause that the second sale and its addendum (the final contract) novated the first sale. It follows that the applicant's entitlement to transfer of the property into its name must be determined by interpreting the terms of the final contract in their factual context. The intention of the contracting parties must be determined from the ordinary meaning of the language used in written documents comprising the final contract. If the written terms of the contract, or any part thereof, are found to be ambiguous, the interpreter may have regard to evidence of the full context wherein the contract was concluded. The purpose of such evidence is not to vary or add to the terms of the written contract, but to shed light on what the parties probably meant when they used the written words in the contract. Evidence that varies or adds to the terms of the written contract is inadmissible: the intention of the parties must be determined from the words they chose to use in the contract. (**Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A)** at 454F to 455C; **KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA)** at para. 39.)

In the papers Mr Joubert, who deposed to the answering affidavits on the respondent's behalf, raised a number of defences to the applicant's claim for transfer of the property. Mr Venter, who appeared for the respondent, however, did not persist with all these defences. In brief, Mr Venter argued that clauses 12 and 13 of the second sale are indivisible parts of the second sale and thus of the final contract. Those clauses, counsel argued, are ambiguous and incapable of interpretation as they stand. Accordingly, the court must have regard to evidence of the circumstances surrounding the conclusion of the final contract. Doing that, the argument went on, the court must find that, as to clauses 12 and 13, the written contract does not reflect consensus between the parties. The court must find that the parties in fact did not agree or reach consensus on the subject matter of clauses 12 and 13. Counsel submitted that, at best for the applicant, the parties laboured under a common mistake as regards the subject matter of clauses 12 and 13 or that the respondent (Mr Joubert) laboured under a material unilateral mistake. Moreover, counsel argued, the parties had agreed that the respondent would have a right of first refusal in the event of the applicant deciding to sell the property. It is common cause that the respondent was not afforded such right of first refusal. Finally, counsel submitted that the applicant has repudiated its obligations under the contract. In the course of argument, counsel abandoned the latter argument. In essence counsel abandoned the argument based on an alleged repudiation because it was predicated on the correctness of his argument that the contract does not reflect the true consensus of he parties. If the court finds against him on that argument, then the applicant did not repudiate its obligations under the contract. Conversely, if the court finds for the respondent on the consensus issue, reliance on repudiation is unnecessary.

Mr Joubert's answering affidavit runs into no less than 162 pages. It deals with events from the inception of his relationship with the late Mr Kits to events that happened after this application had been launched. I do not propose to traverse all that evidence as most of it is irrelevant to the correct interpretation of the final contract. I have already sketched the contractual setting wherein the final contract was entered into. As for further evidence of the circumstances surrounding the conclusion of the final contract, that will only be admissible if it is found that the terms of the final contract, clauses 12 and 13 in particular, are ambiguous. I shall nevertheless briefly summarise Joubert's evidence regarding the negotiations pertaining to the conclusion of the final contract. I do that because such a summary will be conducive to a better understanding of counsel's argument.

In his answering affidavit Mr Joubert states that he has "some recollection" that, after the applicant's request for a new agreement, he had a discussion with the late Mr Kits. Mr Joubert's recollection is that he told Mr Kits that, as a prerequisite to a new agreement, such agreement must provide for Vaalbend's entitlement in due course to construct a water bottling plant on the farm in which venture the respondent would be prepared to allow the applicant a 50% interest. Joubert elaborates on this, but this evidence is the essence of Joubert's explanation for the presence of clause12 in the agreement.

During the same discussion Joubert required that the applicant must agree "insofar as may be necessary, to support Vaalbend in its attempt to secure mineral prospecting rights". According to Joubert he required a term to that effect in a new agreement and he told Kits as much. This evidence is the essence of Joubert's contention as to the background of clause 13.

In a letter to the applicant's attorneys the respondent's attorneys confirmed that Joubert and Kits had agreed on the water bottling and mineral rights issues and the applicant's attorneys then proceeded to draft the second sale.

