

SOUTH AFRICA / JUDGMENT

Hayes Matkovich Development (Pty) Ltd v Lekwa Local Municipality (34401/2012) [2015] ZAGPPHC 758 (16 September 2015) [2015] ZAGPPHC 758

COURT

North Gauteng High Court, Pretoria

BEFORE

E Bertelsmann

CASE / FILE NUMBER

34401/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Date::17

September 2015

Case

No: 34401/2012

In

the matter between:

HAYES
MATKOVICH DEVELOPMENT (PTY)
LTD
Plaintiff
and
LEKWA
LOCAL
MUNICIPALITY
Defendant

JUDGMENT**BERTELSMANN J:**

1. Plaintiff is HAYES MATKOVICH DEVELOPMENT (PTY) LTD, a company with limited liability duly incorporated and registered in accordance with the South African company laws, with registered address at Block C, 348 Rivonia Boulevard, Johannesburg, Gauteng. The plaintiff carries on business as a developer of golf courses and residential property.
2. Defendant is LEKWA LOCAL MUNICIPALITY, a municipality with legal personality, capable of being sued in terms of section 2
- (d) of the Local Government Municipal Systems Act 32 of 2000, with its offices and principal place of business at c/o Dr Beyers Naude and Mbonani Mayifela Streets, Standerton, Mpumalanga.
3. During or about 2007 the plaintiff, as developer of golf courses, identified the property of the Standerton Golf club and its surrounding areas as a suitable site to develop as a country estate ('the estate') of which a golf course would form part. It developed a proposal for such development and presented it to the Standerton Golf club and the defendant. The Standerton Golf Club is situate within the boundaries of the defendant. Both these parties approved of the plan, which included a proposed sale of municipal property to the plaintiff, namely the land both adjacent to and upon which the Standerton Golf Club had been established. The defendant's council gave its approval of the proposal at a meeting held on 14 December 2007. An advertisement was thereafter published in the print media on the 29th February 2008 circulating in the area inviting any objections from the public against the proposed disposal of municipal land. No objections were received. On the 15th July 2008, the agreement of sale of the municipal land upon which the estate would be developed to the plaintiff was signed by the parties. The purchase price was determined by a clause that plaintiff would pay 10% of the purchase price of each stand sold to the defendant. According to the formula set out in an annexure to the agreement the defendant would receive a minimum of R 7 175 00, 00 for the land that was valued at R 750 000, 00 five years later. During the negotiations with the defendant it was pointed out that this income - quite apart from future income from rates and taxes and the injection the development would provide for the local economy and job creation
 - was more than ten times the market value of the land that was to be transferred to the plaintiff. This evidence was not disputed.
4. In order to be able to develop the estate the plaintiff had to prepare a complete Township Application in terms of section 96 (1)
- (3) and section 69 (6) (a) of the Town Planning Township Ordinance 25 of 1965. This application was submitted on the 11h August 2009 as part of the plaintiff's preparation of the project in

anticipation of the formal approval thereof by the defendant, including the rezoning of the land involved. The plaintiff

invested and expended a total sum of R 4 104 575, 70 while awaiting the final consents from the defendant. The sum includes a claim for the application of intellectual property.

5. The defendant's municipal manager was, however, informed by the Acting Head of the Public/Private Sector Partnership Unit at the National Treasury, Mr Tumisang Moleke, that the contract entered into by the parties was invalid as a result of a failure on the part of the defendant to comply with the provisions of the Municipal Finance Management Act 56 of 2003 ('MFMA'). The defendant notified the plaintiff that the agreement was invalid and would not be implemented.
6. The plaintiff had consequently suffered the loss of the money needlessly expended prior to being informed of defendant's failure to comply with the MFMA and defendant accepted that it was liable to the plaintiff for these damages.
7. The parties agreed, however, that the development of the estate should not be abandoned. The development project would be placed on tender and advertised to the world at large. The parties agreed further that the loss that the plaintiff had suffered and for which defendant was liable, would be recouped through the contract that would be entered once the tender for the revitalised project had been awarded. The terms of the tender would include - and did include when the tender was published - full particulars of the reason why the successful bidder would have to pay this sum as part of the cost of the project that the tender was advertised for. Should the plaintiff be the successful tenderer it would not be paid, but would utilise the fruits of its earlier labours for the development of the estate.
8. On the 31 May 2010, after having received recommendations regarding the development from the municipal administrator at an earlier

