

SOUTH AFRICA / JUDGMENT

Pinnacle Micro (Proprietay) Limited v Manthata (57571/2021) [2024] ZAGPJHC 453 (3 May 2024) [2024] ZAGPJHC 453

COURT

South Gauteng High Court, Johannesburg

BEFORE

Twala M L

CASE / FILE NUMBER

57571/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE NO: 57571/2021

1. REPORTABLE: NO

2. OF INTEREST TO OTHER

JUDGES: NO

3. REVISED.

In

the matter between:

PINNACLE
MICRO (PROPRIETAY) LIMITED
APPLICANT
And
MAMAFA
GEORGE MANTHATA
RESPONDENT

JUDGMENT

TWALA J

Introduction

[1] In this application, the applicant seeks an order that judgment be entered against the respondent for payment of money and other ancillary relief in the following terms:

1.1 Payment of the sum of R5 million; and

1.2 Interest on the sum of R5 million at the agreed rate, being the publicly quoted rate of interest per annum of First National Bank Limited from time to time at which it lends on unsecured overdraft to its first class corporate borrowers in general, on the basis of such interest being calculated on a daily basis, compounded monthly in arrears and determined on 365 day year factor (irrespective of whether the year in question is a leap year or not), plus 5% (five percentage points), from 30 April 2019 until date of final payment.

1.3 Costs of suit on the attorney and client scale.

[2] The application is opposed by the respondent who has filed a substantial answering affidavit.

Factual

Background

[3] The facts foundation to this case are mostly common cause and are the following: on 4 April 2019 in Johannesburg the applicant and Sinalo Accelerator Group (Proprietary) Limited (“Sinalo”) concluded a loan agreement, and the terms whereof were that the applicant will loan and advance an amount of R5 million to Sinalo. It was a condition of the agreement that the loan is subject to the conclusion of the Modrac sale of shares agreement (“SSA”) which condition precedent was fulfilled when the SSA was concluded in writing and signed on 4 March 2019. It was a further condition of the loan agreement that a suretyship is required, and that the capital was to be used by Sinalo to fulfil its obligation under the Modrac sale of shares agreement.

[4] On 4 April 2019, in compliance with the terms and conditions of the loan agreement, the respondent signed the suretyship agreement and bound himself as surety and co-principal debtor in solidum with Sinalo for the proper and timeous payment of all amounts which are now or might in the future become payable by Sinalo to the applicant arising out of any contract or agreement between the parties or from whatever cause and howsoever arising.

- [5] The applicant has discharged its obligations under the loan agreement by advancing to Sinalo a sum of R5 million. However, Sinalo is in breach of the terms of the loan agreement in that Sinalo has failed to discharge its indebtedness to the applicant. The applicant has called upon the surety, the respondent in this case, to discharge its obligations in terms of the suretyship agreement and the surety has failed to do so – hence the institution of these proceedings.

The Parties Submissions

- [6] The respondent's case is that there were three agreements concluded in this case which are interrelated and interlinked to each other being the loan agreement, the SSA and the supply agreement. It was contended that the court should consider the surrounding

circumstance and context for the conclusion of the loan agreement otherwise the court will lose the context with which the loan

agreement was concluded. Although the three agreements were concluded among different parties, so it was contended, they were all

interlinked and interrelated.

- [7] The SSA was concluded between DCT Holdings Proprietary Limited and Sinalo Accelerator Group Proprietary Limited and Modrac Proprietary Limited; the supply agreement was concluded between Pinnacle Micro Proprietary Limited and Modrac Proprietary Limited ("Modrac") and the loan agreement between the applicant and Sinalo. The respondent stood surety for payment of loan under the agreement. The

surrounding circumstances and the context in which the agreements were concluded are, so it was contended, the applicant is a sister

company of Modrac which sold its shares to Sinalo. The loan amount of R5 million was to add to the purchase price for Modrac from DCT Holdings.

- [8] To enable Sinalo to repay the loan as agreed, the applicant concluded the supply agreement with Modrac for the applicant to be supplied with or purchase certain cabinets for a period of three years with the initial period being twelve months. It is the respondent's submission that the loan amount has not become due and payable by Sinalo since the applicant has breached the terms of the supply agreement by its failure to make purchases that make the minimum value of R42 million per annum. The purchases which were made by the applicant of R53 million relate to a period earlier than when the directors of Sinalo took control of Modrac. Modrac was still in the hands of the directors of the applicant when these purchases were made.

