

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1119/2008
4513/2007

In the case between:

SHOZHALOZA SAFARIS AND AIR
CHARTERS CC

Applicant

and

DIPKA FARMING (PTY) LTD

Respondent

CORAM: VAN DER MERWE, J

JUDGMENT: VAN DER MERWE, J

HEARD ON: 2 SEPTEMBER 2009

DELIVERED ON: 17 SEPTEMBER 2009

[1] This application concerns the interpretation of provisions of a contract of sale ("the contract") in terms of which the purchase price is to be determined.

[2] The aim of interpretation of a contract is to ascertain the meaning of the words used therein, in other words to ascertain the intention of the parties from the words used.

To this end the words used must be given their ordinary grammatical meanings within the context in which they were used. The context includes not only the wording of the rest of the contract, but also the genesis, nature and purpose of the contract as well as the relationship between the various parties concerned. See **WORMAN v HUGHES AND OTHERS** 1948 (3) SA 495 (AD) at 505; **SASSOON CONFIRMING AND ACCEPTANCE CO (PTY) LTD v BARCLAYS NATIONAL BANK LTD** 1974 (1) SA 641 (AD) at 646B – C; **LIST v JUNGERS** 1979 (3) SA 106 (AD) at 120B – F; **COOPERS & LYBRAND AND OTHERS v BRYANT** 1995 (3) SA 761 (AD) at 768A – T; **PANGBOURNE PROPERTIES (LTD) v GILL AND RAMSDEN** 1996 (1) SA 1182 (AD) at 1187B – C.

- [3] During argument in respect of the interpretation of the contract before me, reference was made to evidence of the negotiations between the parties leading to the entering into the contract as well as subsequent conduct of the parties showing the sense in which they acted on the contract. The papers also contain direct evidence by the parties of their intentions. In the past evidence of the first

two types mentioned above, were for purposes of interpretation of a contract classified as “surrounding circumstances” as opposed to “background circumstances”, which would only be admissible in case of ambiguity in the language of the contract. In **KPMG CHARTERED ACCOUNTANTS (SA) v SECUREFIN LIMITED AND ANOTHER** 2009 (4) SA 399 (SCA) at 409 – 410 para [39], the Supreme Court of Appeal per Harms DP jettisoned both the nebulous concepts of background circumstances and surrounding circumstances in the context of interpretation of a document in favour of the context or factual matrix thereof. I do not think that evidence of the subsequent conduct of parties to a contract can contextualise a contract. Such evidence ought therefore not to be admitted in order to interpret the contract. I do think that evidence of the negotiations of the parties could in an appropriate case be admitted to contextualise a contract and such evidence would in the light of the above be admissible without necessarily requiring an ambiguity in the language as a prerequisite for the admission thereof. However, in the **KPMG**-case the court reaffirmed that the integration rule remains part of our

law and that therefore if a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning. In the light hereof, the court stated that all evidence to establish the context or factual matrix of the document must be used as conservatively as possible. In my judgment it follows that evidence of the negotiations between parties to such written contract, should be resorted to for purposes of interpretation thereof rarely and in exceptional cases. It is clear too, that direct evidence of the intentions of the parties remains inadmissible to interpret the document. See COOPERS & LYBRAND v BRYANT-*supra* at 768D – E.

- [4] This application was referred for oral evidence by order of a Colleague dated 24 April 2008. When the matter came before me counsel for the respondent indicated that the respondent considered abandoning its reliance in the papers on rectification of the contract. I then raised the question whether in the light of the above the evidence intended to be led, would be admissible. This led to formal abandonment by the respondent of any reliance on

rectification of the contract and a request by agreement between the parties that oral evidence be dispensed with. To this request I acceded, in the light of the above. See **WALLACH v LEW GEFFEN ESTATES CC** 1993 (3) SA 258 (AD) at 263.

