



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D7969/2022

In the matter between:

LIMITLESS INVESTMENTS (PTY) LTD

Applicant

and

MAXIMPROPS 1007 CC

First Respondent

LESTER HALL FLETCHER INC

Second Respondent

ORDER

The following order is granted:

1. The late delivery of the applicant's replying affidavit is condoned.
2. The applicant is directed to pay the respondents' costs of the opposed condonation application on Scale B, such costs to include the costs of senior counsel where employed.
3. The application is dismissed.
4. The applicant is directed to pay the respondents' costs of the application, on Scale C, such costs to include the costs of senior counsel where employed.

JUDGMENT

Veerasamy AJ

Introduction

[1] On or about 28 July 2021 the applicant and the first respondent concluded a written agreement of sale in respect of a property situated at Gowrie Farm, Golf & Flyfishing Estate, in Nottingham Road ("the property"). It is common cause between the parties that a total purchase price of R15 million was paid by the applicant with R1 million of such funds being held as a deposit by the second respondent (acting in their capacity as conveyancers). The interest which would have accrued on the R1 million would be for the benefit of the first respondent.

[2] The very narrow issue which serves before me is whether the agreement contemplates that interest which would accrue on the balance of the purchase price is to be paid to the applicant or the first respondent.

[3] It is common cause that the singular determination to be made in the application in respect of the above issue is an interpretation of clause 2.2 of the agreement. I turn to this issue further on in this judgment.

[4] Prior to the hearing of the opposed application, the applicant delivered an application seeking condonation for the late delivery of its replying affidavit. This was opposed by both respondents.

[5] I intend to deal with the application for condonation first.

Condonation for the late filing of the replying affidavit

[6] The principal application was instituted on or about 4 August 2022. The answering affidavit was delivered on 30 September 2022. The applicant delivered its replying affidavit on 26 February 2024, being 16 months and 28 days after delivery of the answering affidavit.

[7] In its application for condonation, the applicant's deponent, Ms Kim Hulett, explains the aforementioned delay in delivering the replying affidavit as follows:

- (a) There were "tremendous *delays*" with obtaining the evidence of Mr Daniel Raath, whose evidence was needed to respond to allegations in the answering affidavit. Mr Raath, it is alleged, had emigrated to Australia. No detail is given of what steps were taken to obtain his evidence and what the hurdles were which contributed to the delay.
- (b) During the second half of 2022, Ms Hulett's godson was diagnosed with multiple sclerosis and attending to his needs at the time prevented her from attending to the replying affidavit with any greater expedition. No detail is given of how this event contributed to the delay.
- (c) During or about July 2023, Mr Hulett's ex-husband was involved in a serious motorcycle accident in Namibia. As a result of his accident, she had to further attend to his needs and that of her children which also involved her assuming sole parental responsibilities whilst her ex-husband remained incapacitated. No detail is given of how this has contributed to the delay.
- (d) There had been significant disruptions in the activities of Next Bio Sciences (Pty) Ltd, of which Ms Hulett alleges she is the founder and Chief Executive Officer. She only finalised the handover of her role in the company in September 2023. Ms Hulett alleges that her time was further taken up by roles she serves at various institutions such as the Faculty of the Singularity University, the investment committee of One Bio, the board of directors of the National Heritage Project NPC and as an investment director in the Wild Earth Group. No detail is given of how this has contributed to the delay.
- (e) Ms Hulett advises that it was only after settlement negotiations in November and December 2023 failed, that she proceeded to prepare her replying affidavit.

[8] Ms Hulett's explanation for the applicant's delay in delivering its replying affidavit timeously is sparse, to say the least. She provides the court with an overview of the events that distracted her but no detailed explanation has been given as to why it has taken 16 months and 28 days to deliver a replying affidavit.

[9] The respondents argue that the replying affidavit falls to be disregarded, not only because of the excessive delay but, further, because the applicant now seeks to

rely on inadmissible evidence.

[10] The respondents did not deliver any notice of an irregular step when the replying affidavit was delivered. Nor was there any suggestion during the hearing that in the event this court granted condonation, then the respondents wished to deliver an application to strike out the inadmissible evidence in the replying affidavit. Mr *Harpur* SC who appeared for the respondents adopted, correctly so, a very pragmatic approach being that should condonation be granted, then the court would be invited to merely disregard the evidence which was inadmissible.

