

SOUTH AFRICA / JUDGMENT

Oelofse v Prokureurs (A706/2012) [2015] ZAGPPHC 963 (13 November 2015)

[2015] ZAGPPHC 963

COURT

North Gauteng High Court, Pretoria

BEFORE

M F Legodi, L M Molopa-Sethosa, N B Tugten

CASE / FILE NUMBER

A706/2012

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HIGH

COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A706/2012

DATE:

13/11/2015

IN

THE MATTER BETWEEN

JOHAN

OELOFSE

Appellant

and

STEYN

LYELL MAEYANE

PROKUREURS

Respondent

JUDGMENT

LEGODI J,

HEARD ON: 28 OCTOBER 2015

JUDGMENT

HANDED DOWN: 13 NOVEMBER 2015

- [1] "It is in my view, an unrewarding and misleading exercise to seize on one word in a document, determine its more usual or ordinary meaning, and then having done so, to seek to interpret the document in the light of the meaning so described to that word. Apart from the fact that to decide on the more usual or ordinary meaning of a word may be a delicate task so for example, STRAFORD CJ and GREENBERG J gave differing "ordinary meanings" to the word 'guarantee' in the cases noted above - it is clear that the context in which the word is used is of prime importance".
- [2] This is an appeal against the whole of the decision of the court a quo (as per Prinsloo J) involving a guarantee. The appeal is with his leave. What is stated above was said by Diemont JA as he then

was, in the matter of List v Jungers 1979 (3) SA 106 (A) at 118 D. In the present case, the appellant (the plaintiff in the court a quo) had sued the respondent, a firm of attorneys (the defendant in the court a quo) for payment of R1 million based on a guarantee that was contained in a letter dated 1 April 2008 from the respondent which letter was attached to the particulars of claim as annexure "A". In the letter it was recorded:

"This letter serves as a guarantee for funding required by Dr Johan Oelofse to assist in the purchase of Wiesehof Business Park. Heidelberg in the name of Plenty Properties.

On instructions of our client, ABRINA 2537 (PTY) Limited, we confirm that Dr Johan Oelofse has a 10% interest in the abovementioned development, which profit sharing will take place on or before 11th April 2008.

The 10% shareholding amounts to R1 000 000-00 (One Million Rand) which remuneration will be paid to him as agreed.

Please provide us with your banking account details in order for us to make the payment directly into your account for the sum of R1 000 000. 00"

The parties in this appeal will be referred to as in the court a quo. The 'abovementioned development' in the second paragraph of the letter relates to development of Drakensberg Gardens for residential purposes. The underlining is my emphasis.

- [3] In addition, the plaintiff had sued the defendant for R200 000 as damages arising from the plaintiff's failure to make payment in terms of the guarantee as per annexure "A". The amount of R200 000 was a deposit paid by the plaintiff to the seller of the property referred to in the first paragraph of the letter as Wiesenhof Business Park, Heidelberg, which deposit the plaintiff forfeited as he failed to pay in terms of the sale agreement.
- [4] The defendant in its plea and with regard to the claim for R1 000 000-00 based on the guarantee pleaded its defence as follows:

"3.1 The defendant admits that annexure "A" is attached to the particulars of claim.

3.2 The further allegations in these paragraphs are denied.

3.3 In amplification of the aforesaid denial, and without detracting from the generality thereof, the defendant pleads:

3.3.1 In its terms annexure "A" is not addressed to the plaintiff but is addressed to "Gary Yanks (sic) Attorneys".

3.3.2 Annexure "A" is not an unconditional guarantee to pay to the addressee thereof R1 million.

3.3.3 On a proper construction of annexure "A" the obligation to pay to the addressee thereof is conditional upon Abrina 2537 (PTY) Limited ("Abrina") paying to the defendant the plaintiff's 10% interest in the profit share of Abrina on or before 11 April 2008.

