

SOUTH AFRICA / JUDGMENT

Great Oaks 71 Trading CC v YTC Franchising Group CC and Another (CA183/18) [2019] ZAECGHC 87 (17 September 2019)

[2019] ZAECGHC 87

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Nhlangulela, Jaji

CASE / FILE NUMBER

CA183/18

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, GRAHAMSTOWN]

CASE NO: CA183/18

Heard on: 30/08/19

Delivered on: 17/09/19

In the matter between:

GREAT OAKS 71 TRADING CC Appellant

and

YTC FRANCHISING GROUP CC First

Respondent

TANIA STOLTZ

Second Respondent

CORAM: Nhlangulela DJP et Jaji

APPEAL JUDGMENT

NHLANGULELA DJP

- [1] This is an appeal against the judgment of the Regional Magistrate, East London (per Ms S. Jacobs) dismissing the appellant's action with costs. The appeal is brought to this Court in terms of the rule 51 of the rules applicable in the Magistrates' Court, read with rule 50 of the Uniform Rules of the High Court.
- [2] The appellant is described as Great Oaks Trading 71 CC, a close corporation with registration number 2007/240561/23, duly incorporated in terms of the Close Corporations Act 69 of 1984 with its registered address at 69 Main Street, Kokstad, KwaZulu-Natal.
- [3] The first respondent is YTC Franchising Group CC, a Close Corporation with registered offices at Unit 3, Vancott House, 15 Devereux Avenue, East London.
- [4] The second respondent is Tania Stoltz, an adult female businesswoman whose chosen domicilium citandi et executandi is 11 Francolin Street, Gonubie, East London.
- [5] For the appellant, Ms Jeanette Stephanie Malan, a businesswoman, testified during the trial of the matter before the regional court. Mr Donald Herbert Meyer, a businessman, also testified. For the respondent, Tania Stoltz, a businesswoman, testified on behalf of the first respondent as well as in her own personal capacity.
- [6] In the regional court the appellant founded its causes of action on two claims, each originating from two separate contracts. I deal with the first claim. The appellant alleged that on 22 May 2013 and at Pietermaritzburg a written agreement was concluded between it and the first respondent; the parties being represented by Ms Malan and Ms Stoltz respectively. The terms of the agreement were that the assets of a business operated by the appellant at 205 Langalibalele Street, Pietermaritzburg, KwaZulu-Natal (the premises) were sold to the first respondent at R700 000,00 plus VAT. Other than the bulkheads, underbar fridge, small freezer, wall clock, otto bin, flat top quilt, fish fryer, kitchen fan, 6 small tables and chairs, Winston chicken fryer and a back office computer, all the moveable assets, fittings and fixtures used in a Dorego's franchise restaurant of the appellant were sold to the first respondent. A sum of R550 000,00 of the purchase price would be paid on 01 June 2013 and the remaining R150 000,00 being paid in ten monthly instalments of R15 000,00 with effect from 01 July 2013. Possession of the assets would be taken upon payment on 01 June 2013, the effective date. Ownership of the assets would pass to and vest in the first respondent upon payment of the full purchase price. In terms of the breach clause the appellant was entitled to sue for non-payment of the purchase price as agreed.
- [7] The appellant alleged further that the first respondent breached the agreement in that after paying R550 000,00 and two trenches of R15 000,00 it then stopped making payments. Consequently, it was owed a balance of R218 000,00 including VAT. The appellant sought judgment against the respondents jointly and severally, the one paying, the other to be absolved from liability.

- [8] In its second claim, the appellant alleged that it was entitled to be paid a sum of R4 594,30 a being debt unpaid by the first respondent only that arose from a breach of an oral agreement of sale of stock.
- [9] The respondents defended themselves against the appellant's claims based on the pleas that, in respect of the first claim: the appellant misrepresented the facts in breach of clause 7.1.2 with a result that the first respondent was thereby prevented from conducting business at the premises taken over from the appellant and cancelled the agreement against a demand for refund of the sum of R580 000,00 that it had paid towards the purchase price. Clause 7.1.2 under question reads:

"All licenses and permits required for the conduct of the business are in force and the Seller is not aware of any facts which may lead to the revocation or withdrawal of any of the licenses. The Purchaser hereby undertakes to attend to the signature of any documentation that may be required for the transfer of the licence(s)."