[11] Ms *Brammer*, who appeared for the applicant, in her argument in the main application limited herself to the evidence contained in the founding affidavit, thus avoiding any further disputes regarding which evidence in the replying affidavit was inadmissible and may be considered by the court.

[12] In the current proceedings, strict adherence to the Uniform Rule relating to the timeframes for the delivery of a replying affidavit would give rise to a substantial injustice.¹

[13] In the matter under consideration all the papers are before me in the matters ready to be dealt with. To uphold an argument that the replying affidavit falls to be disregarded because it was filed out of time would be a formalistic exercise in futility and would leave the parties to commence the proceedings on the same facts *de novo*. This does not appear to me to be in the interests of justice.²

[14] The absence of a rule 30 notice regarding the setting aside of irregular proceedings and the respondents' preparedness to argue the matter on the day on its merits fortifies my view that neither party is ultimately prejudiced by the late filing of the replying affidavit.

[15] The applicant concedes that it seeks an indulgence from the court in respect of the replying affidavit. That indulgence must come at a price, especially in circumstances where the applicant has provided an anaemic explanation for the delay.

¹ *Hart and Another v Nelson* 2000 (4) SA 368 (E) at 374G-375F.

² *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ) paras 17-19.

The applicant's problems are further compounded by the fact that the replying affidavit was incomplete, and the applicant sought to hand up documents omitted from the replying affidavit on the day of the hearing.

[16] Whilst I am inclined to granted condonation, the applicant must pay the respondents' costs of the opposed application for condonation on Scale B.

The interpretation of clause 2.2 of the sale agreement

[17] The manner in which the purchase price was to be dealt with is regulated by clause 2 of the sale agreement. Of importance to these proceedings is the interpretation of clause 2.2 which, at the time that the agreement was signed, read as follows:

'The Purchaser shall lodge with the conveyancers, either a guarantee acceptable to them or, alternatively, cash for the balance of the purchase price within 10 days of the date of the Purchaser's signature to this agreement. Any such cash paid by the Purchaser shall be held by the conveyancers in accordance with the provisions of clause 2.1 above.'

[18] Clause 2.1 of the sale agreement reads as follows:

'The Purchaser shall lodge a non-refundable deposit of R1 000 000 with Lester Hall, Fletcher Inc ('the conveyancers') within 7 days of the sale agreement being concluded, which sum shall be retained by the conveyancers in trust in an interest-bearing account upon their standard terms applicable to corporate saver accounts with interest accruing to the Seller pending transfer. Payments to the conveyancers shall be made in cash by cheque or alternatively by direct deposit to the following account ...'

[19] In the sale agreement, the portion of clause 2.1 which originally read "...to corporate saver accounts with interest accruing to the purchaser pending transfer" was amended in manuscript to delete the word "*purchaser*" and to insert the word "*Seller*".

[20] Equally, in clause 2.2 the original formulation of the clause which read, *inter alia*, "... cash for the balance of the purchase price within 30 days of the date of the Purchaser's signature ..." was amended by deletion of the number '30' and the insertion of the number '10' in manuscript.

[21] On or about 10 August 2024, the applicant and the first respondent concluded the first addendum. The first addendum consisted of three clauses. For the purposes of this application clauses 1 and 2 are instructive.

[22] Clause 1 reads as follows:

'The non-refundable deposit referred to in clause 2.1 of the agreement shall be paid by 13th August 2021.'

[23] Clause 2 of the first addendum reads as follows:

'The Purchaser shall supply an acceptable Bank guarantee for R14 000 000.00 (Fourteen Million Rand) by 25th August 2021.'

[24] The applicant could not provide the bank guarantee by 25 August 2021 which resulted in a second addendum being concluded between the parties. The second addendum consists of three clauses, with clause 1 reading as follows:

'Clause 2.2 of the Agreement and Addendum is hereby amended to reflect that the Purchaser shall secure payment of the balance of the purchase price in cash before 25 September 2021.'

[25] The applicant contends that clause 1 of the second addendum amounts to a complete deletion and substitution of the existing clause 2.2 as amended by the first addendum.

[26] The respondents contend that the second addendum merely amended clause 2.2 to reflect the payment of the purchase price by 25 September 2021. They argue that the rest of clause 2.2 remained operative and in particular the sentence which reads as follows:

'Any such cash paid by the Purchaser shall be held by the conveyancers in accordance with the provisions of 2.1 above.'