meeting, the defendant's council resolved to re-advertise the proposals for the development of the estate '... and be put to open tender where Messrs. Hayes Matkevich and other bidders can compete for the development of the land in a fair, transparent, equitable and competitive manner...(t)hat the costs incurred by Messrs Hayes Matkevich for preliminary work done on the golf estate development be included as part of the tender document.'

9. The council meeting at which this resolution was taken was described as a special council meeting and was properly convened. The minutes of the meeting reflect that it was open to the public. The minutes record further that 23 individuals who were described as belonging to this class were in attendance. The development of a golf estate clearly contemplated the disposal of a municipal asset - once the development was completed the land involved could never be devoted to municipal services again.
10. The plaintiff sent a letter after the meeting to the defendant setting out the calculation of the loss it claimed it had suffered,

in the sum of R 4 104 575, 70. On 13 July 2010 a letter of undertaking was signed by the parties which recorded that the proposed estate development would be subjected to a tender process and that any successful bidder other than the plaintiff itself would be liable to pay plaintiff's compensation as part of the costs of the project tendered for. Should any bidder other than the plaintiff be successful in being awarded the tender the defendant would reimburse the plaintiff once the bidder effected payment of the said amount to it.

11. The defendant issued an invitation to tender during the period 27 July 2010 and 1 August 2010 which contained the terms agreed upon. The tender was published in the print media and informed intending bidders that a compulsory briefing would be held prior to the delivery of tender documents on 3 August 2010 at the defendant's offices. This meeting was attended by eleven potential bidders. Briefing documents were obtainable prior to the meeting upon payment of a non-refundable deposit. In the briefing documents potential bidders were informed of the particulars of the tender in some detail. A Preference Points Claim Form in terms of the Preferential Procurement Regulations 2001 issued under the Preferential Procurement Policy Framework Act 5 of 2000 formed part of these documents; as did a declaration form of past supply chain management practices. The fact that the wasted costs of the previous developer - the plaintiff - were to be paid as part of the tender price was fully disclosed. Those who attended the meeting were given the opportunity to ask questions in respect of the tender. Mr Hudson attended this meeting on behalf of the plaintiff. The meeting was chaired by the defendant's manager of Technical Services, Mr Lwasi Cindwi.
12. The plaintiff was at all relevant times a potential bidder for the above tender. Three tenders were received, one of which was submitted out of time. Both the other tenders made provision for the sum that was payable to the plaintiff. The defendant's Bid Evaluation Committee recommended upon 20 October 2010 that two bidders, the plaintiff and Sisonke Development (Pty) Ltd, be invited to make a presentation to the said Bid Evaluation Committee. The plaintiff's proposal was the only tender that complied with all the tender conditions, Sisonke Developments having failed to present a valid tax clearing certificate. The Bid Evaluation committee recommended that the plaintiff's tender be accepted; which decision was on the 5th November 2010 endorsed by the Bid Adjudication Committee. The tender was awarded on 23 November 2010. Pursuant to the tender having been awarded the plaintiff, represented by Robert Gregory Hudson, and the defendant, represented by Jabu Sindane as Municipal Administrator, concluded a written agreement for the development of the estate. The agreement is dated 24 February 2011. A written addendum to correct an error in the original agreement regarding the description of the land upon which the estate would be situated was agreed upon and signed by the parties' same representatives on the 9th May 2011. Mr Sindane had been appointed as Municipal Administrator to the defendant as envisaged in section 139 of the Constitution 108 of 1996.

