

SOUTH AFRICA / JUDGMENT

Remote Construction Group (Pty) Ltd and Others v Sheridan N.O and Others (11170/09)

[2010] ZAKZPHC 93 (28 April 2010)

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COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Steyn

CASE / FILE NUMBER

11170/09

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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No: 11170/09

In the matter between

Remote Construction Group (Pty) LtdFirst Applicant

Rees, David N.O.Second Applicant

Rees, Lorna Dianne N.O.Third Applicant

Van Dongen, William N.O.Fourth Applicant

versus

Wilson, Brian Robert Sheridan N.O.First Respondent

Wilson, Brian Robert Sheridan N.O.Second Respondent

Wilson, Brian Robert Sheridan N.O.Third Respondent

Squirewood Investments 50 (Pty) LtdFourth Respondent

Generation Leisure Ownership (Pty) LtdFifth Respondent

June Margaret Wilson N.O.Sixth Respondent

Brian WilsonSeventh Respondent

David ReesEight Respondent

JUDGMENT

Delivered on: 28 April 2010

STEYN J

[1] The applicants seek an order for the following relief:

“2. Declaring that the agreement for the sale of shares and loan accounts concluded between the BRS Wilson Family Trust, the Sukses Trust, the first respondent, the David Rees Family Trust, the fourth respondent and the first applicant in terms of:

the memorandum of understanding (“MOU”) signed on or about 31 July 2009, which is annexure “LB3” to the founding affidavit; and

the implementation of the MOU as contained in the agreement which is annexure “LB4” to the founding affidavit (“hereinafter referred to as “the agreement”),

is valid and binding on the parties.

Directing the first respondent, the BRS Wilson Family Trust and the Sukses Trust to comply with their obligations in terms of the agreement, and, in particular, that the first respondent (in his personal capacity and/or on behalf of the BRS Wilson Family Trust and the Sukses Trust);

sign the necessary transfer forms to enable transfer of the shares in the fourth respondent to be registered in the name of the fifth respondent as the nominee of the first applicant;

provide written cession of the first respondent’s, the Wilson Trust’s and the Sukses Trust’s loan accounts against the fourth respondent;

sign the resolution by the directors of the fourth respondent approving the transfer of the shares in the fourth respondent into the name of the fifth respondent as the nominee of the first applicant;

furnish his written resignation (in his capacity as representative of the BRS Wilson Family Trust and the Sukses Trust) as a director of the fourth respondent;

sign offers to purchase on behalf of the Sukses Trust, to be held by the first applicant’s attorneys, on terms satisfactory to the first applicant, to pass transfer from the Sukses Trust to the first applicant of the traversing farms, as defined.

In the event of the first respondent, the BRS Wilson Family Trust and the Sukses Trust failing to comply with their obligations in terms of the agreement within 30 days from the date of this order, the Sheriff or his duly authorised deputy is authorised and directed to take such steps on behalf of the first respondent, the BRS Wilson Family Trust and the Sukses Trust as may be necessary in order to give effect to the order in prayer 3 above.”

- [2] The application is opposed by the first, second and third respondents inter alia on the basis that neither the Memorandum of Understanding (hereinafter referred to as 'MOU') nor the document contained per annexure LB4 constitute a valid agreement, binding on all the parties.
- [3] I do not consider it necessary to deal with the share certificate in this judgment since Mr Miltz has also stated in response to a question why the share certificate was never signed by the directors of the company:

"[A] section 115 application was threatened and on the last occasion we told the respondent, our learned counterpart, that there would be no need to bring that application but in our view the auditors had incorrectly transferred the shares without the necessary paperwork, and that they would be instructed to restore the status quo until after the hearing of the application."

Mr Miltz has also given an undertaking on behalf of the applicant that it will properly reflect the Wilson Family Trust as the owner of these shares until such time as the order sought, in relation to the shares, is granted.

[4] Parties

The First applicant is Remote Construction Group (Pty) Ltd ("RCG"), this group was also appointed as the project manager for the installation of services for the development of Dunblane Eco and Golf Estate ("Dunblane Estate"), which is the development to which the present application applies. RCG or its nominee is also defined in "LB4" as the purchaser of the shares and loan accounts of the BRS Wilson Family Trust. ("the Wilson Trust") and the loan accounts of the Sukses Trust in the Fourth respondent Squirewood Investments 50 (Pty) Ltd ("the company"). The shares and loan accounts in the company are the subject of the alleged agreement and the trigger to this application. In light of the issues in dispute, applicants' have to prove the existence of a valid agreement between all the parties.