- [9] It was contended further by the respondent that the applicant cannot enforce the contractual terms before it performs its part in terms of the supply agreement since there are reciprocal obligations arising from the supply agreement. Without placing the necessary orders and making payment in advance in terms of the supply agreement, so the argument

went, Modrac was not placed in a position to pay its indebtedness to the applicant for it was dependent on the money as provided for in the supply agreement. Having failed to comply with the supply agreement, the applicant has no claim against Sinalo and by extension the respondent.

- [10] The applicant says that the three agreements may be interrelated and interlinked but are independent of each other. The loan agreement is completely independent and self-standing agreement from the supply agreement as it is not concluded between the same parties as the loan agreement. The terms of the supply agreement are that the applicant must make purchase orders of not less R42 million per annum from Modrac. However, the loan in terms of the loan agreement is payable monthly. The applicant made purchases of R48 million in the first year and R42 million in the second year until Modrac breached the supply agreement by failing to produce and supply the goods as agreed – hence the applicant cancelled the agreement.
- [11] Further, both the loan and the suretyship agreement do not provide for the dispute between the parties to be referred for determination in arbitration. There is no ambiguity in the loan agreement and therefore, so it was contended, there is no reason for the court to consider the surrounding circumstances or context in which the agreement was concluded. The loan agreement has a clause providing that it is the whole agreement as agreed between the parties and that no representations may be relied upon by a party unless the representation is recorded in the agreement.
- [12] It was contended further by the applicant that the principle of reciprocity does not find application in this case. Although there are three agreements that were concluded, all three agreements are independent of each other and are stand-alone.

Discussion

- [13] It is trite that to determine whether two contracts are interrelated to the extent that the performance of the obligations arising therefrom are reciprocal lies in the contracts themselves. Put in another way, to establish the issue that the performance of an obligation by one party in a contract is dependent upon the performance of the other party in another contract lies in the

interpretation of the contracts concerned.

- [14] In *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd*[1] where the Court was faced with the issue of two agreements that were linked to each other said that the answer to the question whether the cancellation of one of two linked agreements resulted in the termination of the other with attendant consequences lies in the interpretation of the agreements in question.

[15] It is now settled that when interpreting documents, the Courts must first have regard to the plain, ordinary, grammatical meaning of the words used in the document. While maintaining that words should generally be given their grammatical meaning, it has long been established that a contextual and purposive approach must be adopted in the interpretative process.

[16] In *University of Johannesburg v Auckland Park Theological Seminary and Another*[2] the Constitutional Court had the opportunity to deal with the principles of interpretation of documents and stated the following:

“[65] This approach to interpretation requires that ‘from the outset one considers the context and the language together, with neither predominating over the other.’ In Chisuse, although speaking in the context of statutory interpretation, this Court held that this ‘now settled’ approach to interpretation, is a ‘unitary’ exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

[66] The approach in *Endumeni* ‘updated’ the position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and knowledge at the time of those who negotiated and produced the contract”.

[17] It is perhaps apposite at this stage to restate the terms of the loan, supply and sale of shares agreements which are relevant to the discussion that follows:

17.1 Loan Agreement:

“Clause 5.4 Payment

The lender shall discharge its obligations under this clause by:

5.4.1(a) Paying the borrower an amount of R5 000 000 (five million rand) in cash or by way of electronic funds transfer directly into the following account:

Bank: Standard Bank of South Africa

Branch Number: 0[...]

Account Number: 2[...]

Account Name: S[...]

Clause 7 Payment of the Loan and interest

7.1 Subject to the terms of this agreement the borrower shall repay the outstanding principal amount of the loan and all interest which has accrued thereon, in accordance with annexure A

Clause 21 Miscellaneous

21.1 Entire Contract

This agreement, read together with the other finance documents, contains all the express provisions agreed on by the parties with regard to the subject matter of the finance documents and each party waives the right to rely on any alleged express provision not contained in the finance documents.

21.2 No Representations

A party may not rely on any representation which allegedly induced that party to enter into this agreement or any other finance document unless the representation is recorded in this agreement or another finance document.

