

SOUTH AFRICA / JUDGMENT

Primedia (Pty) Ltd v Alfonso (2015/9527) [2017] ZAGPJHC 246 (13 February 2017)

[2017] ZAGPJHC 246

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Weiner

CASE / FILE NUMBER

2015/9527

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG
CASE
NO: 2015/9527
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED.

In the matter

between:	PRIMEDIA
	(PTY)
	LIMITED Plaintiff
	and
	TEXEIRA
	EMMANUEL ALBERTO
	ALFONSO Defendant

JUDGMENT

WEINER, J:

- [1] The defendant herein applied for a separation of issues. He applied to have his first and second special pleas separated and determined prior to all remaining issues in the matter in terms of the provisions of Rule 33(4). It was agreed between the parties that the issues would be separated and that the remaining issues in the matter would be postponed sine die. The costs were reserved.

THE

BACKGROUND

- [2] The plaintiff sued the defendant for the sum of R1 675 243,69. The claim was based upon the terms of a sale of shares agreement (the sale agreement), which was concluded between the plaintiff, on the one hand; and the defendant, one Van den Bergh, one Henry and Spectrum Visual Network Solutions (Pty) Limited, on the other.
- [3] In answer to the plaintiff's claim the defendant filed two special pleas.
- [4] The first special plea referred to a written consensual separation agreement (the separation agreement) which was concluded between the plaintiff and the defendant on the 13th May 2014. The defendant alleged that the defendant's employment at the plaintiff was terminated by mutual consent on the terms and conditions set out therein. He further alleged that the separation agreement constituted a compromise of all contractual and/or delictual claims between the parties. Accordingly, in the context of the separation agreement, and on a proper construction thereof the defendant claimed that the plaintiff compromised and waived all contractual, delictual and statutory claims it may have had against the defendant. This included the claim arising from the sale agreement.

The second special plea was one of non-joinder. The defendant averred that the plaintiff had failed to join Van den Bergh and Henry to the action, as co-sellers and interested parties, in regard to the relief sought against the defendant.

- [5] The relevant clauses of the separation agreement are the following:

"3. Full and final settlement.

- (a) The amounts referred to in clause 7 below incorporate all payments and claims to Texeira.

- (b) The parties further agree that this agreement is in full and final settlement of any and all claims which Texeira may have against the company or any associated companies, or that the company or any associated companies may have against Texeira, whether such claims arise ex contractu, ex delicto or out of any statutory provision and whether such claims arose as a result of the employment relationship between the parties, or the termination thereof.
- (c) ...
- (d) It is recorded that this agreement has been entered into without any admission of liability whatsoever by any party hereto and in order to regulate the consensual termination of the employment relationship between the parties.
4.the agreement constitutes the sole agreement between the parties relating to the employment of Texeira.
5. ...
6. ...
7. ...
8. Given that the contract of cancellation is of a consensual nature, the employee agrees to waive all rights at law and equity to proceed against the employer for any matter arising from the termination of the employment relationship. Consequently the payment of money as set out in this agreement is in full and final settlement of any and all claims which either party may have one against the other, arising from the employment relationship and the termination of the employer/employee relationship regardless of whether such claim arises from contract, delict, statute, equity or otherwise.”
- [6] The contract also contained the usual “non-variation unless in writing” clause.
- [7] The defendant contends that, upon a proper interpretation of the terms of the separation agreement and, in particular, the provisions
- of clause 3(b), the parties intended and agreed to settle all claims whether arising out of the employment relationship or otherwise, in full and final settlement and that the plaintiff therefore compromised all its claims against him including the claim in the present trial action (emphasis added).
- [8] It is common cause that the separation agreement did not state that all claims were settled whether arising out of the employment relationship “or otherwise”. The terms of the clause are set out in para 5 above.

- [9] The plaintiff submits that, on a plain reading of the separation agreement, using the ordinary grammatical meaning of the words and within the context of the provisions of the separation agreement as a whole, it is clear that the intention of the parties was that the separation agreement would only regulate the consequences of the termination of the employment relationship between the parties. Plaintiff therefore submits that the agreement did not constitute a compromise of the plaintiff's present claim.
- [10] The plaintiff contends that its claim against the defendant arises out of the separate sale agreement, which is unrelated to the employment relationship or the termination thereof.

APPLICABLE LEGAL PRINCIPLES

Interpretation of contracts

- [12] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph [18] the SCA set out its approach in interpreting contracts as follows:
- [18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. 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 leads 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.[emphasis added]

See also *Bothma Batho Transport (Edms) Beperk v S Bothma en Seun Transport (Edms) Beperk* 2014 (2) SA 494 (SCA) at paragraph [10]

Waiver/Compromise

[13] The plaintiff contends that the defendant's first special plea is premised on a compromise and waiver. Compromise is a settlement, by agreement, of disputed obligations whether contractual or otherwise. See *Jonathan v Haggie Rand Wire Ltd* 1978(2) SA 34 N @ 38F

[14] The plaintiff submits that, at the time the separation agreement was concluded, there was no dispute between the plaintiff and the defendant in relation to the sale agreement, which is the subject matter of the plaintiff's claim against the defendant.

