

SOUTH AFRICA / JUDGMENT

Buchan v Stockdale and Another (2563/2009) [2011] ZAECHGHC 18 (26 May 2011) [2011] ZAECHGHC 18

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.E Smith

CASE / FILE NUMBER

2563/2009

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION,

GRAHAMSTOWN

Case no: 2563/2009

Date Heard: 13/5/11

Date Delivered: 26/5/11

In the matter between: THOMAS RICHARD SINCLAIR BUCHAN
 PLAINTIFF
Versus
 DORVIN ELROY STOCKDALE
 1st
 DEFENDANT
 KIM PATRICIA CARLIN STOCKDALE
 2nd
 DEFENDANT

JUDGMENT

SMITH J:

INTRODUCTION

- [1] During February 2008 the Plaintiff concluded a written agreement of sale with the Defendants in terms whereof he purchased from them the immovable property known as "Thorn Bush Ranch". The property was operating as a hunting business and was sold together with certain movable items and the game thereon. The movables and game were listed in addenda to the agreement.
- [2] The parties have by agreement applied to separate from the other disputes between them the issue as to whether or not the Defendants were contractually obligated to deliver to the Plaintiff the game listed in Addendum B on the date of the transfer of the property. I have granted the order and the issue was argued before me as a stated case. Other than the pleadings in the matter, the parties have also placed before me certain documents, namely a copy of the website advertisement of the property; a document headed "Thorn Bush Safaris Sterkstroom", the minutes of a meeting held in February 2008 and an undated and unsigned copy of heads of agreement. It was however the understanding that these documents will only be relevant in the event of a finding that the disputed clause is ambiguous and capable of more than one meaning.
- [3] The stated case essentially turns on the interpretation of clause 11.4 of the agreement which reads as follows:

"11 The sellers warrants and undertakes (sic) that –

11.4 it is agreed that the Game Count is per Addendum B"

- [4] Mr Beyleveld SC, who appeared for the Plaintiff, contended that the clause should be given its ordinary grammatical meaning, namely that it constitutes a warranty by the Defendants that the animals listed in Addendum B would be delivered to the Plaintiff on the date of the transfer of the immovable property.
- [5] Mr Kincaid, who appeared for the Defendants, however contended that the disputed clause does not constitute a warranty and was merely a recordal of an agreement that the animals listed in the addendum were present on the farm at a certain date. He submitted that the clause does therefore not create a contractual obligation on the part of the Defendants in this regard. He submitted further that the clause is ambiguous and open to different interpretations and that the court should therefore have regard to the above-mentioned documents in order to determine the true intention of the parties.

RULES OF INTERPRETATION PERTINENT TO CONTRACTUAL PROVISIONS

- [6] In actions based on contract the rule of interpretation is applied in order to determine what the language in the contract means and not to divine what was in the minds of the parties when they concluded the agreement. This distinction is fundamentally important in the interpretation of contractual provisions. Greenberg JA expressed himself as follows in this regard in the matter of *Worman v Hughes and Others* 1948 (3) SA 495 (A) at 505:

“It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties intention was, but what the language used in the contract means, i.e what their intention was as expressed in the contract. As was said by Solomon, J, in Van Pletsen v Henning (1913 A.D., p. 82 at page 89): ‘The intention of the parties must be gathered from their language, not from what either of them may have had in mind.’”

See in this regard also Ferndale Crossroads Share Block (Pty) Ltd and others v City of Johannesburg Metropolitan Municipality and others 2011 2 ALL SALR 15 at paragraph 14.

[7] The golden rule of interpretation is that language in contracts is to be given its ordinary grammatical meaning unless this results in some absurdity or repugnancy or inconsistency with the rest of the instrument. See in this regard Coopers and Lybrandt and others v Bryant

[1995] ZASCA 64; 1995 (3) SA 761 (A) at 767 E-F.

[8] Words or phrases should not be interpreted in isolation but in the context of the contract as a whole, having due regard to the nature and purpose of the contract. See in this regard Swart en 'n Ander v Cape Fabrix Pty (Ltd) 1979 (1) SA 195 (A) at 202C.

[9] Courts should only have regard to evidence of surrounding circumstances which might show the meaning which the parties intended if a clause in a contract is ambiguous and capable of more than one meaning. See in this regard Delmas Milling CO Ltd v Du Plessis 1955 (3) SA 447 AD. The mere fact that there may be difficulties with the interpretation of badly drafted contractual provisions does however not mean that it is permissible to reach a different result by drawing inferences from surrounding circumstances where it is possible to reach sufficient certainty from the ordinary grammatical meaning of the language. See in this regard the judgment of Schreiner JA in Delmas Milling CO Ltd (supra) at page 454H – 455A

“Whether there is sufficient certainty in the language of even very badly drafted contracts to make it unnecessary and therefore wrong to draw inferences from the surrounding circumstances is a matter of individual judicial opinion on each case.”

THE PLEADINGS

[10] The portions of the pleadings which are relevant to the stated case are as follows:

The Plaintiff averred as follows in this regard:

“10 In terms of clause 11 of the agreement, the Defendants warranted that the game count on the property (the number of game to be found on the property) is as recorded in Addendum B.

