

SOUTH AFRICA / JUDGMENT

Reid and Others v Greyling and Another (A245/2013) [2015] ZAGPPHC 1102 (7 August 2015) [2015] ZAGPPHC 1102

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi, Khumalo

CASE / FILE NUMBER

A245/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE NUMBER: A254/13

DATE: 7 AUGUST

2016

In the matter between:

MAGRIETA CAROLINA REID

1st

APPELLANT

OLOF

ABRAHAM SERVAAS VON LANDSBERG(SNR) 2nd

APPELLANT

OLOF ABRAHAM S ERVAAS

VON LANDSBERG (JNR) 3rdAPPELLANT

LEONARD GREYLING

1st

RESPONDENT

CARL GRELYING

2nd

RESPONDENT

JUDGEMENT

TLHAPI J

INTRODUCTION

[1] This is an appeal against the whole of the judgement of Ledwaba J, in terms of which he declared that the respondents had validly cancelled a sale of shares agreement in terms of clause 13 thereof.

The agreement was concluded by the parties on the 3rd and the 7th December 2009.

[2] The shares and loan accounts were sold for R4 000 000.00 (four million rand). A deposit of R100 000.00 (one hundred thousand rand) was payable into an interest bearing account to be held in trust by the transferring attorneys for the benefit of the plaintiffs ('respondents'). The said amount together with the balance of the purchase price in the amount of R3 900 000.00 (three million nine hundred thousand rand) was payable to the defendant ('appellants') on the effective date of the agreement (clause 2.1). The respondents were to deliver guarantees for the balance payable on the effective date to the appellants within ninety days of the signing of the agreement (clause 2.3).

[3] It was common cause that the deposit was duly paid to the appellants. It was further common cause that correspondence between the parties followed:

1. the respondents on 24 February 2010 cancelled the agreement in terms of clause 13;
 2. the appellants refused to accept such cancellation and on 10 March 2010 made demand for the delivery of guarantees within seven(?) days, failing which they would be entitled to cancel the agreement and retain the deposit; and, when there was no delivery on 25 March 2010 gave notification of their cancellation of the agreement;
 3. On 29 March 2010 the respondents notified the appellants that their letter of 10 March 2010 did not comply with the provisions of the agreement, therefore, the purported cancellation by the appellants was considered to have been a repudiation of the agreement, which was accepted by the respondents.
- [4] After the cancellation by the respondents, Mr Greyling in his personal capacity engaged in other negotiations with the appellants to purchase the same immovable property from the appellants and he gave Mr van der Westhuizen instructions to prepare an agreement for such purchase. This transaction is not relevant to the present appeal.

BACKGROUND

[5] Mr Greyling senior ('Greyling') was a manufacturer of drilling equipment and, as a past time, bought farms for investment purposes. Prior to this contract being

entered into, he had contacted an estate agent with the view to purchasing a farm for purposes of investment and development. He was informed of a company which was selling the farm it owned and its shares. He always did business with his sons and gave them support in their businesses. In this instance it was decided to purchase either the farm or the shares of the company, and that registration be in the names of

his sons. He was duly authorised by them to engage with the appellants and to conclude a contract to purchase only the shares and loan account in the company Clifton Dunes Investments 282 (Edms) Beperk.

[6] The respondents issued summons for a declaratory order that they had on 24 February 2010 validly cancelled the agreement in terms of clause 13; alternatively, a declaratory order that the respondents had validly cancelled the agreement on 29 March 2010; and, lastly for payment of the deposit in the amount of R100 000.00 plus interest and costs.

[7] The following was pleaded in paragraph 9 of the particulars of claim:

"From the balance sheet of the company it was evident that the company was at risk to pay a substantial amount of income tax of a capital nature as contemplated in terms of Schedule 8 to the Income Tax Act, 58 of 1962, as a result of which the transaction was in the bona fide opinion of the Plaintiff's at risk."

The appellants denied that the company was at risk for the payment of a substantial income tax of a capital nature or that the transaction was at risk.

[8] In cross examination Greyling testified that he relied on his attorney, Mr van der Westhuizen to advise him on tax issues. He cancelled the agreement because he was going to pay a lot of tax. He could not tell what he had intended doing with the shares in the future and he conceded that the basis for the

determination

for the payment of capital gains tax was to be found in Schedule 8 to the Income Tax Act, 8 of 1962.

[9] Mr van der Westhuizen testified about the concern Mr Greyling had when the balance sheets were not forthcoming. Unsigned and unaudited balance sheets were first presented in January of 2010 and a demand was made for signed copies and when these were presented they revealed unacceptable risks for his client.

[10] In terms of clause 13 of the agreement the purchasers {'the respondents'} could cancel the agreement under the following circumstances:

"Sou dit blyk dat die balansstate onaanvaarbare laste of onuitgekeerde winste bevat of items wat die transaksie op risiko plaas, sal die Kopers geregtig wees om die ooreenkoms te kanselleer en sal die bepaling van klousule 2.1 nie van toepassing wees nie."

[11] In the court C! quo, Ledwaba J, relying on *Coopers and Lybrand and others v Bryant*

[1995] ZASCA 64; 1995 (3) SA 761 (AD) found that there was nothing repugnant or inconsistent in Clause 13, that same was inserted at the instance and for the benefit of the plaintiff.

Therefore, the plaintiffs had a discretion to determine what constituted unacceptable risk and that they had elected to cancel the agreement. He found that the

reasons

for cancelling the contract were reasonable in the circumstance and that it was properly and legally cancelled in terms of clause 13.

This appeal called for an interpretation of clause 13.