3.4 Alternatively, and in the event of it being found that annexure "A" to the particulars of claim is a written guarantee by the defendant to the plaintiff to pay R1 million to the plaintiff's designated bank account on or before 11 April 2008 then the defendant pleads as follows:

3.4.1 The plaintiff had invested in Abrina 2537 and was entitled to a 10% share of the profits generated by Abrina.

3.4.2 The plaintiff and Abrina had agreed that the plaintiff's entitlement to profits generated by Abrina would be paid to the defendant, and that the defendant would pay the profits to Gary Yanks Attorneys.

3.4.3 In the context of, the facts set out in paragraphs 3.5. 1 and 3.5.2 above the defendant was instructed by Abrina to address annexure "A" to Gary Yanks.

3.4.4 Abrina did not pay the plaintiff's profit share to the defendant.

3.4.5 During May 2008;

- (a) The defendant was advised by the Abrina that the plaintiff had agreed to annexure A being withdrawn, which the defendant did on 21 May 2008; and
- (b) To the defendant issuing, on behalf of Abrina, a further conditional undertaking to Gary Yanks Attorneys, which the defendant did on 27 May 2008.

3.4.6 Accordingly annexure "A" was withdrawn, alternatively novated".

[5] The court a quo dismissed the plaintiffs claim in its entirety and of relevance made the following findings:

"77. Ek is dus van mening dat dit blyk uit hierdie verwikkelinge, minstens op 'n duidelike oorwig van waarskynlikhede, dat die partye by ooreenkoms wegbeweeg het van "879" en dat die eiser, minstens by implikasie, die verweerder se onttrekking uit "879" aanvaar het. In die lig van my bevinding dat die eiser nie daarin kon slaag om te bewys dat "879" 'n afdwingbare waarborg is nie, ag ek dit nie nodig om 'n formele bevinding te maak ten opsigte van die alternatiewe verweer soos dit gepleit is nie.

Die tweede eis vir skadevergoeding van R200 000, 00

78. Blykens die besonderhede van vordering is hierdie eis gekoppel aan die verweerder se beweerde "onregmatige weiering om in terme van die waarborg op te tree".
79. Waar ek bevind het dat die beweerde waarborg nie afdwingbaar is nie, en waar die tweede eis om skadevergoeding afhanklik is van 'n bevinding dat die waarborg inderdaal afdwingbaar was en dat die verweerder onregmatiglik versuim het om die bepalings daarvan na te kom, kan die tweede eis om hierdie rede na my mening nie slaag nie."
- [6] '879' referred to in the quotation above is a letter referred to in paragraph 2 of this judgment. It is clear from the findings quoted above that the plaintiff's claims were dismissed on the basis that the plaintiff failed to show on the balance of probability that the guarantee was enforceable, in other words, that the plaintiff had failed to show that the guarantee was unconditional and was not legally withdrawn. The court a quo did not find it necessary to deal in detail with the defence of withdrawal or novation.

INTERPRETATION OF AN AGREEMENT IN A WRITTEN DOCUMENT

- [7] In dealing with the interpretation of a document, Harms DP (as he then was), in *KMPS v Securefin Ltd* 2009 (4) SA 399 (SCA) at paragraph 39 stated:

"First, the interpretation (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 Jura/ act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (SA) 927 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: Hodg M Malek (ed) *Phipson on evidence* (16ed 2005) paras 33 -64. Third, the rules about admissibility of evidence in this regard do not depend upon the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly - Clerk Corporation and Kimberley-Clerk of South Africa (Pty) Ltd* 1985 (BP) 126 (A). Fourth, to the extent that evidence may be admissible to contextualize the document (since context is everything) to establish its factual matrix and purpose, or for purposes of identification, "one must use it as conservatively as possible" (*Delmas Milling Company Ltd v Du Plessis* 1955(3) 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". The underlining is my emphasis.

- [8] Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at para 18 in dealing with contextualization in interpreting a document or agreement stated:

"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 lead 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".