- [5] Mr Charles Larsen and Mr Jim McLain at the time together held 97% members interest in the applicant. Both are citizens of the United States of America. Mr L J van Vuuren at the time held 3% members interests in the applicant and at all times relevant hereto acted as the South African manager and representative of the applicant. The negotiations that led to the contract commenced on or about 1 April 2006 when Mr Van Vuuren offered the property mentioned in the contract for sale for a total purchase price of R7,5 million. At the time no mention was made of the rand/US dollar exchange rate, nor was there mention thereof in the draft contract drawn during or about July 2006 by an attorney appointed by Mr Van Vuuren on behalf of the applicant. It is clear however that it was at all relevant times known to the respondent that there is at least a possibility that the greater portion of the purchase

prise would find its way to the United States of America. It is however undisputed that the respondent intended to utilise the farm properties in question for beef production for the South African market and that therefore from the respondent's perspective, the rand/dollar exchange rate played no role in its decision to enter into the transaction. The negotiations between the parties were then delayed by the attempt by the respondent to obtain black economic empowerment partners for purposes of the transaction.

- [6] The contract itself was negotiated at a meeting held on 4 August 2006 at Vrede. For purposes of this meeting both Mr Larsen and Mr McLain and their spouses came from the US and were present. At the meeting mention was made thereof that the rand had since April 2006 deteriorated against the dollar. Further negotiations took place as a result of which agreement was reached on that day. The contract was subsequently drafted by an attorney instructed by Mr Van Vuuren on behalf of the applicant and signed by the parties thereto on 11 September 2006. Mr Van Vuuren signed the contract on behalf of the applicant. The farm properties were transferred in the name of the

respondent on 7 March 2007. On that day the rand/dollar exchange rate was R7,266 to the dollar.

[7] The relevant provision in the contract provides as follows:

“1. PURCHASE PRICE:

THE purchase price is the amount of **R7,5 million** (SEVEN comma FIVE MILLION RANDS) AT PRICE OF R6,20 TO THE DOLLAR

The PURCHASE PRICE of the **FARMS** is the sum of **R5 380 000,00** (FIVE MILLION THREE HUNDRED AND EIGHTY THOUSAND RANDS)

The PURCHASE PRICE of the **GAME** is the sum of **R2 000 000,00** (TWO MILLION RANDS)

The PURCHASE PRICE of the **EQUIPMENT** is the sum of **R120 000,00** (ONE HUNDRED AND TWENTY THOUSAND RANDS)

And payable by the PURCHASER to the SELLER as follows:

a FINAL PRICE adjustment will be made in favour of the SELLER if the RAND-DOLLAR exchange rate exceeds that of R6,51 to a dollar – the PURCHASE PRICE to be paid into the following account on date of registration:

ACCOUNT NAME SHOZHALOZA SAFARIS AND AIR CHARTERS CC – STANDARD BANK, VREDE – ACCOUNT NUMBER 042323266 – ACB CODE 055043

A DEPOSIT of 5% (FIVE PERCENT) will be paid on DATE OF SIGNATURE of this CONTRACT to PRETORIUS AND BOSMAN TRUST, ABSA BANK, VREDE, Acc no: 2260660161 – payable to the SELLER on date of transfer.

The PURCHASER will provide guarantees for the balance of the purchase price within six (6) months from date of signature hereof.”

- [8] It is common cause that the respondent paid the amount of R7 875 000,00 in respect of the purchase price in terms of the contract. This amount consists of the purchase price of R7,5 million adjusted with the amount of R375 000,00. Interest in the amount of R10 119,85 was also paid. In the

notice of motion the applicant asks for an order declaring that the purchase price in terms of the contract on 7 March 2007 amounted to R8 789 516,12 and for judgment against the respondent in favour of the applicant in the amount of R904 306,28 together with *mora* interest thereon calculated from 7 March 2007 to date of payment. The relief claimed by the applicant is based thereon that in terms of the contract the purchase price is the dollar equivalent of R7,5 million at the exchange rate of R6,20 to the dollar, adjusted to rand at the rate of R7,266 to a dollar ($R7,5 \text{ million} \div 6,20 \times 7,266$). This according to the applicant amounts to R8 789 516.12, leaving a shortfall of R904 396,28 after taking into account the aforesaid total payment of R7 885 119,85. The stance of the respondent is that in terms of the contract the adjustment of the purchase price is limited to a rand/dollar exchange rate of R6,51 to a dollar and that that amounts to the amount paid in respect of the purchase price, namely R7 875 000,00.