APPROACH TO THE INTERPRETATION OF CONTRACTS

[12] Mr Shepstone for the appellant submitted that the golden rule in *Coopers supra* was applicable to the interpretation of the clause. Mr de Beer for the respondent disagreed. He submitted that the prevalent approach was that all relevant facts and the circumstances around which the agreement came into being, had to be considered as was adopted in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at 499 F-H and 500 A, per Wallis JA:

"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 ... Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise. Accordingly it is no longer helpful to refer to the earlier approach."

[13] In light of the discussions in *Bothma supra*, the court should engage a unitary process in interpreting what was contemplated by the parties in clause 13. This is to be deduced

from the words in the clause including all relevant circumstances that led to the contract coming into being. The following aspects

were considered by Greyling on the advice of his attorney:

1. that it would be cheaper to buy the shares in the company because that transaction would not attract transfer costs;
2. that the disadvantage to purchasing the farm was that if improved and sold shortly thereafter, that is, at a later stage that such transaction had the potential of attracting capital gains tax which could prove to be costly for him;

3. Greyling heeded the advice to examine the books of the company whose shares he intended purchasing to determine if there were any liabilities, what effect such liabilities if existing would have on the shares he was acquiring and whether such liabilities if existing constituted the reason for the sale. This in particular resulted in the following exchange of correspondence between the attorneys:

A letter from Mr van der Westhuizen of 23 November 2009 to the appellants stated:

"Ons bevestig dat ons dringend 'n finansiete ondersoek moet doen ten einde vas te stel of daar enige betetsets is dat die maatskappy deur ons ktient oorgeneem word. Ons sat dit derhatwe waardeer indien u...batanstate van die maatskappy kan verskaf Ons bevestig dat die Direkteur van Clifton Dunes geen beswaar het dat ons 'n ITC navraag op hul/e name doen nie"

The appellants attorney Mr Erasmus responded on 1 December 2009:

"Ek wil voorstel dat u 'n voorwaarde in die kontrak voeg dat die koop onderhewig is aan lewering van balanstate wat aantoon dat daar geen eise teen die maatskappy is nie. Dan kan koper solank teken en die deposito by u Trust inbetaal"

The agreement was concluded hereafter.

[14] In the disclosures requested in the pre-trial conference for particulars pertaining to the alleged unacceptable risks in the balance sheet, the respondents were asked to identify the items and the amount in the balance sheets and on what basis 'in fact and /or in law the company was at risk to pay a substantial amount of income tax of a capital nature.'

[15] Except for items 2.5 and 2.6 in the particulars provided, the late rendition of unsigned I signed; unaudited I audited balance sheets and, the difference in them did not address the purpose for which clause 13 was introduced."Reasonable

apprehension"

"2.5 The Plaintiffs had reasonable apprehension that no proper accounting records were kept by the company, which could place the company and its directors at risk;

"Capital Gains Tax"

2. 6 The company was at risk to pay substantial tax of a capital nature if the property was to be sold at a future date. 11

[16] According to Mr van der Westhuizen the agreement was cancelled after the balance sheets had been referred by him to an auditor. Therefore according to his evidence, and as I see it, an interpretation of, or, an examination of specific items in the company's books of account and balance sheets were _ C1 source from which the _ inferences of such risk were made. An apprehension should be based on facts. Absent that exercise it would be difficult for the court to determine that the conduct of the respondents in cancelling the agreement was reasonable. Mr Greyling admitted that he had no understanding of accounting procedures, and that he relied solely on Mr van der Westhuizen to give a proper explanation of the

seriousness of the risk involved. It had already been communicated before the agreement was concluded that the balance sheets were required " ten einde vas te stet of daar enige beletsels is... 11 As I see it, it was difficult for Mr van der Westhuizen in his testimony to point out such risks in the balance sheets.

- [17] In considering such concerns, the starting point should have been be that Mr Greyling was advised not to purchase the immovable property in the company because of the transfer costs he would have had to pay. He opted to purchase the shares. It is the intention for which the shares were acquired by the respondents that would create the risk to paying capital gains tax in the future. The risk is not something that one can speculate about. According to Mr Greyling, it was intended to purchase the shares as an investment. It would depend upon how long the shares were going to be retained by the respondents and whether at their disposal the shares were considered to be of a capital nature or as ordinary revenue.
- [18] It was argued by Mr Shepstone that if the concern was that the respondents would be exposed to paying capital gains tax should the company sell the immovable property in the future, as opposed to them selling the shares then the risk ', was a contingent or prospective risk which was not present at all when the agreement was concluded and which prospective risk did not impact upon the transaction which was concluded by the parties. I am in agreement with this view.

What was disclosed in the balance sheet was the base cost of the immovable property when it was acquired by the company. There was no suggestion that there was something untoward in such base cost which would have affected the transaction

- [19] Whichever way one looks at it, the respondents had to prove on a balance of probabilities that their concerns were based on what was contemplated by the parties when the transaction was concluded and in such a manner as to give meaning and understanding to the wording in clause 13. The respondents did not have a discretion without a proper basis to cancel the agreement without illustrating why they bona fide believed the transaction was at risk and in respect of which items in the balance sheets. The appeal should therefore succeed for these

reasons.

- [20] In the result the following order is given

1. The appeal is upheld with costs.
2. The judgment and order of the court a quo is set aside and replaced by the following order:
2.1 The Plaintiff's claim is dismissed with costs.

TLHAPI V V

(JUDGE OF THE HIGH COURT)

I agree,

KHUMALO N V

(ACTING JUDGE OF THE HIGH COURT)

MATTER HEARD ON : 12 NOVEMBER 2014

JUDGMENT RESERVED : 12 NOVEMBER 2014

ATTORNEYS FOR THE APPELLANTS : PULE INCORPORATED

ATTORNEYS FOR THE RESPONDENTS : JASPER VAN DER WESTHUIZEN & BODENSTEIN INC

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