- [10] In respect of the second claim it was pleaded on behalf of the first defendant that R4 594,30 is not due and payable because the appellant had acknowledged the fact that the amount represented cost of stock returned to it by reason that the stock had already reached an expiry date at the time when they were sold to the first defendant.
- [11] In giving a short-shrift to the appellant's claim based on 7.1.2 the regional Magistrate said the following in para 28 of her judgment:

"Having regard to the above, I am not persuaded that the Defendants' attorney instructed the Plaintiff to ignore paragraph 7.1.2. The probabilities are however favouring the conclusion that because the business which the Plaintiff conducted from the premises required a business license, which the Plaintiff did not possess at the time, she sold the assets to the defendant. The Plaintiff was aware that the heritage permit was a precursor for the licence. She had trouble to obtain the permit based on the alterations made by her. As such she was aware that the Defendant would not be liable to obtain a heritage permit from the said property and would therefore not be able to obtain a licence to conduct business at the time the contract of sale was entered into."

- [12] On the second claim the Regional Magistrate found that it was more probable, than not, that the sum of R4 594,30 represented the cost of stock returned to the appellant, by reason that the utility thereof had expired, for which a credit note passed extinguished the debt.
- [13] As I understand the grounds of appeal, the appellant's assets that the Magistrate erred in postulating that the only issue to be determined was whether clause 7.1.2 formed part of the agreement of sale which if interpreted together with clauses 2.1, 3.1, 8.1, 8.2 and 9.1 she would have found that it was not clear and ambiguous unless the credible evidence of Ms Malan and Mr Meyer was taken into account and that of Ms Stoltz rejected. Further, at the very least, the Magistrate could have found that the contra proferentem rule applies against Mr Stoltz as the maker of the written agreement.

- [14] It bears mentioning at this stage that the notice of appeal filed does not incorporate an attack against the judgment on the second claim. Therefore, there will be no need to disturb the judgment on that claim.
- [15] There is a reference made by the Magistrate to authoritative cases dealing with a proper approach to the interpretation of documents/contracts. After emphasizing the inadvisability of merely interpreting the words as they stand, as stated in the case of *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009 (4) SA 399 (SCA) at para 39; and interpreting the words in a contract against permissible background of surrounding circumstances - as shown in *Coopers and Lybrand and Others v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A, she applied the binding statement that appears in *Bothma-Batho Transport v S Bothma & Seun Transport (Edms) BPK* 2014 (2) SA 494 (SCA) which reads as follows at 499G:

“Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all

relevant and admissible context, including the circumstances in which the document came into being.”

- [16] However, it is submitted in this Court that the Magistrate misapplied the very tools of interpretation of contracts that she herself referred to in her judgment. The task at hand is to investigate what the written contract really means to the parties.
- [17] The provisions of clause 7.1.2 cannot be understood unless they are read in the context of the entire body of the contract in which they appear and the circumstances in which the contract came into being. The meaning of the words used in the clause is not clear but ambiguous. For an example, reference to the words: “all licences and permits required for the conduct of business are in force” do not convey a clear and unambiguous meaning to a reader. Therefore, it will help to have recourse to the evidence of the witnesses.
- [18] Ms Malan testified that she is a member of the appellant. She was an authorized representative of the appellant when the contract was concluded with the first defendant on 22 May 2013. The appellant had been operating a fast food outlet at the premises owned by the third party under the name and style Dorego’s Franchised Business. The appellant decided during the course of doing business to stop trading and sell certain business assets and transfer the lease agreement it had with one H. Collins & Sons (Pty) Ltd. The appellant then started to look for a person engaged in a business similar to Dorego’s to take over its fast-food outlet, but without selling Dorego’s business licence. When the appellant finally got the first respondent to conclude the contract and over the lease of the premises and buy the business assets, it knew that it had applied for but not yet been issued with a Heritage

Permit. It also knew that the first respondent would not be able to be issued with a business licence without the Heritage Permit first having been issued under the name of the first respondent. She stated that selling assets to the first respondent did not have to include the transfer of this Heritage Permit that the appellant did not have. Nevertheless, the parties proceeded to conclude the contract it being known to both that they were expected to comply with the terms as contained therein.