[9] Furthermore, in the case of *Affirmative Portfolios CC v Transnet Limited t/a Metrorail* [2008] ZASCA 127; 2009 (1) SA 196 SCA with reference to parol evidence rule it was held:

"The parol evidence rule applies only where the written agreement is or was intended to be exclusive memorial of the agreement between the parties. Where the written agreement is intended merely to record a portion of the agreed transaction, leaving the remainder as an oral agreement, then the rule prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement. This is often referred to as the 'partial integration' rule. A court may look to surrounding circumstances, including the relevant negotiations of the parties, in order to determine whether the parties intended a written contract to be an integration of their whole transaction or merely a partial integration. The fact that the party specifically referred to a topic or subject in the wording is generally an indication that the writing was intended to be conclusive as to that aspect of the transaction'. This point is aptly made in the following passage in *Wigmore on Evidence* §2430:

(3) In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element, if it is not, then probably the writing was not intended to embody that element of the negotiation . . .

If it was indeed the common intention of the parties that the rates be varied the Appellant could have availed itself of the equitable remedy for rectification. In the event, however, it chose not to do so and is bound to the terms of the written agreement.

Reliance cannot be placed on the allegation in paragraph 6 of the particulars of claim to the effect that the agreement was varied tacitly or by conduct in the light of the foregoing.

Furthermore clause 10.1 which is in effect a non-variation clause, entrenches the pricing provisions against oral or tacit variation. The binding nature of such a provision was emphasized in *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren en Andere* and affirmed more recently in the case of *Brisley v Drotsky*".

[10] Furthermore, in *National Joint Municipal Pension Fund* supra at 603F to 604 D it was further held:

"The sole benefit of expressions such as 'the intention of the legislator, or 'the intention of the parties' is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say. Their disadvantages far outweigh that benefit, lie at opposite ends of the interpretative spectrum. At the one end, they may lead to a fragmentation of the process of interpretation by conveying that it must commence with an initial search for the 'ordinary grammatical meaning' or 'natural meaning' of the words used seen in isolation, to be followed in some instances only be resort to context. At the other they beguile judges into seeking out intention free from constraints of the language in question, and then imposing that intention on the language used. Both of these are contrary to the proper approach, which is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances. That is how people use and understand a language and it is sensible, more transparent and conduces a greater clarity about the task of interpretation for courts to do the same".

[11] In interpreting any document the starting point is inevitably the language of the document, but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context the purpose of the provision under consideration and background to the preparation and productions of the document in question are not secondary matters introduced to resolve linguistic uncertainty, but fundamental to the process of interpretation from the outset.

FACTS

PRECEDING THE INSTITUTION OF THE ACTION

[12] In March 2007 the plaintiff invested R375 000-00 in a property development known as Drakensburg Gardens. The development was

conducted by Abrina 2537 (PTY) Ltd ("Abrina"). It was anticipated that the plaintiff will receive a return of about R1 200 000 to R 1 500 000 being 10% of his sharing in the development. The profit sharing was to be determined at the completion of the project. In a letter dated 7 December 2007 the plaintiff's 10% interest sharing was confirmed. The expedited completion period was estimated to be during January/February 2008.

[13] On 26 February 2008 a written sale agreement was concluded between Plenty Properties (Pty) Ltd and one Jakobus Johannes Wiese in terms of which the property known as Wiesenhof Business Park was sold to Plenty Properties (Pty) Ltd represented by the plaintiff in the sum of R3 265 000-00. A deposit in the amount of R200 000 was paid already on 12 February 2008. On the last page of the sale agreement the plaintiff is indicated as the purchaser.

[14] The plaintiff was required to submit a guarantee for the balance of the purchase price. When he could not get the guarantee he asked for an extension within which to submit the guarantee and the extension was granted until Friday 4 April 2008. This appears in the trailing emails exchanged on 31 March 2008, being the date on which the guarantee was to be furnished.

