IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH)

Case No.: 341/2010
Date heard: 18 November 2014
Date delivered: 21 November 2014

In the matter between:

MEDIA 24 (PTY) LTD Plaintiff

and

NATIONAL PRIDE TRADING 452 (PTY) LTD Defendant

J U D G M E N T

GQAMANA, AJ:

[1] The plaintiff caused summons to be issued against the defendant for a rental claim in the amount of R1,023,948.39 (excluding VAT). The claim is for the outstanding rental for the months of September 2010 to 30 April 2011 and a *pro rata* amount from 1 to 24 May 2011, in terms of the written lease agreement entered into between the parties.

[2] In resisting such claim, the defendant raised a number of defences in its plea. However for the present purposes the issue for adjudication is very crisp and it relates to the proper interpretation of clause 7.3 of the sale agreement entered into between the plaintiff and Lococo 4 (Pty) Ltd *("the Lococo sale agreement")*. Relying on clause 7.3 of the Lococo sale agreement the defendant alleges that all rights, title

and interests in the lease agreement were ceded to Lococo and accordingly plaintiff lack *locus standi*. The history of the matter is succinctly summarised in the stated case filed by the parties and is as follows. On 08 January 2008, the parties concluded the written lease agreement which terminated on 31 December 2009 *("the first lease agreement").* However, defendant continued with the occupation of the property which was the subject matter of the said lease agreement.

[3] On 10 February 2010, the plaintiff caused summons to be issued against the defendant in respect of the leased property. On 31 March 2010, a default judgment was granted in the plaintiff's favour for payment of the amount of R233,400.00 and an amount of R116,700.00 for every month that the defendant remained in occupation of the said leased property from 1 March 2010.

[4] On 22 July 2010, the leased property was sold on auction to Lococo for an amount of R10 Million and an agreement of sale was signed thereto by the parties. This agreement will be referred hereto as *"the Auction Alliance sale agreement"*. The Auction Alliance sale agreement did not make provision for transfer of the lease or any going concern of any nature.

[5] During February 2011 the parties concluded another lease agreement for the same property, for the period 01 January 2010 to 31 December 2010 *("the second lease agreement")*. The second lease agreement was a retroactive agreement.

[6] Few days after the conclusion of the second lease agreement, the plaintiff and Lococo signed a new sale agreement *("the Lococo sale agreement").* The Lococo

sale agreement provided for the transfer of the letting enterprise as a going concern, meaning that the sale of the property was classified as a zero-rated transaction.

[7] The outstanding rental amount was agreed by the parties. However the issue for adjudication is whether, on a proper interpretation, the rental claim was ceded to Lococo in terms of clause 7.3 of Lococo sale agreement.

[8] In advancing the defendant's contention, *Mr Crompton* argued that I am constrained by the parol evidence rule to only have regard to the lease agreement signed between the plaintiff and the defendant on 16 February 2011 and the Lococo sale agreement. For such submission reliance was placed on the judgment by the Supreme Court of Appeal in *Van Aardt v Galway* [2012] 2 All SA 78 (SCA).

[9] In my view, the correct approach to resolve the issue at hand is the one set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2014 (4) SA 593 (SCA). The Supreme Court of Appeal stated therein that, our law in regard to interpretation of documents can be summarised as follows:

> "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 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."

[10] In the instant matter the problem of interpretation arises from that portion of clause 7.3 commencing with the words *"cedes all rights, interest and title"*. The defendant's argument is that this clause must be read to mean that the rental claim for the period in question was ceded to Lococo and therefore the plaintiff has no *locus standi* to institute the present action. To advance that point further, the defendant sought to rely on the judgment by the Constitutional Court in *NEHAWU v University of Cape Town* [2003] JOL 10448 (CC). Reliance to the aforesaid judgment, as I understand it, was to demonstrate that the Lococo sale agreement was a *"going concern"* and the term *"going concern"* means that the enterprise was sold *'lock, stock and barrel'.* The *NEHAWU* judgment *(supra)* is quite distinguishable from the facts in the present matter. In the *NEHAWU* matter, the court was concerned with factors that need to be considered to decide whether the business was sold as a going concern or not. In the present matter what was intended to be sold is set out specifically in clause 3.6.1 and 3.6.4 of the Lococo agreement. As

set out in clause 3.6.4 what was sold were *"all the assets which are necessary for the carrying on of the Letting Enterprise".*

[11] In my view, the suggested construction of clause 7.3 by the defendant is absurd, and not a sensible one. It was conceded by *Mr Crompton* and correctly so, that, in the commercial sense, businesses are there to make profit. To me it would not make business sense for the plaintiff to have agreed to forego its rental claim without factoring same into the purchase price. The outstanding rental was quite a substantial amount of money in excess of a million rand. No business person, in his sane mind would have simply agreed to cede such an amount of money without there being a benefit to his business. Further if one has regard to the surrounding circumstances, in the Auction Alliance sale agreement, a provision was made for the occupational interest. In addition the cession in terms of clause 7.3 was conditional upon registration of transfer of the property taking place. Also at the time of the conclusion of the Lococo sale agreement, a default judgment was already granted in favour of the plaintiff for the rental claim. If one has regard to the context of the relevant sale agreement and all the surrounding circumstances, it would be absurd to think that the plaintiff would have intended to cede to Lococo the already accrued rental claim.

[12] Accordingly the suggested construction of clause 7.3 of the Lococo agreement as suggested by the defendant would lead to insensible and unbusinesslike results. A contract must be interpreted so as to give it a commercially sensible meaning. (See *Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund* 2010 (2) SA 498 (SCA) para 13.) The

correct and proper interpretation of clause 7.3 is that, the cession does not include the rental claim which had already accrued at the time when the transfer took place.

[13] Assuming that I am wrong in so concluding, however the defendant's special plea would have still failed. I say so because at the time when the Lococo sale agreement was concluded, a default judgment was already granted in favour of the plaintiff. But I do not have to decide this point because of my findings above on the proper interpretation of clause 7.3 of the Lococo sale agreement.

Costs

[14] The plaintiff argued that the manner in which the defendant conducted itself, by raising ill-conceived points *in limine* throughout the proceedings and avoiding dealing with the merits of the matter requires sanctioning through an appropriate costs order by this Court. The points raised by the defendant are to my view not an abuse of the court process. The defendant saw it fit to raise *inter alia,* the issue of the proper interpretation of clause 7.3. That was not a vexatious and unfounded point. Therefore, I am not persuaded that the plaintiff has made out a case for costs in the punitive scale. I therefore decline to order the punitive costs against the defendant.

Order

[15] In the result the following order is made:

1. The defendant is ordered to make payment to the plaintiff in the amount R1,023,948.39.

2. Interest on the aforesaid amount at the rate of 15.5% per annum *tempore morae.*

3. The defendant is further ordered to pay the costs of suit.

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N W GQAMANA
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the plaintiff:
Adv C Joubert

Instructed by:
Joubert Galpin Searle, Port Elizabeth

For the defendant:
Adv R D Crompton

Instructed by:
Kuban Chetty Attorneys, Port Elizabeth