According to Mr Joubert, the late Mr Kits seemed to regard the successive contracts more as a lease than as a sale. Kits did not seem to have any intention for the applicant to take transfer of the property. According to Joubert, when he discussed the mining rights and the water bottling venture with Kits, the latter must have understood that "he no longer could deal with Knopfontein in any which way he wanted, as an owner would have done". In addition, Joubert states that although "it was not discussed, there was a non-negotiable understanding between us that in the unlikely event, which at that stage was not even discussed, of Xantium taking transfer that Vaalbend would have a right of first refusal in the event of Xantium intending to resell the farm. It was so obvious that it required no mention".

That the applicant did not intend to and would not take transfer of the property is a recurring theme in Joubert's affidavits. He does not articulate it in so many words, but if regard is had to his contentions and also those of the respondent's counsel, Joubert probably intended to convey the following: Despite the sale of the property to the applicant, the respondent in the long term intended to establish a water bottling plant thereon. The respondent also intended to establish mining operations on the property. When he was asked to enter into a new agreement (the second sale) Joubert agreed on the express condition that the respondent's rights to the bottling and mining projects be recognised and protected in the new agreement. As those rights entail a long term relationship between the applicant, as purchaser or owner of the property, and the respondent, it necessarily follows that the respondent cannot sell the property without recognition of the respondent's rights with respect to the bottling and mining projects. Apart from other considerations, it would be unconscionable for the applicant now to take transfer of the property and on-sell it without first offering the property for sale to the respondent.

I must now first interpret the final contract with particular reference to clauses 12 and 13. It is convenient to start with clause 13.

In my view the wording of clause 13 is unequivocal: It puts on the applicant the contractual obligation to support ("ondersteun") the respondent's application to obtain mining rights (die reg om minerale te ontgin). This obligation of the applicant is, however, conditional. It will in terms of the agreement only arise if and when the respondent decides to exercise mineral rights on the property ("indien die verkoper nineraalregte wil ontgin"). Not only is clause 13 in my view unambiguous. Even if regard is had to the evidence of Joubert, though inadmissible, the clause accurately reflects what Joubert now contends the agreement was.

In terms of clause 13 the respondent has long term rights that might have been compromised if the applicant were allowed to take transfer of the property and to on-sell it without somehow protecting the respondent's said rights. I say the rights "might have been compromised" because, on the respondent's own evidence, it has already secured the prospecting rights. Joubert dedicates many pages to an explanation of how he went about to secure those rights. I do not summarise that evidence as counsel agreed that the essence thereof is that the respondent has secured the rights. In the circumstances the applicant's support as provided for in clause 12 is no longer relevant. Interesting as it might have been, it is no longer necessary to decide how the applicant's obligation would have affected its right to transfer and to on-sell the property. In a nutshell, the clause is unambiguous, accurately reflects whet the respondent contends the agreement was and is in any event at present of no more than academic interest.

I turn to clause 12. In my view this clause is also unambiguous. It gives each of the parties the right to a 50% share in a business that, if established, was to bottle and market underground water on the property. Those rights, however, are subject to a condition that is dependant on the will of each party: the rights only arise if both parties decide to start such a business ("as die partye sou besluit o mom 'n besigheid te begin ...). It follows that no evidence is necessary to interpret the term. Even if it could be said that the term is ambiguous, it cannot in my view mean what Mr Joubert contends was agreed: That the respondent would have the right to construct a water bottling plant on the farm in which venture the respondent would be prepared to allow the applicant a 50% interest. In the circumstances Mr Joubert's evidence seeks not to clarify but to vary the terms of the second sale and is inadmissible.

Clause 12 does give to the respondent a long term interest with respect to the property and for that reason the respondent's rights in terms of clause 12 might have affected the applicant's right to alienate the property. The applicant has made it clear, however, that it does not intend to start a water bottling business. It follows that the condition to which the applicant's rights was subject has failed. It is true that the applicant might change its corporate mind but by selling the property its decision not to start a water bottling business on the property has become irreversible. The condition, potestative as it is, has finally failed.