- [19] Ms Malan told the magistrate that one Mr Arnold Herbert Meyer was present during the negotiations which preceded the signing of the contract. Mr Stoltz, an attorney by profession, finally drew up the contract that was signed by the parties. When the provisions of clause 7.1.2 of the contract were brought to her for a comment she agreed that they meant what they say but for the advice that Mr Stoltz had given to her and Mr Meyer that those provisions may be ignored her understanding was that the appellant was not bound by them.
- [20] Mr Meyer testified on behalf of the appellant and confirmed the version that Mr Stoltz's advised that the provisions of clause 7.1.2 may be ignored.
- [21] Ms Stoltz put up a contradictory version that the appellant and first respondent were bound by the provisions of clause 7.1.2 of the contract, including all other terms that are contained in the contract.
- [22] Ms Stoltz testified further that the first respondent knew that it had to operate business at the premises previously occupied by the appellant and that it would do so under the unexpired lease agreement and under its own business licence that would go under the name known as Zebros. The business to be carried out would be similar to that of the appellant. She confirmed that a lease was accepted by the owner of the premises and that Zebros was to conduct a fast-food outlet using the assets purchased from the appellant. However, she was never told during negotiations by Ms Malan that the

Heritage Permit would be required from the first respondent before a business licence was approved by the Licensing Board. Upon entering the premises and commencing trading, albeit without a licence, she applied for a restaurant licence. After the refusal of two applications that she had lodged with the Licensing Board, and twice being threatened with a lock-up of the premises by reason that the first respondent was trading without a licence in contravention of the law, she discovered that a licence cannot be approved without the Heritage Permit having been issued in respect of the premises. When investigating the matter further, she discovered that the issue of absence of the Heritage Permit had been raised by Amafa aKwaZulu-Natal Heritage Society with the appellant before the 01 June 2013, the commencement date of the contracts; but that issue was never resolved. She discovered further that the reason that the permit and licence would not be issued to the first respondent was due to the fact that the appellant had effected structural changes to the leased premises

in contravention of a policy of Amafa aKwaZulu-Natal Heritage Society that city buildings aged 60 years and more cannot be altered without a written permission of the Heritage Society having been obtained. In this case the premises, known to the appellant to be affected by the policy, were structurally altered by the appellant both on the inside and outside without a permit, thus raising a dispute that created a problem for the appellant to have its own business licence being renewed. The first respondent would not have been able to resolve the problem created by the appellant, which ultimately affected its standing as the new occupier of the premises. The first respondent regarded its inability to get a licence as having been caused by fraudulent non-disclosure by the appellant that necessitated treating such conduct as a breach of the contract. In the absence of a satisfactory redress, the first respondent was forced to terminate the contract and leave the business premises in November 2013.

[23] In so far as the issue before the Magistrate, and also in this Court, pertained to what the meaning of the contract is so that the true animus contrahendi of the parties could be ascertained, the proper approach that finds resonance in this case was stated by Corbett JA (as he was then) in the case of *Johnston v Leal* 1980

(3) SA 927 (A) as follows at 943B:

“... [I]t is clear to me that the aim and effect of this rule [the parol evidence rule] is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. ... To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered...” (My added emphasis.)

[24] The whole purpose to be achieved by this Court in dealing with oral evidence of Ms Malan, Mr Meyer and Ms Stoltz must be appreciated against the context in which the provisions of clause 7.1.2 exist in the contract and the circumstances under which the contract was concluded. Such oral evidence is not intended to introduce materials which have the effect of altering the meaning of the existing contract that has been concluded and reduced into writing by the parties. That much was emphasized by Watermeyer JA in the case of *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 where he stated as follows at 47:

“Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suite between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence...”

[25] The oral evidence of the witnesses is largely common cause. In so far as their versions are mutually conflicting in certain respects findings must be made with regard to their credibility, reliability and probabilities (see *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14I-15E).