On 26 February when the application was argued, Mr Miltz SC, acting on behalf of applicants asked that Mrs Wilson, her being a trustee of the Wilson trust, be joined as the Sixth Respondent and Brian Wilson as the Seventh Respondent and David Rees as the Eighth Respondent. After an exchange of papers, which was not originally filed by the applicants, Mr Kemack SC acting on behalf of First, Second and Third respondents, no longer objected to the intended joinder of the aforementioned respondents. The joinder of Sixth to Eighth Respondent was hereafter permitted and the parties proceeded in arguing the case.

- [5] The crisp issue to decide in this case is whether MOU1 agreed upon by Brian Wilson, David Rees and Remote Construction Group, signed however by not three but four parties ex facie the document, constitutes a binding contract when read with LB4. Applicants' aver that the document MOU – coupled with the agreement to implement MOU ("LB4") together constitute not only a valid but an enforceable agreement. Applicants' were also of the view that respondents' could not withdraw LB4, since it was no longer an offer, and the parties to the agreement had already performed in terms of their respective obligations. Throughout it

has been argued by the applicants that LB4 is merely a document that recorded the subsidiary terms of the relationship between the parties, and hence LB4 constitutes a mere recordal of the parties' earlier agreement.

Respondents, on the other hand, however, submit that neither MOU nor LB4, constitute a valid agreement for a number of reasons, which will be dealt with later in this judgment.

- [6] Respondents argued that no option could have existed before signature of LB4 by all parties. It is evident that LB4 was not signed by the fourth respondent and, so it was argued, the first applicant never obtained an enforceable right to purchase the traversing farms as described in terms of clause 15 of LB4. Clause 15 of LB4 deals with:

"15. Option to purchase

15.1 The Sellers shall sign an Offer to Purchase agreement, to be held by the Attorneys for the Purchaser, on terms satisfactory to the Purchaser of the following Properties (the "Traversing Farms"):"

Furthermore since the offer of the five year option to purchase the property was withdrawn before the signature date, no five year option came into existence, and no option could have been accepted or exercised.

- [7] In order to decide upon the issues raised it is important to consider the content of MOU and analyse it against the general principles and norms of the law of contract.
- [8] In oral submissions, Mr Miltz forcefully argued that the purpose of the agreement between the parties was clear, the terms of the agreement were clear and embodied in the written document, which was signed by the parties. In his view nothing more could have been required to constitute a valid agreement. In my view this submission is problematic for the following reasons:
- (i) MOU was a Memorandum of Understanding between RCG, Brian Wilson and David Rees, i.e. 'the parties';

(ii) LB4 defines all the parties as set out in clause 1, and clause 1 lists the parties to the agreement as:

BRS Wilson Family Trust;

Sukses Trust;

Brain Robert Sheridan Wilson;

David Rees Family Trust;

Squirewood Investments 50 (Pty) Ltd; and

Remote Construction Group or nominee.

It is significant that the Wilson Family Trust was not a party to MOU. MOU was an agreement to agree between RCG, Brian Wilson and David Rees. Secondly, Brian Wilson signed as a party duly authorised by the Sukses Trust, leaving aside whether he had any authority to sign on behalf of the Sukses Trust, MOU was intended to be an intended agreement between the parties RCG, Brian Wilson and David Rees. Thirdly, MOU was never signed by BRS Wilson Trust and Squirewood as parties. As referred to earlier, LB4 includes Sukses Trust, Brian Wilson Trust and Squirewood as parties. In my view LB4, without analysing the obligations contained in the document, could never have constituted a mere recordal of MOU.

- [9] Before acceptance could have taken place in the manner prescribed in MOU, a further written contract between the parties was needed. If LB4 is supposed to be that further agreement then the parties should have been the same as those stipulated in MOU. In addition if tacit acceptance is to be relied upon, then such tacit acceptance should have been stated in the papers.

I have carefully considered the content of the papers filed and no allegation to a tacit acceptance of the offer was ever made.

- [10] What remains is whether there was any oral or tacit acceptance by the first applicant and the fourth respondent, of the terms as set out in LB4.