13. The agreement as amended provided for the sale by the defendant to the plaintiff of the sale of Portion of the Remainder of the Farm Grootverlangen 409 IS: Mpumalanga (a portion of portion
- 2) measuring 92.7870 Ha. (The agreement records that the sale agreement was entered into rather than to conclude a Land Availability Agreement) The estate was to be developed upon this land and property to be acquired from a private seller on the south bank of the Vaal River in accordance with the 2009 Township Application.
14. In terms of the agreement of sale as amended the defendant undertook to approve the Township application and enter into a bulk services agreement within 90 days from the date of signature thereof. The plaintiff in turn undertook to pay R 25 000, 00 per stand sold upon transfer thereof to the purchaser, provided that an adequate level of pre-sales was achieved and the bulk infrastructure development had been undertaken; and that a 10% escalation would annually apply to the percentage of each sales price after 2012.
15. Transfer of the land was to be effected within 24 months after signature (or an extended period if agreed to by the parties).
16. The defendant admits that it failed to implement the agreement and that it did not react to numerous demands by the plaintiff. It is common cause that the defendant failed to issue the township approval and also failed to enter into a bulk services agreement. There is more than just a suggestion in the papers and the plaintiff's evidence that the performance of the agreement was frustrated because a powerful personality within the defendant's ranks was intent upon gaining a corrupt advantage for himself by holding out until the plaintiff succumbed to an unlawful demand to channel some benefit into his pocket. Mr Hudson's evidence that Mr Cindwi, who as manager of Technical Services had to give the go-ahead before the township development could be implemented, demanded a benefit by way of a corrupt transaction was never disputed. Plaintiff declined the approach made by Cindwi. At no stage during the exchange of pleadings or the trial was it ever suggested that the bulk service agreement or the township approval could not be realised. On the contrary, the plaintiff's evidence that the township development plan it presented to the defendant was regarded by the latter's responsible officials as the best that had ever been presented to them was never denied. Similarly the plaintiff's evidence was not disputed that it offered to install an additional electrical generator at an additional cost of R1,3 million when concerns were raised about the amount of electricity the defendant would be able to supply to the new development on the golf course. This item did not form part of the parties' agreement.
17. It should be added at this stage that Mr Cindwi presented several reports or comments to the defendant's council which were clearly responsible for the otherwise inexplicable delay in the approval of the township development scheme. Mr Cindwi resigned in 2011 and the defendant was unable to trace a single one of his reports or comments in their files after he left. According to the present municipal manager, Mr Tshabalala, Mr Cindwi refused point-blank to assist the defendant in the preparation of the defence to plaintiff's claim and

refused to come to court to testify.

18. The plaintiff duly placed the defendant in mora and was entitled to cancel the agreement. There can be no doubt that the defendant repudiated the parties' agreement. The defendant debated the agreement in several council meetings after the first letter of demand was written and while accepting, on the advice of its internal legal advisers at the time, that it was legally bound by the parties' agreement, objections and concerns were raised that were never detailed or precisely formulated and communicated to the plaintiff and its legal representatives. Eventually the plaintiff cancelled the agreement by a letter sent by its legal representatives to the defendant on the 3 February 2012, claiming that it accepted the defendant's repudiation. Substantial damages were claimed consequent upon the cancellation of the agreement. Summons was issued in due course after due notification of the fact that a claim was about to be instituted against an organ of state.
19. The defendant raised a number of defences to the claims advanced by the plaintiff in the particulars of claim. It was submitted that the agreement was void for failure to comply with the Alienation of Land Act 68 of 1981; in respect of the description of the land sold, which would not allow a surveyor to determine the exact boundaries of the land sold without further description. The defence was correctly abandoned during argument in the light of the expert evidence presented to the court on this issue.
20. The further defence, and the only one persisted in, was that the agreement and the tender process that preceded it were invalid and therefore unenforceable because they did not comply with section 217 of the Constitution, with sections 14 and 90 of the MFMA and with the defendant's supply chain management policy. In particular it was pleaded that
 - (i) the inclusion in the tender of the clause that plaintiff's losses arising from the abortive 2008 agreement should be reimbursed by the successful bidder other than the plaintiff, rendered the process unfair;
 - (ii) that bidders other than the plaintiff did not compete on an equal footing as a result thereof;
 - (iii) that the decision to dispose of the land sold to plaintiff, which constituted a municipal asset, was not taken at a council meeting open to the public; and
 - (iv) that the consideration payable by plaintiff to the defendant for the land did not constitute fair value, nor was such value market related;
 - (v) It was further pleaded that the resolution to allow the plaintiff to create the estate referred only to the development of the land and not to the sale thereof. The sale of the land was therefore argued to be ultra vires the resolution.
21. In order to consider this defence it is necessary to pay attention to the constitutional and statutory imperatives the defendant invokes to determine whether the process followed by the defendant in disposing of the land was indeed fatally flawed or not. If it did in fact fail to comply with the constitutional and statutory prescripts the agreement is invalid and such