[15] The plaintiff argues that questions arising as to whether a compromise has been concluded must be decided according to ordinary

principles of contract. "What claims were and were not included in the compromise must be ascertainable from the terms of the compromise interpreted in accordance with the general rules of interpretation in any other case and there must be no ambiguity in this regard." See *Viola v Harvey (Pty) Limited* 1964 (2) SA 535 (T) at 538B-D.

The onus to prove that a compromise has been effected is on the party alleging same. See *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011(1) SA 8 SCA. It involves the waiver of existing rights and it must be as clearly and unambiguously proved as any other waiver or novation. See *Viola v Harvey* supra.

[16] It is trite that there is a factual presumption that a party is not likely deemed to have waived his or her rights and that clear and unequivocal evidence of a waiver is required. See *Feinstein v Niggli* 1981 (2) SA 684 (A).

[17] In addition, it must be clearly proved by the defendant that the plaintiff who has waived his rights knew what those rights were. See *Feinstein v Niggli* supra at 698F.

[18] Accordingly, not only must the defendant prove that there was an intention to waive its rights by the plaintiff, but the defendant must prove that the plaintiff was fully aware of both the facts and the legal consequences which surrounded such waiver.

EVIDENCE

[19] The evidence of Mr Mahange, the plaintiff's Group Human Capital Director, is relied upon by the plaintiff to show firstly, that the purpose of the separation agreement was only to terminate the employment relationship and secondly to demonstrate the facts in respect of which he had/ did not have knowledge at the time the separation agreement was concluded.

[20] Mahange testified that he met with the defendant in his role as Group Human Capital Director to negotiate with the defendant, on behalf of the plaintiff, only in regard to the termination of the employment agreement.

- [21] He further testified that he was not aware of the details of the terms of the sale agreement and this was not raised by him or the defendant during the meeting. Had the defendant done so, he would have referred him to Mr Crwys-Williams, the plaintiff's Legal and Commercial Executive who would have authority to discuss such matters.
- [22] He was only mandated to negotiate the termination of the employment agreement and not to discuss matters such as the sale agreement or the settlement of any other disputes that there might have been.
- [23] He did not have any authority or a mandate to compromise a claim under the sale agreement. Mahange was cross-examined on his role and the fact that he was on the Exco of plaintiff. It was put to him that he therefore would have been aware of the sale agreement and the claim which the plaintiff had against the defendant. His response was that he was aware that there was a sale agreement but he was unaware of the precise details thereof and whether or not any claims has arisen between the parties in regard thereto.
- [24] The plaintiff contends that the terms of the separation agreement read in context and given its express purpose as testified to by Mahange do not support the defendant's first special plea.
- [25] Plaintiff refers, in addition, to the cover page of the separation agreement, which refers to a "consensual separation agreement between the employer and the employee". Furthermore, the plaintiff refers to clause 1 which states that the agreement has been reached in terms of which the employee's employment contract will be terminated on the basis of a mutual agreement..
- [26] Plaintiff, on an analysis on the terms of the agreement contends that the separation agreement deals only with employment-related issues. In regard to clause 3(d) which refers to full and final settlement, the plaintiff submits that the meaning of these words was subject to an express qualification by the words that follow immediately thereafter: "Whether such claims arose as a result of the employment relationship between the parties or the termination thereof." The defendant's attempt to introduce the words 'or otherwise' therein differ from what is stated in the agreement.
- [27] The plaintiff submits that the qualification in clause 3(b) makes it clear that what is settled are claims which arise as a result, either of the employment relationship, or the termination thereof between the parties. The plaintiff also refers to clause 4 which records that "the agreement constitutes the sole agreement between the parties relating to the employment of Teixeira".
- [28] The plaintiff also relies on clause 8 read together with clause 3(b). This makes it clear that the only claims that were settled between the parties were those relating to the employment relationship and termination thereof.

- [29] The defendant however submits that the plaintiff, in its particulars of claim against Van den Bergh, stated that no relief was sought against the defendant and Henry. This, the defendant argues, confirms the defendant's view that all claims against him were compromised in the separation agreement. The plaintiff's explanation is that, at the time, the defendant and Henry had paid the plaintiff a third each of what was owing. It sued Van den Bergh, at that time to avoid prescription, but that did not mean that it waived its rights to sue the defendant and Henry for the balance owing, based upon their joint and several liability.
- [30] The defendant's contention is that it is clear from the agreement that it is in full and final settlement of all claims. The defendant argues that clause 8 is included because 3(b) referred to all claims; Clause 8 referred only to claims arising from the employment relationship. However, this submission is reliant upon the defendant's insertion of the words "or otherwise" at the end of clause 3(b). Without such words, it appears clear from the document that only claims relating to employment were dealt with in the separation agreement.
- [31] Reference was made by the defendant to the judgment in *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009
- (4) SA 399 (SCA) at paragraph [39] in which it was held that one needs to look at the context in order to interpret a contract. However, the context cannot change the ordinary meaning of the words. See *Braun Medical (Pty) Ltd v Ambasaam* 2015 (3) SA 22 (SCA) at 14-15.
- [14] A great deal of inadmissible evidence was led before the court a quo concerning the parties' intention in concluding and their interpretation of the terms of the contract of carriage. As pointed out by this court:

'[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 Second, interpretation is a matter of law and not of fact and, accordingly,

interpretation is a matter for the court and not for witnesses Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent 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" 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.