The Defendants, in breach of their obligations in terms of the agreement and in particular in breach of the warranty contained in clause 11.4 of the agreement, have delivered less game to the Plaintiff than warranted in Addendum B.

The defendants pleaded as follows to these averments:

AD PARAGRAPH 10 thereof:

Defendants deny the averments set out in this paragraph and aver that by the provisions of clause 11.4 of Annexure POC 1 the parties recorded that they were in agreement that the game listed in Addendum B was upon the property, the Plaintiff having inspected the property and having himself seen the game.

AD PARAGRAPH 13 thereof:

Defendants deny the averments set out in this paragraph and in particular:

6.1.1 Deny that Clause 11.4 of Annexure “POC 1” constitutes a warranty and

6.1.2 aver that Clause 11.4 of Annexure “POC 1” is a recordal of agreement that the game listed in Addendum B was accepted by the parties.

6.2 Defendants do not admit that upon registration of transfer and passing of risk to Plaintiff that there was less game upon the property than is listed in Addendum “B” and aver further that Plaintiff was in occupation of the property during the period 29 March 2008 to 5 April 2008 and during the period 1 May 2008 to 13 June 2008.”

THE DISPUTED CLAUSE IN CONTEXT

[11] There are numerous indications in the contract that the game listed in Addendum B were included in the purchase price. Clause 2 thereof is in particularly explicit in this regard. It reads as follows:

“The purchase price for the property which is known as Thorn Bush Ranch and is currently operating a hunting business and is being sold together with all the game thereon and the movables as listed is R13,500,000 (Thirteen Million Five Hundred Thousand Rands only) plus 14% Vat shall be paid by the purchaser as follows:”

Clause 7 also requires of the sellers to give delivery and possession of “the enterprise” on the date of the transfer of the farm into the name of the purchaser. This can only be interpreted to mean that the Defendants

were under a contractual obligation not only to effect transfer of the immovable property, namely the farm, but also to effect delivery and give possession of the “enterprise”, being the hunting operation, including the movables listed in Addendum A and the game listed in Addendum B. This interpretation is furthermore consistent with clause 6 which relates to the payment of VAT in respect of the “enterprise”.

[12] Mr Kincaid submitted that the impugned clause does not have any contractual force but was merely a recordal of the fact that the parties had agreed that at a particular point in time the game on the farm were as listed in Addendum B. He submitted also that the word “warranty” is an English Law importation and may have different meanings. He submitted that in respect of the equipment listed in Addendum A, the contract, in particular clause 11.5 thereof, clearly states that “the equipment as per Addendum A will be on the property as of

date of registration.” He argued that the fact that no similar explicit and unequivocal undertaking is provided in respect of the game, (it merely being stated that it is agreed that the game count is per Addendum B), is therefore a clear indication that the parties did not intend for clause 11.4 to constitute a warranty or undertaking that the game listed in Addendum B will be on the property at the date of registration. He submitted that clause 11.3 further lends credence to this argument as it deals only with the shooting, catching or removal of game. The sellers' contractual responsibilities in respect of the game were therefore limited to these eventualities only.

- [13] It is so that a contract often contains recordals, recitals or explanatory statements which are not intended to create contractual obligations. As was held by Cameron JA in the matter of Absa Bank Limited v Swanepoel NO 2004 (6) (SCA) 178 at 181B-C

“At its simplest, a contract is an enforceable promise to do or not do something. But when parties record an agreement in writing, they often add provisions that do not embody such promises. A contract may have a preamble. It may contain "recordals" and "recitals". It may document prior events, or record the parties future intentions. It may contain clarificatory or explanatory statements. The parties may place on record matters that bear on the interpretation of what they have undertaken. It is therefore wrong to approach a written contract as though every provision is intended to create contractual obligations”

- [14] The issue as to whether or not a contractual provision creates an enforceable contractual obligation is fundamental to the ambit of the obligations that the parties undertook and should be resolved before the application of rules of interpretation to determine the intention of the parties. In this regard Cameron JA stated the following in the Absa Bank matter (supra) at page 181 E-F:

“Only once it is determined that a provision was intended to have contractual effect will the Court try to interpret it so as to give it business efficacy. If it was not so intended, those rules of interpretation do not come into play.”

In this matter however there can be little doubt that the game listed in Addendum B to the contract formed part and parcel of the res vendita. I have earlier referred to various contractual provisions which support such a conclusion. For this reason clause 11.4 cannot be a mere recordal of a factual situation that does not have any contractual enforceability. The disputed clause relates to the essentialia of the contract and on the principle of pacta servanda sunt must be accorded contractual efficacy. It was clearly included to circumscribe the scope and content of the res vendita and in this regard was intended to create a contractual obligation on the part of the sellers. The issue as to whether or not it constitutes a warranty or undertaking to deliver the listed game on the date of the transfer of the property is a matter which should be resolved as the second part of the enquiry and by application of the abovementioned rules of interpretation.