invalidity can successfully be raised as a defence against the plaintiff's claim, see, in particular, *Municipal Manager: Quakeni Local Municipality v FV General Trading CC* 2010 (1) SA 355 (SCA); *Strata International (Pty) Ltd v Ekurhuleni Metropolitan Municipality*

[2015] SASCA 47.

22. Section 217 of the Constitution 108 of 1996 sets the standard with which organs of state on the local government level must comply in dealing with the acquisition or disposal of assets, or the contracting of services:

"Procurement

217.

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

'(3) National legislation must prescribe a framework within which the policy referred to in subsection (2)".

23. Sections 14, 90, 111 and 112 of the Municipal Finance Management Act 56 of 2003, which prescribe the conditions subject to, and the manner in which, a municipality may dispose of an immovable asset registered in the municipality's name, read as follows:

"14. Disposal of capital assets.-(1) A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

- (2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public-
 - (a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and
 - (b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

- (3) A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of.
- (4) A municipal council may delegate to the accounting officer of the municipality its power to make the determinations referred to in subsection (2)(a) and (b) in respect of movable capital assets below a value determined by the council.
- (5) Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain in terms of section 111.
- (6) This section does not apply to the transfer of a capital asset to another municipality or to a municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework.
90. Disposal of capital assets.-(1) A municipal entity may not transfer ownership as a result of a sale or other transaction or otherwise dispose of a capital asset needed to provide the minimum level of basic municipal services.
- (2) A municipal entity may transfer ownership or otherwise dispose of a capital asset other than an asset contemplated in subsection (1), but only after the council of its parent municipality, in a meeting open to the public-
- (3) A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services may not be reversed by the municipality or municipal entity after that asset has been sold, transferred or otherwise disposed of.
- (4) A municipal council may delegate to the accounting officer of a municipal entity its power to make the determinations referred to in subsection (2)(a) and (b) in respect of movable capital assets of the entity below a value determined by the council.
- (5) Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent and competitive and consistent with the supply chain management policy which the municipal entity must have and maintain in terms of section 111.
- (6) This section does not apply to the transfer of a capital asset to a municipality or another municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury provided that such transfers are in accordance with a prescribed framework.
111. Supply chain management policy.- Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this Part.

112. Supply chain management policy to comply with prescribed framework.-(1) The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least

the following:

- (a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;
- (b) when a municipality or municipal entity may or must use a particular type of process;
- (c) procedures and mechanisms for each type of process;
- (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;
- (e) open and transparent pre-qualification processes for tenders or other bids;
- (f) competitive bidding processes in which only pre-qualified persons may participate;
- (g) bid documentation, advertising of and invitations for contracts;
- (h) procedures and mechanisms for-
- (i) the opening, registering and recording of bids in the presence of interested persons;
- (ii) the evaluation of bids to ensure best value for money;
- (iii) negotiating the final terms of contracts; and
- (iv) the approval of bids;
- (i) screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value;
- (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids;
- (k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117;
- (I) the barring of persons from participating in tendering or other bidding processes, including persons-
- (i) who were convicted for fraud or corruption during the past five years;
- (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or