[26] The issue that was confronted the Magistrate, as it does on appeal, is whether it was agreed between the parties that the appellant did make an undertaking that as it was selling the business assets and transferring the lease agreement to the first respondent “all licences and permits required” for the first respondent to conduct a fast food business were available to the first respondent. The sale of Dorego’s Franchise is not the relevant issue for the obvious reason that the first respondent did not buy the business of the appellant. Both Ms Malan and Mr Stoltz confirmed that position. Neither did the Magistrate have to decide that irrelevant issue. With regard to the relevant question, Ms Malan’s evidence that clause 7.1.2 should be ignored simply because Mr Stoltz told her that it may be ignored could only have been raised to create protection for the appellant. Her evidence that the appellant could have transferred the Heritage Permit, that it received from Amafa aKwaZulu-Natal in October 2013, but for the endorsement on the permit that the permit was not transferrable cannot be an honest answer to the question. What her evidence together with that of Ms Stoltz does make clear is that the appellant failed to alert the first respondent during negotiations and, at least, at the time when the contract was signed that the Heritage Society and the appellant were locked-up in a dispute that would prejudice the first respondent from obtaining a business licence approved by the Licensing Board. The failure to disclose that impediment prejudiced the first respondent from ever commencing to conduct its business lawfully. The omission was not only an unfair business practice on the part of the appellant but also a

breach going to the root of the contract. Impossibility of performance of any contractual term(s) brought about in the manner in which the appellant conducted itself towards the first respondent negated the intention of the parties that was manifested in the provisions of clause 7.1.2. The attempt by Ms Malan to call aid the provisions of clauses 2.1; 3.1; 8.1; 8.2 and 9.1 to bolster a version that the intention of the parties was to exonerate the appellant from ensuring that the contract enabled the first respondent to trade in the leased premises lawfully must be rejected. The version of Ms Stoltz is cogent in that contracting parties must have been understood as having desired that the first respondent’s taking over of the fast-food business was a reality. In my opinion on the authority of the statements made in the case of *National Employers’ General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-G the version of Ms Stoltz is more probable than not.

[27] The best that can be said about the evidence of Ms Malan is that it impermissibly alters the terms of the contract in such a way as to introduce an exemption that was never contemplated by the parties.

[28] I cannot find the evidence that points out ambiguities in the words used in clause 7.1.2 which are not capable of resolution by the context as well as the oral evidence led. For that reason the evidence of Ms Malan and Mr Meyer that Mr Stoltz, not the parties themselves, should bear responsibility for

the legal advice that clause 7.1.2 may be treated as *pro non scripto* falls to be rejected.

[29] On the foregoing the argument advanced on behalf of the applicant that the Magistrate erred in not applying the interpretational technique of contra proferentem rule has no basis. This Court accepts the legal submission made on behalf of the first respondent that the rule is to be applied only after all the ordinary rules of interpretation have been exhausted. Counsel for the first respondent placed reliance to the statement made in Cairns (Pty) Ltd v Playdon & Co, Ltd 1948 (3) SA 99 (A) at 123, which reads:

“The contra proferentem rule, however, is one which is not to be used unless all the ordinary rules of interpretation have been exhausted in an attempt to arrive at the true intention...”

And at 124 the following was said:

However that may be, in the present case I find it essential at this stage to rely on this rule, for the document has been so badly drawn and there is so little in it that I understand with any certainty that at one time I was in doubt whether it was not void and of no effect as being unintelligible. I still do not know, and I know of no means of ascertaining at this stage, what the parties really intended: I have to ‘cut the Gordian knot.’”

[30] In essence, in a case such as the present where the ambiguity of the words used in a written contract are capable of ascertainment by application of any or all other rules of interpretation the contra proferentem rule does not find application as it was not invented to traverse the words used in a contract. In my view, therefore, the question whether Mr Stoltz should have been called to testify does not arise in this case.

[31] Consequently, the facts of this case together with the law applicable thereto do not warrant interference with the judgment of the Magistrate.

[32] In the result the following order shall issue:

The appeal against the judgment of the Regional Magistrate, East London dated 02 November 2017 be and is hereby dismissed with costs.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

I agree:

N.P. JAJI

JUDGE OF THE HIGH COURT

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EAST LONDON.

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