- [11] As to tacit contracts in general, in *Standard Bank SA Ltd v Ocean Commodities Inc*,² it was stated:

*“In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended, to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem. (See generally Festus v Worcester Municipality, 1945 CPD 186 at 192 -3; City of Cape Town v Abelsohn’s Estate, 1947 (3) SA 315 (C) at page 327-8; Parsons v Langemann and Others, 1948 (4) SA 258 (C) at 263; Bremer Meulens (Edms) Bpk v Floros and Another, a decision of this Court reported only in Prentice Hall, 1966 (1) A36; Blaikie-Johnstone v Holliman, 1971 (4) SA 108 (D) at 119 B-E; Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd, 1979 (3) SA 267 (W) at 281 E-F; Muhlmann v Muhlmann, 1981 (4) SA 632 (W) at 635 B-D.L)”*³

The correctness of this general formulation has nevertheless been questioned by the Court in *Malamed and Another v Cleveland Estate Malamed and Another*.⁴ 5 More recently the SCA in *Transman (Pty) Ltd v Dick*⁶ held that the ordinary test for determining whether a tacit term exists remain the bystander test, and hence it is incumbent on a party to prove facts from which it could be inferred. In my view applicants failed to stipulate this on paper and there could be no basis for relying on a tacit term or contract.

- [12] In *Du Plessis NO and Another v Goldco Motor and Cycle Supplies (Pty) Ltd*⁷ the majority of the Supreme Court of Appeal re-affirmed what was stated by Corbett JA in *Johnston v Leal*:⁸

“The material terms of the contract are not confined to those prescribing the essentialia of a contract of sale, viz the parties to the contract, the merx and the pretium, but include, in addition, all other material termsIt is not easy to define what constitutes a material term.” (at 937 (H)).

[13] Option

This principle is put into context by the eminent scholar Professor Christie:

“To understand the true nature of an option it is best to analyse it into two parts – an offer to enter into the main contract together with a concluded subsidiary contract (the contract of option) binding the offeror to keep that offer open for a certain period. On this analysis it is easy to see that the offeror is contractually bound to keep his offer open, and if he breaks this contract of option by disabling himself from performing it or by expressly or impliedly repudiating it he will be liable for damages for breach of contract.”⁹

[14] It has been argued that LB4 the ‘agreement’ for the sale of shares and loan accounts, is a document incorporating a sale agreement and an option to purchase certain farms and stipulates that both the applicant and the fourth respondent are “parties to this agreement”. LB4 also defines the First, second and third respondents as “the sellers” and the first applicant as the “purchaser.”

[15] The factual background that emerges from the founding and answering affidavit is that on 26 November 2009, one day before the first applicant signed LB4 the first, second and third respondents’ legal representative, Mr W Steyn, delivered a letter to the applicants (1-4) stating:

“[T]he agreement as signed by our clients and Squirewood, but unsigned by you, constitutes an offer by our clients and Squirewood to contract with you and David Rees Family Trust on the terms and conditions therein set out Our clients herewith withdraw the offer to contract with the other parties on the terms and conditions set out in the agreement.”¹⁰ (My emphasis).

LB4 was signed by the first applicant duly on 27 November 2009, a day after the withdrawal of the offer.

[16] MOU inter alia provides for:

“The parties have agreed internally in order for Dunblane estate to progress and to meet the banks and new investors expectations the company Squirewood will be restructured and Brian Wilson hereby elects to sell his 75% shareholding in Squirewood and enter a sale agreement pertaining to the farms in the Dunblane OTP.

In order to facilitate the transaction and secure the necessary investment and understandings from the bank/investors the following is hereby agreed:”

LB4 provides for a purchase price, the payment of the loan accounts and some suspensive conditions. The suspensive conditions are contained in clause 8 and I shall list them since they require closer scrutiny:

“8.1 This Agreement, save for the provisions of this clause 8, clauses 11, 16, 17, 22, 23 and 24 which shall be of immediate force and effect, is subject to the following suspensive conditions:-

The Purchaser shall obtain written confirmation from the Bank before the Effective Date that it shall, on terms and conditions acceptable to the Bank and to the Purchaser: -

Release the Company from its obligation of immediate payment of the current loan for a period of 2 (Two) years;

Grant bridging finance to the Company to meet the current liabilities of the Company until the Investor's funding is provided;

Release Brian of his personal suretyship as surety and co-principal debtor to the Bank, on terms and conditions as prescribed by the Bank in its absolute discretion.

8.1(sic) The Parties shall use their best endeavours to procure the fulfilment of the suspensive conditions in clause 8.1 timeously.

8.2(sic) Unless the suspensive conditions in clause 8.1 are fulfilled of (sic) waived on or before 30 September 2009 or such extended period as determined by the Purchaser and the Bank from time to time, this Agreement, save for the provisions of clauses 11, 16, 17, 22, 23, 24 shall lapse and cease to be of any force or effect.”