- (iii) whose tax matters are not cleared by South African Revenue Service;
 - (m) measures for-
 - (i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and
 - (ii) promoting ethics of officials and other role players involved in municipal supply chain management;
 - (n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by-
 - (i) councillors in contravention of item 5 or 6 of the Code of Conduct for Councillors set out in Schedule 1 to the Municipal Systems Act; or
 - (ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that Act;
 - (o) the procurement of goods and services by municipalities or municipal entities through contracts procured by other organs of state;
 - (p) contract management and dispute settling procedures; and
 - (q) the delegation of municipal supply chain management powers and duties, including to officials.
- (2) The regulatory framework for municipal supply chain management must be fair, equitable, transparent, competitive and cost-effective".
24. The defendant had adopted a supply chain management policy in accordance with the constitutional and statutory prescripts formulated in the sections of the Constitution and the MFMA quoted above. A copy thereof was annexed to the plea, but it is unnecessary to quote any part thereof in the light of its uncontroversial compliance with the Legislature's dictates.
25. The defendant filed a counterclaim, which was launched substantially out of time, in which the defendant sought an order reviewing and setting aside the defendant's decision to award the tender to the plaintiff and to include the payment of plaintiff's damages claim as an item in the tender price as aforesaid. The plaintiff opposes this relief, pleading that the counterclaim amounts to a review which is neither filed timeously nor brought in terms of Rule 53, and should therefore be dismissed without even addressing the merits thereof. In the alternative the plaintiff restates the facts and conclusions of law advanced in the particulars of claim already in its plea to the counterclaim.
26. Having thus sketched the background to the issues between the parties the remaining disputes can be examined.

27. The plea that the public did not attend the meeting at which the decision was taken to develop the estate is *ex facie* the minutes of that meeting incorrect. The document records that 23 individual members of the public were present when the council

passed the motion concerned.

- 2s. When the decision of the 3151 May 2011 was taken, the defendant's council was fully aware of the resolution

adopted in 2007 to dispose of the land to develop the estate, as that resolution formed part of the documents referred to in the resolution presented to the Council in the agenda for the meeting. The 2007 agreement entered into between the parties was expressly referred to, from which the minimum benefit to the defendant from the transaction was clearly apparent. No-one in the Council Chamber could have been under any misimpression that the estate would not be used for the rendering of minimum municipal services - it had not been devoted to any other purpose than a golf course and grazing for rural residents' cattle prior to that date in any event.

29. It must have been similarly clear to the defendant's council that the sum in excess of R 7 million which the defendant stood to gain, as set out in the 2007 resolution and its annexures, far exceeded the market value of the land involved in the transaction. The suggestion that the council allowed the land to be disposed under its market value is therefore unfounded.
30. The defendant attacks the decision to include the plaintiffs claim for money and know-how expended in preparation for the execution of the 2007 agreement as having rendered the tender process unfair and uncompetitive, resulting in unequal treatment being meted out to the bidders other than the plaintiff. There are several considerations why this submission is incorrect. In the first instance, the potential profit of the project self-evidently outstripped the expense of having to fund the defendant's obligation toward the plaintiff by a very significant margin. Secondly, the bulk of the plaintiff's expenditure had been incurred in respect of the