[15] On 1 April 2008 the defendant on behalf of Abrina 2537 (PTY) Ltd (Abrina) sent a letter to the seller's attorneys and recorded as follows:

"On instructions of our client we confirm that Dr Johan Oelofse has a 10% interest in the above mentioned development, which profit sharing will take place on or before 11th April 2008.

The 10% interest amounts to approximately R1 000 000 .00 (One million rand), which remuneration will be paid to him as agreed".

[16] A copy of the letter was emailed to the plaintiff at about 12:57 PM. The letter did not elicit a positive response from either the seller or the plaintiff. Instead the plaintiff made some amendments to the letter and at about 1:18 PM sent it back to the defendant and recorded in the covering email as follows:

"Please see amendments made. If your attorney is in agreement, please ask him to sign and send the final letter to me".

[17] The email and copy of the amendments were sent to one Anita Maharaj of the defendant. On the same date, that is, 1 April 2008, the defendant addressed another letter to the seller's attorneys containing the guarantee as quoted in paragraph 2 of this judgment.

The interpretation of the contents of the said letter was the subject of a dispute in the court a quo. What follows hereunder, are the events after receipt of the said letter.

[18] On 20 May 2008 the defendant wrote to the attorneys of the seller of Wiesenhof property in which it was recorded that the funds had not been made available for the profit sharing for payment to the seller's attorneys.

[19] On 21 May 2008 and in response to a letter dated 20 May 2008 from the seller's attorneys, the defendant on behalf of Abrina recorded as follows:

"Your letter of 20th May 2008 refers:

We have been informed by our client that a meeting has been arranged between our clients and Dr Oelofse to discuss this matter.

Our firm therefore withdraws from the letter addressed to your office dated 1st April 2008 as as (sic) our client has assured us that the matter will be resolved directly with Dr Oelofse.

We confirm that Dr Oelofse has verified the above".

The letter of 20 May 2008 referred to in the quotation was a letter of demand for payment of the guarantees to the seller's attorneys. That 'Dr Oelofse has verified the above,' is however contradicted by the email hereunder.

[20] On 21 May 2015 at about 8:47 PM the plaintiff sent an email to the defendant for the attention of Anita Maharaj and recorded:

"Further to our telephone conversation and your subsequent letter, I can merely confirm that a meeting has been arranged for Monday 26 June between your client and myself.

I reserve my rights for further actions based on the outcome of the meeting as well as possible financial losses incurred by myself and my business partners as a result of your attached letter sent to Gary Janks Attorneys.

All future correspondence from your firm regarding this matter must please be addressed to my attorney Mr Walter Hepple of Bezuidenhout and Hepple Attorneys Centurion (012 - 643 0480), walter@bez.co.za".

[21] On 27 May 2008 the defendant purportedly on behalf of the developer, Abrina 2537 (Pty) Ltd addressed a letter to the attorneys of the seller of Wiesenhof Business Park property wherein it was recorded:

"We advise that Dr J Oelofse is an investor in our client's, Drakensberg Gardens Development and he holds a 10% share in the net profit from the development plus a R132 000. 00 loan account to his credit. The total amount due to him is R950 000. 00 which includes his loan account.

Our client expects to complete the development by the end of June 2008, however Dr Oelofse requires a guarantee as soon as possible and therefore Abrina 2537 (PTY) Limited offers their debt acknowledgement to the amount of R950 000. 00 to serve as guarantee for the transaction they are currently involved in.

We will pay this amount on behalf of Abrina 2537 (PTY) Limited to your offices on registration of the transaction, which is expected to be in two to three month's time, provided no notice in terms of Section 99 of the Income Tax Act is served on us by the Commissioner of Inland Revenue demanding payment to it of any or all funds held or to be held by us on behalf of our client in respect of which this undertaking is given.