[27] It is common cause between the parties that the balance of the purchase price in the sum of R14 million was paid into the second respondent's trust account and that interest has accrued on such payment.

[28] Ms *Brammer* argues that it was never the intention of the parties for the interest which accrued on the R14 million payment to accrue for the benefit of the first

respondent. She submits that the parties had never contemplated interest on the balance of the purchase price because at all material times the balance of the purchase price was to be secured by a bank guarantee.

[29] Ms *Brammer* submitted that the context of providing a bank guarantee evidences that it was never the intention of the parties for interest on the balance of the purchase price to be paid to the seller and that this was never within the contemplation of the parties. Thus, when the second addendum was signed the applicant argues that it and the first respondent were *ad idem* that interest on the R14 million would not be payable to the first respondent.

[30] In support of this argument, the applicant relies upon an email which Ms Hulett had sent on 25 August 2021 being the day before she signed the second addendum. In the final paragraph of her email, Ms Hulett states the following:
 'In any event, this deal has left me with a really bad taste in my mouth. Despite this, I will arrange transfer and deposit into your conveyancers trust account (interest for my account). Once this has taken place I will expect occupation within one week. Please confirm.'

[31] In paragraph 37 of her founding affidavit, Ms Hulett alleges that Mr Rowles confirmed receipt of the aforementioned email in a telephonic conversation they had the very same day (being 25 August 2021).

[32] Mr Rowles is the deponent to the respondents' answering affidavit. In paragraphs 25, 26 and 29 of his answering affidavits, Mr Rowles denies Ms Hulett's interpretation of the second addendum. He submits that there was never any agreement that interest on the balance of the purchase price would accrue to the applicant and in fact the second addendum was not intended to reflect same.

[33] He alleges that Ms Hulett signed the second addendum without asking for any amendment to reflect such interest would accrue to the applicant.

[34] Mr *Harpur* SC correctly submits that if the applicant is to succeed, then it must do so on the respondents' version³ and that on the respondents' version, there was never an agreement for interest to accrue to the applicant and that Ms Hulett's email

³ *Plascon Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634A-I.

did not translate into such an agreement.

[35] Ms *Brammer* submitted that there was no benefit to be gained by the applicant in giving up interest on the balance of the purchase price. She submitted that the agreement contemplated that the deposit was paid as a genuine pre-estimate of damages which the first respondent would suffer if the transfer did not proceed because of the applicant's breach of the agreement. It was a mechanism to secure the agreement. She submitted that no similar benefit accrued to the applicant in giving up the interest on the balance of the purchase price.

[36] Mr *Harpur*, however, contended that the benefit for the applicant in fact arose from the rent-free occupation which the applicant gained before the transfer.

[37] In paragraph 4.3 of his answering affidavit, Mr Rowles alleges that the seller was prepared to forego occupational rental and levies until registration of transfer with the obvious commercial rationale being that it would have been entitled to the interest on the balance of the purchase price. He contends that this ultimately is what transpired since the interest which the applicant is asking for is close to the amount which would have been payable as occupational rental.

[38] In *University of Johannesburg v Auckland Park Theological Seminary and Another*,⁴ the Constitutional Court cautioned that admission of contextual evidence whilst forming part of an interpretive exercise was not limitless. At paragraph 68 of the judgment Justice Khampepe held the following:

'Let me clarify that what I say here does not mean that extrinsic evidence is *always* admissible. It is true that a court's recourse to extrinsic evidence is not limitless because "interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses". It is also true that "to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible". I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of

⁴ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC).

course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.' (Footnotes omitted.)

[39] In *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*⁵ the Supreme Court of Appeal ('the SCA') held at paragraph 27:

'I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. *KPMG*, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.'

[40] In *Natal Joint Municipal Pension Fund v Endumeni*⁶ the SCA held at paragraph 18:

'Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: 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 context in which the provision appears; the apparent purpose to

⁵ *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA).

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

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.' (Footnotes omitted.)

[41] In *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*⁷ the SCA held at paragraph 39:

'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. 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 (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible" (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances". The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or "factual matrix" ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* [2008 (6) SA 654 (SCA) para 7.]'

⁷ *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA).