17.2 Supply Agreement

Definitions

'This agreement' means this agreement together with all annexures thereto

17.3 Sale of Shares Agreement:

Clause 17. Whole Agreement

17.1 This agreement, and any documents referred to in it or executed contemporaneously with it or at closing, constitute the whole agreement between the parties and superseded all previous arrangements, understandings and agreements between them, whether

oral or written, relating to their subject matter, including the expression of interest letter from the seller to the purchaser dated 20 September 2018.

17.2 Each party acknowledges that in entering into this agreement, and any documents referred to in it or executed contemporaneously with it does not rely on, and shall have no remedy in respect of, any representation or warranty (whether made innocently or negligently) that is not set out in this agreement or those documents and, accordingly, irrevocably and unconditionally waives any and all rights it may have in respect of any such representation or warranty.

17.3 ...”

[18] The language used in these agreements is plain, clear and unambiguous. All the three agreements have the whole agreement clause which confirms that each agreement is independent of any other agreement. Further, there is nothing in the loan agreement which suggests that payment of the loan is dependent on the applicant buying goods or cabinets from Modrac. There is therefore no ambiguity in the loan agreement upon which the cause of action of the applicant is based. I therefore agree with the applicant that there is no reason for the court to consider background facts when the agreement is plain and clear.

- [19] There is no merit in the respondent's contention that the debt is not yet due and payable as the applicant has failed to perform in terms of the supply agreement. There is no link between the supply agreement and the loan agreement and there is no clause in both agreements which suggests that the payment of the loan amount was contingent upon prior performance by the applicant under the supply agreement. Clause 7 of the loan agreement provides that the borrower shall repay the outstanding principal amount of the loan and all the interest which has accrued thereon in accordance with annexure "A" (which is the schedule for monthly payments agreed upon by the parties).
- [20] In *Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd*[3] the Supreme Court of Appeal stated the following with regard to the principle of reciprocity:
- "[13] The application of the principle of reciprocity to contracts is a matter of interpretation. It has to be determined whether the obligations are contractually so closely linked that the principle applies. Put differently, in cases such as the present the question to be posed is whether reciprocity has been contractually excluded".*
- [21] It is my considered view therefore that there is no clause in the supply agreement or loan agreement which provides that payment of the loan is dependent on the applicant's performance of any obligation other than to pay the sum of R5 million into the bank account of Sinalo. Once payment has been made by the applicant, it has discharged its obligations in terms of the loan agreement and it is left to Sinalo to pay back the loan or the respondent, as surety, if Sinalo fails to do so.
- [22] Recently the Constitutional Court in *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others*[4] also had an opportunity to emphasized the principle of *pacta sunt servanda* and stated the following:
- "[83] The first is the principle that '[p]ublic policy demands that the contracts freely and consciously entered into must be honoured'. This Court has emphasised that the principle of pacta sunt servanda gives effect to the 'central constitutional values of freedom and dignity'. It has further recognised that in general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. Pacta sunt servanda is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.*
- [84] Moreover, contractual relations are the bedrock of economic activity, and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

[85] The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.”

[23] It is undisputed that the applicant has discharged its obligations in terms of the loan agreement and that Sinalo has failed to discharge its obligations – hence the applicant is demanding the surety to make payment as undertaken. Courts have been urged in a number of decisions to hold parties bound by obligations willingly assumed. The unavoidable conclusion therefore is that the applicant has made out an unassailable case against the respondent and is therefore entitled to the relief it seeks.

[24] In the result, the following order is made:

1. The respondent is to pay the applicant the sum of R5 million;
2. The respondent is to pay interest on the sum of R5 million at the agreed rate, being the publicly quoted rate of interest per annum of First National Bank Limited from time to time at which it lends on unsecured overdraft to its first class corporate borrowers in general, on the basis of such interest being calculated on a daily basis, compounded monthly in arrears and determined on 365 day year factor (irrespective of whether the year in question is a leap year or not), plus 5% (five percentage points), from 30 April 2019 until date of final payment.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

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Date of Hearing: 15th of April 2024

Date of Judgment: 3rd of May 2024

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 3rd of May 2024.

[1]

[2002] (3) SA 435 (A).

[2] (CCT 70/20) [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (11 June 2021).

[3] (793/2016) [2017] ZASCA 11 (20 September 2017).

[4] CCT 109/19 [2020] ZACC 13.

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