We reserve the right to withdraw from this undertaking should any unforeseen circumstances arise to prevent our client from making

payment as mentioned above, whereupon the said sum will no longer be held at your disposal, subject to the condition that we give you written notice, prior to registration of our intention to withdraw from this undertaking.

In the event of the proceeds from our above transfer being judicially attached or there being any legal impediment preventing us from making payment, this undertaking will be null and void".

[22] The email quoted above outraged the plaintiff. On the same date the plaintiff wrote to Anita and recorded:

"Please note that the attached "guarantee" means nothing because of legal jargon and back door you have specified in your letter (see paragraphs highlighted in yellow). This was not part of the agreement last night - it was agreed to provide a non-conditional guarantee.

Please discuss with your client and revert back to me with the correct document.

I have already discussed it with Willie Coetzee.

You have sent communication to Gary Janks last week, I suggest you use the same contact details".

[23] On 28 May 2008 the plaintiff sent an email to the seller's attorneys and stated. "Sorry for not sending the promised document I have received another 'letter of intent' type of document, but after our discussion last time I asked for an irrevocable guarantee. I will hopefully get it tomorrow and will forward it immediately to you".

[24] On 2 June 2008 the plaintiff addressed another email to the seller's attorneys in which he advised that he had asked for an irrevocable guarantee which he hoped will be paid on time for the registration of the Wiesenhof property. On 5 June 2008 the seller's attorneys wrote to the plaintiff and recorded:

"We refer to the writer's telephonic discussion with your Mr Oelofse on the 4th instant.

We confirm that it was agreed that the agreement between our client, Mr Wiese and yourselves was no longer of any force and effect by virtue of the fact that you were unfortunately unable to procure the purchase price for the property timeously or at all and as a result thereof, the agreement is no longer of any force or effect.

We confirm further your advices to us that we were to furnish your client with the deposit of R200, 000. 00 together with any interest

that may have accrued thereon, as provided for in the agreement.

We confirm further your request that we transmit to you the funds that we are handling in our trust account and we await receipt of the relevant banking details".

[25] There were three issues in my view to be determined by the court a quo as pleaded by the defendant. Firstly, whether the guarantee by the defendant for payment of the sum of R1 000 000.00 was unconditional. And if so, whether the guarantee has been withdrawn and if not, whether there has been a novation of the guarantee given on 1 April

2008. I now turn to deal with each of the issues raised.

WHETHER THE GUARANTEE WAS UNCONDITIONAL

[26] This issue is relevant to the interpretation of the second letter of 1 April 2008 referred to in paragraph 2 of this judgment. Therefore the authorities quoted in paragraphs 7 to 11 of this judgment are relevant. Two projects were involved. The Drankensburg Garden in respect of which the appellant was entitled to 10% sharing amounting to R1 000 000.00 and the Wiesenhof project in respect of which a guarantee was given by the defendant to pay unspecified amount to enable the plaintiff to purchase the Wiesenhof Park property. On the face of the document, the two projects appear to be independent of each other. In my view, contextualization clarifies this contrary to the trial court's findings. However one must be mindful of the fact that parole evidence remains part of our law and that the rule must not be ignored and ought to be enforced by the courts. Extrinsic evidence may not be used to contradict, add to or modify the meaning of a written agreement. The interpretation is a matter for the court and not for witnesses through their evidence. Such evidence is inadmissible except insofar as it relates to contextualization in which case everything is admissible.

[27] The first letter of 1 April 2008 referred to in paragraph 15 above contains no guarantee and it binds no one. It is an information

letter in terms of which the attorneys of the seller of Wiesenhof property who were to do the registration and transfer were informed

that the plaintiff has a 10% sharing interest amounting to R1 000 000.00 in Abrina of which profit sharing was to take place on or before 11 April 2008. The defendant did not testify during the trial instead it was Mr Goetze of Abrina who testified in denial of the plaintiff's claim. The real issue is whether, the second letter of 1 April 2008 contains an unconditional guarantee intended by the parties.