What follows thereafter in the document is various undertakings and obligations that aim at a successful establishment of the envisaged Dunblane estate.

[17] In terms of clause 6.2 of LB4, the:

“[P]urchase price for the loan accounts of the Wilson Trust, the Sukses Trust and Brian Wilson shall be determined and audited by the Auditor and thereafter adjusted, having regard to the Auditor's report and the requirements of the Bank, and is subject to final agreement by the Purchaser and/or the Investor, within 45 days of receipt by the Company of any money from the Investor.”

This clause indeed does not comply with the common law principle that the purchase price should be fixed or determinable.¹¹

[18] In *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd*¹² Colman J stated the basic rule on a price that should be paid as follows:

“[T]here can be no valid contract of sale unless the parties have agreed expressly or by implication, upon a purchase price. There must either fix the amount of that price in their contract or agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them.”^{13 14}

[19] Mr Miltz relied on *Southernport Development (Pty) Ltd v Transnet Ltd*¹⁵ to counter the submissions of respondents that should there be an agreement then the indivisible sale of shares and loan accounts is void because the price is not fixed nor ascertainable. In his opinion the so called vague terms as suggested by the respondents are capable of agreement

between the parties. In my view the case of Southernport is distinguishable from the present application. The parties in this application did not contractually undertake to negotiate in good faith.

[20] It is doubtful, leaving aside the provisions of the Alienation of Land Act¹⁶ that the option in clause 14 of LB4 would get past the basic validity requirement of being an offer in writing for sale. LB4 does not state a price for the farms nor does it stipulate how the exact price would be determined.

I am persuaded by the submissions made by Mr Kemack SC that no option could have come into existence, unless all the parties have signed LB4.

I am satisfied that the respondents were entitled to withdraw the offer, and since the withdrawal took place before LB4 was signed no 'five year option' to purchase could have come into existence and henceforth no acceptance of any offer could follow.

[21] The respondents have persuaded me that the option agreement should have complied comply with the Alienation of Land Act, more specifically section 2(1).

[22] No valid agreement came into existence on terms necessary for the existence of a valid contract. I am not persuaded that the respondents repudiated from an existing contract, since the offer to contract had been withdrawn and consequently no contract had come into existence.

[23] In light of the aforementioned conclusions, applicants are not entitled to mandatory relief because there is no valid contract that binds the parties. In my view neither MOU nor annexure LB4 constitute a valid enforceable agreement.

[24] Accordingly the following order is made:

The application is dismissed with costs, including the costs of two counsel.

SIGNED BY JUDGE STEYN

Steyn, J

Date of Hearing: 26 February 2010

Date of Judgment: 28 April 2010

Counsel for the applicants: Adv Miltz SC with

Adv Bitter

Instructed by: Hall & Associates Inc.

c/o Austen Smith Attorneys

Counsel for the respondents: Adv Kemack SC with

Adv Flemming

Instructed by: Steenkamp Weakley Ngwane

¹See Annexure LBN 3 page 69 of papers.

² 1983

(1) SA 276 (AD).

³At page 292 B-C.

⁴[1984] ZASCA 4; 1984

(3) SA 155 (A).

⁵Also see Christie ‘The Law of Contract in South Africa’, pages 58-61; *Plumb v Mazista Ltd*, 1981 (3) SA 152 (A) at pages 163-4; *Spes Bona Bank v Portals Water Treatment*, 1983 (1) SA 978 (A) at page 981A-D.

⁵Also see Christie ‘The Law of Contract in South Africa’, pages 58-61; *Plumb v*

Mazista Ltd, 1981 (3) SA 152 (A) at pages 163-4; *Spes Bona Bank v Portals Water Treatment*, 1983 (1) SA 978 (A) at page 981A-D.

⁶ 2009

(4) SA 22 (SCA).

⁷ 2009

(6) SA 617 (SCA).

⁸ 1980

(3) SA 927 (A).

⁸

1980

(3) SA 927 (A).

⁹See R H Christie op cit at 54.

¹⁰See pages 131-132.

¹¹See Burroughs op cit at 670C-D.

¹² 1964

(1) SA 669 (W).

¹³Also see the discussion by Kerr ‘The Law of Sale and Lease’ Butterworths (1984) at 24 et seq.

13Also see the discussion by Kerr ‘The Law of Sale and Lease’ Butterworths

(1984) at 24 et seq.

14At 670 C-D.

15 2005

(2) SA 202 (SCA).

16Act No. 68 of 1981.

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