[42] In *University of Johannesburg* the Constitutional Court affirmed the judgments of *Novartis*, *Endumeni* and *KPMG*.⁸

[43] Evidence may be relevant to the context within which the contract was concluded and its purpose, irrespective of whether the text of the contract is ambiguous, either patently or latently.⁹ However interpretation is a matter of law and not of fact. Accordingly, interpretation is a matter for the court and not witnesses.¹⁰

[44] In its initial incarnation, clause 2.2 of the agreement contemplated that the purchase price would be paid by “either a guarantee” alternatively “cash for the balance of the purchase price”.

[45] In the event that the purchase price was to be paid in cash clause 2.2 of the agreement expressly provided that “Any such cash paid by the Purchaser shall be held by the conveyancers in accordance with clause 2.1 above.”

[46] In terms of clause 2.1 of the agreement, monies were to be held in an interest-bearing account “with interest accruing to the Seller pending transfer”.

[47] Whilst the applicant may have always initially contemplated paying the purchase price by bank guarantee, it concluded an agreement in which at the outset contemplated, as an alternative, that the purchase price may be paid by cash and if payment was made in cash then such monies would be held in an interest bearing account for the benefit of the Seller.

[48] Ms *Brammer* conceded during argument that at the outset, before any addenda had been concluded, the agreement contemplated such an arrangement.

[49] This is the context in which the agreement is to be viewed.

[50] The second addendum sought to amend clause 2.2 “to reflect that the Purchaser shall secure payment of the balance of the purchase price in cash before

⁸ *Minister for Transport and Public Works: WC and Others v Adonisi and Others* 2024 (4) SA 499 (SCA) para 76.

⁹ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 38.

¹⁰ *Minister for Transport v Adonisi* fn 8 above para 77.

25 September 2021". It does not read as a wholesale deletion and replacement of clause 2.2.

[51] The evolution of clause 2.2 must be viewed in context. In its original form clause 2.2 contemplated that the purchase price would be paid either by bank guarantee or cash within 10 days of signature of the agreement.

[52] The first addendum did not delete clause 2.2. In fact, the first addendum merely sought to record that the applicant shall supply an acceptable bank guarantee for R14 million by 25 August 2021.

[53] Clause 3 of the first addendum therefore becomes instructive. It reads as follows:

'The remainder of the terms and conditions of the sale agreement shall continue to be in force and effect and should there be any conflict between this addendum and the sale agreement then the terms and conditions of this addendum shall prevail.'

[54] The only conflict which would have arisen would be in the date for which the guarantee would have to be provided in terms of clause 2.2.

[55] It is only the second addendum which specifically makes direct reference to an amendment of clause 2.2 and in that regard, clause 2.2 is amended "*to reflect that the Purchaser shall secure payment of the balance of the purchase price in cash before 25 September 2021.*"

[56] It is merely the date for payment which is altered in clause 2.2. The remainder of clause 2.2 remains operative.

[57] The second addendum makes no mention of interest and is silent in this regard. Thus, how interest on the balance of the purchase price is to be dealt with is governed by the remainder of clause 2.2, which provides that one must look to clause 2.1. Clause 2.1 in turn provides that such interest is payable to the Seller.

[58] If one has for the moment to consider Ms *Brammer's* argument of "*no benefit to the applicant*", it is abundantly apparent that there was clearly a benefit to be gained by the applicant in that it obtained rent-free occupation of a R15 million home pending

transfer. As the respondents allege, that was the basis upon which the interest would accrue to the first respondent.

[59] Ms Hulett's evidence as to the applicant's intention cannot be admitted. Such is not evidence of context.¹¹

[60] Accordingly, I find that in terms of clause 2.2 of the agreement, the interest is to be paid to the first respondent in accordance with the provisions of clause 2.1 of the agreement.

[61] It accordingly follows that the application cannot succeed. It further follows that the respondents have been substantially successful in these proceedings. As such the respondents are entitled to their costs.

Order

[62] Having considered the papers and submissions before me, I make the following order:

1. The late delivery of the applicant's replying affidavit is condoned.
2. The applicant is directed to pay the respondents' costs of the opposed condonation application on Scale B, such costs to include the costs of senior counsel where employed.
3. The application is dismissed.
4. The applicant is directed to pay the respondents' costs of the application, on Scale C, such costs to include the costs of senior counsel where employed.


I VEERASAMY AJ

¹¹ Ibid para 78.

HEARD ON: 11 October 2024

JUDGMENT DATE: 18 October 2024

FOR THE APPLICANT: B Brammer

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