[28] For the following reasons the letter should have been found to constitute unconditional guarantee binding on the defendant (attorneys Steyn Lyell and Maeyane):

28.1 The seller of the Wiesenhof wanted an unconditional guarantee. The extension for the guarantee was indulged to the plaintiff to 4 April

2008. The first letter of 1 April 2008 did not provide such a guarantee. Subsequent to further discussions the second letter of 1 April 2008 quoted in paragraph 2 above was provided. It contained an unconditional guarantee as per the first paragraph thereof after the plaintiff had made amendments thereon.

28.2 The unconditional guarantee was in a way acknowledged by the defendant as it would appear from the letter the defendant addressed to the seller's attorneys. This was on 21 May 2008 in which inter alia it was recorded:

" Our firm therefore withdraws from the letter addressed to your office dated 1 April 2008 as client has assured us that the matter will be resolved directly with Dr Oelofse".

28.2.1 No suggestion is made in the letter of 21 May 2008 that the withdrawal was based on the non-fulfillment of any one of the alleged conditions. The only thing that the defendant and or Abrina could withdraw from the letter of 1 April 2008 was the unconditional guarantee contained in the first paragraph of the letter. If the guarantee in the letter was to be upon fulfillment of any condition, that could easily have been spelled out in both letters of 1 April 2008 and 21 May 2008 quoted in paragraphs 2 and 19 respectively. That, the defendant did not do, because it knew that the guarantee was unconditional, otherwise there was no need to seek to withdraw it. The withdrawal was not on any factual basis and Abrina had no legal basis to sanction such a withdrawal as it would appear hereunder.

28.2.2 The plaintiff never agreed to the withdrawal of the guarantee. The letters or emails exchanged before 11 April 2008, the first paragraph of the guarantee letter and events thereafter referred to and quoted in the preceding paragraphs are self-explanatory. They contradict the finding that 'minstens op 'n duidelike oorwig van waarskynlikhede, dat die partye byooreenkoms wegbeweeg het van "879" en dat die eiser, minstens by implikasie, die verweerder se ontrekking uit aanvaar het.'

28.3 In the letter of 27 May 2008 addressed to the seller's attorneys on the instructions of Abrina, it was inter alia recorded:

"Dr J Oelofse is an investor in our Drakensberg Gardens development and holds a 10% share in the net profit from the development plus R132 000 account to his credit. The total amount due to him is R950 000 which include his loan account".

28.3.1 The statement was made as an acknowledgement of debt to the plaintiff. It is no different to the first letter of 1 April 2008 quoted in paragraph 15 above which letter was rejected outright as constituting no unconditional guarantee. Neither the seller nor the plaintiff ever accepted the contents of the first letter of 1 April 2008 and the letter of 27 May 2008 quoted in paragraph 21 as constituting sufficient guarantee for payment required in terms of the sale agreement. In fact the plaintiff was upset by the latter letter of 27 May 2008. The rest of the letter contains conditional guarantee which prompted an angry response from the plaintiff as quoted in paragraph 22 of this

judgment. He denied any acceptance of such guarantee clothed with 'acknowledgement of debt' referred to in the quotation under paragraph 21 above.

[29] The plaintiff had 10% sharing in the Drakensberg project which sharing was ultimately calculated at an amount of R1 000 000.00.

Profit sharing was to take place on or before 11 April 2008. It was common cause that the amount derived out of the 10% profit sharing could be used to facilitate or fund the guarantee. On that basis it was argued that the guarantee was conditional. I cannot agree. The source from which the guarantee was to be made was not conditional upon receipt of payment of the profit sharing in the amount of R1 000 000.00. For this, the contention that the guarantee was conditional and unenforceable ought to have been rejected. I now turn to deal with the alternative defence.