preparation of the township and rezoning component of the project. The township development plan as prepared by the plaintiff was in the defendant's possession and could have been used by any successful bidder. Any bidder other than the plaintiff would therefore save a considerable sum that would otherwise have had to be expended upon the township development plan. The plaintiff would, had the bid not been awarded to it, have been reimbursed by the defendant after the latter received the money from the new developer. And after the plaintiff was awarded the bid it garnered the benefit of the earlier expenditure toward a township development plan that was to be put into operation after the tender was accepted. There was thus in effect no unfairness in the treatment of other bidders under the particular circumstances of this case. Fairness must be judged in the light of every particular individual set of circumstances: *Du Preez and Another v Truth and Reconciliation Commission* [1997] ZASCA 2; 1997 (3) SA 204 (A); [1997] 2 All SA 1 (A), quoting a dictum by Lord Mustill in *Doody v Secretary of State for the Department of Home Affairs and Other Appeals* [1993] # All E R 92 (HL). The reason for the inclusion of the cost of the

previous process was set out with sufficient detail in the tender document - no complaints were received from any bidder: *Tetra Mobile Radio (Pty) Ltd v MEG, Department of Works, and Others* 2008 (1) SA 438 (SCA). The attack upon the process on the grounds of unequal and unfair treatment must therefore fail.

31. The defendant contends that the process followed by itself in advertising the tender in the manner and fashion it did failed to comply with the dictates of section 217 of the Constitution and section 14 (5) of the MFMA. Other than in the *Strata International* case, *supra*, the defendant advertised the tender in several print media, resulting in eleven potential bidders expressing interest in the project and attending the compulsory pre-tender briefing. Three tenders were contemplated of which two were considered. The interested potential bidders were given an opportunity to acquaint themselves with the conditions of tender and the locality of the intended development and were able to pose questions to defendant's representatives to eliminate any uncertainties. The defendant's reliance upon decisions such as *Municipal Manager: Quakeni Local Municipality v FV General Trading CC* 2010 (1) SA 355 (SCA) is therefore misplaced. The defendant's process followed the advice of the Treasury. The tender was open to the public. It was comprehensive and disclosed all essential facts and conditions, it was transparent, it was competitive and it would have resulted in very considerable benefit to the defendant and the community the defendant is supposed to serve, had it not been for the actions of an individual who was not prepared to testify in defendant's behalf. The suggestion that section 217 of the Constitution was not observed during the process followed in awarding the tender to the plaintiff can therefore not be upheld.
32. Lastly, the defendant's contention that the council's resolution authorised only the development of the land and not the sale thereof is untenable when the factual context and background against which the decision was taken, is considered. Context in interpretation of documents of this nature is sometimes even said to be everything. In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*, 2014 (2) SA 494 (SCA) para [12] the correct approach was defined in these words:

"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. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".

33. Harms DP had paved the way for this approach in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 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 9438). 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 and Kimberly-Clark of South Africa (Pty) Ltd* 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 4558

- 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. (*Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA); (

[2000] 4 All SA 331 (SCA)".

34. When used in the context of land development, the word certainly includes the concept of selling developed parcels of land, see *Shorter Oxford English Dictionary*, fifth ed. 2002, Vol. I p. 662.
35. It follows that the plaintiff must succeed in claiming the damages arising from the breach and subsequent cancellation of the contract of sale - see *Transnet Limited v Sechaba Photoscan (Pty) Ltd* (Supreme Court of Appeal 98/03) and the authorities there cited - and defendant's counterclaim must be dismissed.
36. The defendant must pay plaintiff's costs. Plaintiff sought a punitive costs order. Had defendant endorsed Cindwi's actions that request must have been acceded to, but given the uncontested evidence that Cindwi turned his back upon the defendant, who sought to call him as a witness, the court is unable to come to the conclusion that defendant's resistance to plaintiff's claim is reprehensible.

The following order is made:

1. The plaintiff is declared to be entitled to be compensated by the defendant, and the defendant is declared to be liable to pay damages to the plaintiff, in an amount to be determined, arising from the plaintiff's cancellation of the sale agreement;
2. The defendant's counterclaim is dismissed;

3. The defendant is ordered to pay the plaintiff's costs to date, such costs to include the costs consequent upon the employment of two counsel

Signed at Pretoria on this 16th day of September 2015

E BERTELSMANN

Judge of the High Court

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