- [9] The parties are agreed, in my judgment correctly, that the provision in question should be interpreted to read that a final price adjustment will be made in favour of the

applicant if on the date of registration of the fixed properties in the name of the respondent the rand/dollar exchange rate is in excess of R6,51 to a US dollar. As stated above, it is common cause that on date of registration the rand/dollar exchange rate thus was in excess of R6,51 to the dollar. The real question therefore is how the price adjustment must be made. The applicant contends that the contract provides that the price adjustment must be made to the actual rand/dollar exchange rate on date of registration of the properties whereas the respondent contends that it provides that the price adjustment must be made to R6,51 per dollar. It is clear that the ordinary grammatical meaning of the words used do not provide an answer to this question. Therefore in my judgment this is particularly a case where the “context is everything”.

- [10] It was argued on behalf of the applicant that it is not expressly stated in the contract that the maximum purchase price would be the dollar equivalent of R7,5 million at the rate of R6,20 to the dollar, adjusted to rand at the rate of R6,51 per dollar and that it would have been easy to say so in the contract. This is true, but it is equally

true that the contract does not expressly provide that the purchase price would be adjusted to the actual exchange rate at the date of transfer of the fixed properties if by then the exchange rate was in excess of R6,51 to the dollar. It would also have been easy to word such a provision, the contract could for instance simply have provided that in that case the purchase price would be the actual rand equivalent of 1,2 million US dollars, as is the applicant's case.

- [11] It was further argued that the adjustment provision in the contract must have been calculated to protect the applicant against a worsening rand/dollar exchange rate as the purchase price or the greater portion thereof would be transferred to the US. This factor however is countered by the improbability that the respondent would be bound to what would on the applicant's interpretation be an open-ended and unpredictable purchase price, based on a matter that was not connected to the intrinsic value of the property to the respondent at all.

[12] To me the decisive factor is the following. It is common cause that at the beginning of April 2006 the rand/dollar exchange rate was in the region of R6,20 to the dollar and on 4 August 2006 it was R6,81 to the dollar and that the parties were aware thereof on 4 August 2006. The number of R6,51 to the dollar is midway between R6,20 and R6,81 to a dollar. The number of R6,51 to a dollar therefore is clearly a very significant matter. In my judgment the number R6,51 to a dollar obviously signifies a compromise. On the respondent's construction of the contract it is easy to find the compromise. The respondent would not pay a purchase price adjusted to more than half of the difference between R6,81 to the dollar and R6,20 to the dollar. It was therefore a case of "split the difference". On the other hand, on the applicant's construction, the number of R6,51 to a dollar is essentially meaningless and there is no actual compromise included in the contract. On 4 August 2006 the rand/dollar exchange rate was already R6,81 to the dollar and the parties expected that that rate might very well continue to rise in rand terms until transfer of the properties takes place which, it was realised, could take some months, as it did. In effect therefore there would

simply be an unlimited price adjustment in favour of the applicant. On this basis, the applicant's construction in my view gives no real effect to the number R6,51 to a dollar and is wrong.

[13] It follows that the applicant did not prove on a balance of probabilities that it is entitled to the relief claimed.

[14] The application is dismissed with costs.

C.H.G. VAN DER MERWE, J

On behalf of applicant: Adv. A. J. R. van Rhyn SC
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of respondent: Adv. R. G. Lagrange
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