- [15] The impugned clause is not elegantly drafted and does not make for easy reading. The words “it is agreed” are superfluous and merely serves to complicate issues. They are however in my view not incompatible with the construction which is contended for by the Plaintiff. All that it means is that the “warranty” is provided in respect of the number and species of game which the parties have verified and agreed were present on the farm.
- [16] Clause 11.4 is preceded by the following words: “The sellers warrants and undertakes (sic) that -”. It is indeed so that, depending on the context, the term “warranty” could have different meanings and does not always necessarily create the contractual obligation implied by its ordinary grammatical meaning. In this case however the addition of the words “and undertakes” establishes beyond any doubt that the parties intended for the obligations listed in clause 11 to constitute contractually binding warranties. Mr Kincaid was constrained to concede that all the other nine sub clauses of clause 11 constitute contractually binding warranties. I do however not agree with his submission that the inclusion of the words “it is agreed” distinguishes clause 11.4 from the other sub clauses and is incompatible with the interpretation advanced by the Plaintiff. On the Defendants’ construction it would mean that other than the prohibition against shooting, catching or removal of game, the plaintiff would be left with no contractual remedy and would have had to take pot luck on the date of delivery of the enterprise. This submission in essence postulates that the purchaser had agreed to assume the risk in respect of the game before taking possession of the farm. Such an interpretation in my view leads to absurdities and could never have been the intention of the parties. Apart from being an unreasonably onerous obligation to read into the contract, such a construction is also fundamentally repugnant to the explicit language and purpose of the contract.
- [17] I agree with Mr Beyleveld’s submission to the effect that even if clause 11.4 did not constitute a warranty to deliver the game on the date of transfer, the agreement is clear and unequivocal that the parties intended the game listed in Addendum B to be part of the res vendita (and therefore included in the purchase price) and that the Defendants had warranted that the listed game were on the property. The Plaintiff would therefore be entitled to relief even if his claim was for delivery of the res vendita.
- [18] I am of the view that even though the impugned clause has been badly and inelegantly drafted, it is capable of one meaning only and that is that the sellers warranted and undertook that the game listed in Addendum B were present on the farm. This clause therefore created a contractual obligation on the part of the sellers to ensure that the listed game, together with the movable items listed in Addendum A, were delivered on the date of transfer of the farm.

- [19] In my view therefore the documents which have been placed before me, and which relate to negotiations between the parties, are irrelevant. In the event I am of the view that even if regard is had to the minutes of the meeting which was held on Wednesday 13th of February 2008 and the heads of agreement which Mr Kincaid has referred to in his heads of argument, they serve to confirm that the listed animals were included in the purchase price. If anything they tend to support the construction contended for by the plaintiff.
- [20] In the result I am of the view that the stated case should be decided in favour of the Plaintiff.

COSTS

- [21] Mr Kincaid has submitted that in the event of the court finding for the Plaintiff the latter should not be awarded costs, but that it should be reserved for decision in due course when the outstanding disputes had been resolved. He submitted that this is not a case where the merits have been separated and resolved in favour of the plaintiff. The merits will still have to be determined in the future. He submitted however that if the stated case is resolved in favour of the defendant it would be dispositive of the matter and costs should therefore follow the result.
- [22] In my view there is no reason why, in a case where the parties have agreed for an issue to be argued separately, costs should not follow the result. In the matter of Brauns v Shoprite Checkers Pty (Ltd) 2004 (6) SA 211 (E) at 221C-E it was argued that a costs order should not be made in favour of the Plaintiff because of the possibility of an award of damages which may not exceed the magistrates' court jurisdiction. Jones J dismissed this argument on the following basis:

"An award of costs is within my discretion. It is invidious for me to speculate on allegations in the pleadings about the likelihood or otherwise of damages being awarded which exceed what can be awarded in the magistrates' court. Whatever damages are awarded, there are significant advantages to litigants to separate the issue of liability from that of quantum, not least a tremendous saving in time and expense if the issue of quantum either falls away or else is agreed once the issue of liability is determined. The experience in the Courts is that this saving is made in the large majority of cases. It is but rarely that the parties go to trial on quantum after the merits have been determined. This kind of advantage cannot be advanced and could possibly even be frustrated, if a plaintiff

must wait for costs because they are reserved despite his or her success on the merits. A successful defendant does not have this

disadvantage".

See also the judgment of Plasket J in the matter of Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry 2005 (3) All SA 583 at 598.

[23] The stated case in this matter turned on an issue which in my view is fundamental to the resolution of the disputes between the parties. In fact, as Mr Kincaid has correctly submitted, if it had been resolved in favour of the Defendant it would have been the end of the matter. The fact that

this issue was heard and decided separately will no doubt advance a more expeditious resolution of the remaining issues between the parties. There is in my view therefore no reason why the successful plaintiff should wait for his costs.

ORDER:

[24] In the result I make the following order:

- (a) The stated case is decided in favour of the Plaintiff and it is declared that the Defendants were contractually obligated to deliver the species and number of game listed in Addendum B to the Plaintiff on the date of transfer.
- (b) The Defendants are ordered to pay the Plaintiff's costs, together with interest thereon at the prescribed rate from a date within fourteen days from allocatur to date of final payment, jointly and severally the one paying the other to be absolved.

J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

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