WITHDRAWAL OF THE GUARANTEE, NOVATION OR AGENCY

[30] What is said in paragraph 28.2 to 28.2.2 above is relevant here. At the risk of repetition, the withdrawal defence was pleaded as follows:

"(a) the defendant was advised by Abrina that the plaintiff had agreed to annexure "A" being withdrawn, which the defendant did on 21 May 2008 and (b) to the defendant issuing, on behalf of Abrina, a further conditional undertaking to Gary Janks Attorneys, which the defendant did on 27 May 2008, 3.4.6 Accordingly annexure "A" was withdrawn, alternatively novated".

[31] Annexure "A" referred to in the quotation is the letter referred to in paragraph 2 of this judgment. The defendant is in my view having a problem with the defence as quoted above. During oral argument it became common cause that the guarantee was for R1 000 000.00 and that the said amount became due and payable on or before 11 April 2008. Therefore as at the time the withdrawal of the guarantee contained in annexure "A" was conveyed, the debt in terms of the guarantee had already accrued. Such withdrawal was therefore rendered moot.

[32] I deal with a defence of novation insofar as it has been pleaded although not argued. When parties novate they intend to replace a valid contract by another valid contract. The valid contract intended to be replaced could only have been as per the letter of 1 April 2008 quoted in paragraph 2 of this judgment. In my view, the defendant and or Abrina could only have wanted it to be replaced because it contained unconditional guarantee. A cancellation by novation is effected by express or implied agreement. Such an agreement in the present case was not expressed, neither could it be implied. A cancellation by one party based on novation following a breach by the other is not based on consensus and in many instances does not bring all aspects of the cancelled contract to an end, and does not novate the contract. The evidence in the instant case did not come closer to novation and therefore the defence ought to be rejected.

[33] Insofar as the defendant suggested that it was an agent of Abrina and that once its mandate regarding the guarantee was terminated, it had no choice other than to withdraw the guarantee, the contention should be seen in the context of what I have mentioned in the preceding paragraphs. The withdrawal was late and the debt had already accrued as on 21 May 2008 when the withdrawal notice was purportedly given by the defendant.

[34] Claim 2 relates to a deposit paid by the plaintiff to the seller of the Wiesenhof property. In terms of the sale agreement, the deposit was not refundable. Failure to pay the balance of the purchase price was attributed to the failure by the defendant to provide guarantee in terms of annexure "A". In the light of my finding on claim 1, the plaintiff should have been found entitled to payment of the said sum of R200 000.

THIRD PARTY NOTICE

[35] On 15 October 2010, a third party notice was served on Abrina 2537 (PTY) Limited, by the defendant in terms of rule 13. In the notice, the defendant asked for a relief as follows:

"1. An order declaring that the third party (Abrina) 2537 (PTY) Limited is liable to pay the defendant.

1.1 R1 million

1.2 R200 000

1.3 Such amount the defendant is liable to pay to the plaintiff as interest.

2. Interest on the aforesaid amounts from the date of the judgment to date of payment.

3. Costs of suit.

4. Further and or alternative relief

The difficulty with the notice is that the defendant did not testify to substantiate its claim against Abrina. On this basis alone, relief sought against Abrina 2537 Limited is not sustainable.

[36] Consequently an order is hereby made as follows:

36.1 The appeal succeeds; and the respondent to pay the costs of the appeal;

36.2 The order of the court a quo is hereby set aside and substituted as follows:

"Judgement is hereby granted against the defendant as follows".

Claim 1

(a) Payment of R1 000 000;

(b) Interest at 15.5% per annum on the amount of R1 000 000-00;

Claim 2

(a) Payment of R200 000;

- (b) Interest at 15.5% per annum on R200 000 from date on which the plaintiff paid the said amount as a deposit;
- (c) The defendant to pay the costs of the action in respect of both claims".
-

M F LEGODI

JUDGE OF THE HIGH COURT

I AGREE

L M MOLOPA-SETHOSA

N B TUCGTEN

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