- [15] It is therefore clear that ‘interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses’. In addition ‘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”’. I do not understand anything stated in later decisions of this court to constitute a departure from those principles.
- [32] The plaintiff contends that the defendant is unable to discharge the onus to demonstrate a waiver and compromise. He is unable to establish such waiver unequivocally nor to show that the plaintiff (and, in particular, Mahange, on its behalf) was fully aware of the rights which the plaintiff had and that, in concluding the separation agreement, such rights would be waived or compromised.
- [33] The plaintiff accordingly submits that, having regard to the evidence, the legal principles, and assigning to the agreement an ordinary grammatical interpretation, within the context referred to, it is clear that the plaintiff did not compromise its claim under the sale agreement when concluding the separation agreement.
- [34] This contention appears to be correct.

NON JOINDER

- [32] The second special plea relates to the issue of non-joinder. Defendant submits that Van den Bergh and Henry should have been joined in the action against defendant, as they have a direct and substantial interest in the proceedings.
- [33] The plaintiff contends that as the sellers (the defendant, Henry and Van den Bergh) are jointly and severally liable, it was entitled to institute separate actions against all three of the sellers. The plaintiff is not obliged to join them as co-defendants and is entitled to “choose his target”. See *Parekh v Shah Cinemas (Pty) Limited and Others* 1982 (3) SA 618 (D) @ 622E-F and 623 A-C. The plaintiff accordingly submits that the second special plea is bad in law. The defendant, on the other hand, states that the plaintiff does not seek joint and several liability against the three sellers. In the claim against the defendant, it is not stated that such judgment will be joint and several with claims against the others. Neither is this the case in the Van den Bergh claim. Therefore, defendant submits that there could be conflicting judgments and each could be held liable for the full amount. In theory, this submission may be correct. The plaintiff, although entitled to “choose its target” has created a situation of ambiguity, which could lead to inequitable results. However, this does not mean that the joinder of the other sellers was necessary.
- [34] Joinder is not a matter of substantive law; it relates to a question of convenience raising a question of practice. It is possible for either party to consolidate the three actions and that this would be the convenient approach.

[35] The non-joinder plea must therefore also fail. The remedy is for the defendant to apply to consolidate the three matters.

COSTS

[36] In regard to costs, the defendant claims that it proposed the separation in September 2016 and this was not agreed to. The plaintiff however contends that the proposal of separation was only raised formally at the pre-trial held on the 23rd January 2017. The plaintiff submits that the special pleas are “bogus” and that they have been raised because the defendants were unable to obtain the consolidation of the three actions prior to this action commencing. The purpose of raising the special pleas was to obtain a postponement of the trial in order to consolidate it with the other matters. Consolidation however was not mentioned at the pre-trial conferences. The plaintiff accordingly seeks attorney and client costs against the defendant.

[37] The defendant on the other hand argues that the specials pleas are not bogus and that the first special plea could be dispositive of the entire matter.

[38] In my view the first special plea raised by the defendant was not a “bogus” plea. It involves the interpretation of an agreement and, if decided in the defendant’s favour, would have disposed of the matter. Accordingly, the defendant was entitled to seek the separation even though it has not been successful on the merits of such claim. In regard to non-joinder, the plea has not succeeded, but for the reasons set out above, I cannot find that such plea was “bogus”. The failure to state in its claim that the judgment granted would be joint and several with any judgment obtained against the other sellers, did result in an element of ambiguity. Accordingly the costs will be dealt with in accordance with these findings.

[39] The following order is granted:

1. The defendant’s first and second special pleas are dismissed.
2. The costs of the hearing of the separation application on the 13th of February 2017 are to be paid by the defendant, including the costs of two counsel.
3. The costs of the separation application, other than the costs referred to in 2 above, are to be costs in the cause.
4. The wasted costs occasioned by the postponement of the remaining issues are to be paid by the defendant.

S WEINER

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

For the Applicants: Advocate R Bhana SC

: Adv C Vetter

Instructed by: Tomlinson Mnguni James Inc.

For the Respondent: Advocate G Kairinos SC

Instructed by: Eugene Marais Attorneys.

Date of hearing 13 February 2017

Date of Judgment: 1st March 2017

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