For the above reasons the contention that the final contract does not reflect the parties' consensus must fail. The contention that the parties laboured under a common mistake must also fail. As for a unilateral material mistake on the part of Mr Joubert, he does not in his evidence say that he laboured under such a mistake. It follows that there is no evidence as to what the unilateral mistake was. The facts show that the applicant's attorney drafted the agreement, including clause 12, on the applicant's instructions. In the circumstances it is difficult to see how Mr Joubert could have made a mistake. In any event, there is no evidence whatsoever that the late Mr Kits was aware or should have been aware of any mistake on the part of Joubert or that he somehow induced such a mistake. In the circumstances, even if the applicant laboured under a unilateral mistake, such mistake cannot avail it to avoid the contract.

Also for the reasons set out the contention that the agreement is void for vagueness must fail.

I have pointed out that Joubert contends that a right of first refusal in the applicant's favour must be inferred from the facts. I cannot agree that the facts that the applicant relies on give rise to the inference that the respondent was granted a right of first refusal. While clauses 12 and 13 give to the respondent certain long terms rights in respect of the property, a right of first refusal is by no means the only or even an obvious way of protecting those rights. Such rights could, for instance, if necessary have been protected by way of an appropriate provision in the contract whereby the applicant sold the property. For reasons already given, such a provision is not at this stage necessary. In addition, the right of first refusal that the respondent seeks to rely on cannot be read into the final contract by way of a tacit term because clause 8 of the second sale expressly provides that the second sale is the exclusive agreement between the parties and that it could only be varied in writing (and not tacitly).

There is on the evidence no reason why the applicant should not be entitled to transfer of the property against it fulfilling its obligation to pay the purchase price. In the result the application must succeed.

The counter application is aimed at setting aside the final contract on the same bases as those already dealt with. Predicated on its contention that the final contract is unenforceable, the respondent also sought to set aside the contract whereby the applicant on-sold the property as well as certain ancillary contracts. It follows that the counter application must fail.

On behalf of the applicant Mr Subel submitted that the respondent's defences are so devoid of merit that a special costs order is warranted. The mere fact that a party raises a poor defence is not in my view a ground for a special costs order. Both parties were represented by two counsel and no objection against the award of the costs of two counsel was raised.

The following order is made:

1. The first respondent is ordered within 10 days from date of this order to sign all documents required and to take all steps necessary in order to effect transfer of the immovable property described as the Farm

Knopfontein "A" 215, district Viljoenskroon, Free State Province ("the property") from the first respondent to the applicant, against payment of the purchase price in terms of the agreement of sale between the parties being Annexure X13 to the applicant's founding affidavit and the addendum thereto (Annexure A14).

2. Failing compliance by the first respondent with the order set out in paragraph 1 above, the Sheriff of the High Court is authorised and directed to sign all documents required and to take all steps necessary in order to effect transfer of the property from the first respondent to the applicant, against payment of the purchase price in terms of the agreement of sale between the parties being Annexure X13 to the applicant's founding affidavit and the addendum thereto (Annexure A14).
3. The first respondent's counter application is dismissed.
4. The first respondent is ordered to pay the applicant's costs, including the costs of two counsel.

B.R. du Plessis

Judge of the High Court

On behalf of the applicant: (In the main application and in the counter application as the first Respondents)	Van Zyl, Le Roux & Hurter Attorneys First Floor, Block 3 Monument Office Park Cnr Steenbok Avenue and Elephant Road Monument Park Pretoria Adv: A Subel SC Adv: J. Pretorius
On behalf of the Respondents: (In the main application and in the counter application as the applicant)	Awie Wright Attorneys c/o Le Grange Attorneys 555 Walker Street Muckleneuk Pretoria Adv: P.J. Venter Adv: A. Louw