

SOUTH AFRICA / JUDGMENT

Visagie NO v MTN Group Ltd (2012/7302) [2013] ZAGPJHC 271 (31 October 2013)

[2013] ZAGPJHC 271

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

2012/7302

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION JOHANNESBURG

CASE NO: 2012/7302

In the matter between

ERIKA VISAGIE NO Plaintiff and MTN GROUP LTD Defendant

Contract - claim for specific performance - interpretation of clause in agreement of retrenchment of employee - contract - basic principles of - wording of clause considered – possible uncertainty as to meaning as it stands - evidence aliunde examined

- interpretation proposed by plaintiff unsustainable - plaintiff's claim dismissed with costs.

J U D G M E N T

VAN OOSTEN J:

- [1] At issue in this case is the proper interpretation of a sub-clause in a written retrenchment agreement (the agreement). The salient facts of the matter are these: Mr Hans Visagie, who had been in the employ of the defendant (MTN) for some nine years, was retrenched on and as at 30 April 2004, 'on special grounds of operational reasons'. The terms and conditions of the retrenchment were embodied in the agreement concluded between him and two representatives of MTN. The agreement provides for and records inter alia the financial benefits Mr Visagie was and would be entitled to upon retrenchment. Those include the payment to him by MTN of firstly, notice period payment for the month of May 2004, 18 weeks' severance pay in respect of 19 years of service and annual leave days not taken up. Then follows the contentious clause in the agreement which deals with firstly, the MTN Staff

Incentive Trust and secondly, Mr Visagie's '100% share option with the Newshelf shares'. I will revert to the exact wording of the terms thereof in due course.

- [2] Mr Visagie died on 12 June 2011 and his wife was duly appointed as the executor in the deceased estate. In that capacity she instituted action against the MTN for payment of R10 807 489,15 interest thereon and costs of suit on the attorney and client scale. The plaintiff's claim is for specific performance of the contentious sub-clause of the agreement, in effect, on the plaintiff's interpretation thereof, for the value of 135 000 MTN shares held and owned by Newshelf 664 (Pty) Ltd (Newshelf) for the trust known as the Alpine Trust (the trust). An alternative claim 'in the event that the Honourable Court should find that the defendant has not breached the agreement' based on alleged false representations by MTN although persisted with at the trial, was neither proved nor does it, in the view I take of the matter, require further consideration. MTN's defence is based on its interpretation of the clause which if correct, would negate the plaintiff's claim. It is common cause that the deceased was paid in full the true benefit he was entitled to as recorded in the sub-clause. For a better understanding of the issues I am required to determine it is necessary to firstly, quote the sub-clauses and then to consider them against the background facts of the matter which are common cause in order to arrive at a proper interpretation thereof.
- [3] The trite basic principles of interpretation in ascertaining the meaning of a contract are that the words or phrases used must be considered in context of the contract as a whole and where any doubt exists as to the true meaning thereof, evidence concerning the background circumstances is permissible (see *Engelbrecht and another NNO v Senwes Ltd* 2007 (3) SA 29 (SCA) para [7]). Clause 3 of the agreement reads as follows:
- '3. MTN shall make payment in respect of the following amounts to the employee on the above date:
- 3.1 The employee's normal monthly remuneration for the 30 days' notice period from 01 May 2004 to 31 May 2004 less the usual and normal deductions in respect of Tax, Unemployment Insurance Fund, Provident and Medical Fund Contributions and the like.
- 3.2 The employee's severance pay which amounts to two weeks pay for every completed year of service with the company. It is recorded that the employee has had nine years of service with MTN which translates to 18 weeks of severance pay.
- 3.3 The employee's annual leave days due to the employee but not taken up to the date of termination of services.

3.4 In addition to (sic) the employee's debentures subject to rules that are contained in the MTN Staff Incentive Trust document at the date of retrenchment will apply. The rules of the scheme governing this situation as at February 2001 are reflected below, however, it should be noted that these may change from time to time in accordance with the Governance Procedures contained within the Trust Deed.

- [3.4.1] The debentures should convert into M-Cell shares within a 30 day period from termination of employment.
- [3.4.2] The security debt (loan) that the employee has from the Trust will bear interest from date of termination of employment until the loan has been settled in full by the employee which needs to take place within 180 days from the date from which employment was terminated.
- [3.4.3] Delivery of shares to the employee will only take place once the security debt (loan) has been settled in full.
- [3.4.4] Should the scenario arise where the security debt (loan) is greater than the value of the shares, then the employee may be liable to settle this difference.
- [3.4.5] Should, for whatever reason, the swap into M-Cell shares not be possible, then the Trustees will purchase the MTN Holding Exchange shares from the employees at the then relevant market rate and pay the net proceeds (after settling the security debt loan) to the (sic) within 60 days of date of termination of employment.
- [3.4.6] It is further recorded that Mr Visagie will get his 100% share option with the Newshelf shares which the date of signing of this agreement were 135 000 shares. These shares will only vest upon the holder once the 6 year period has lapsed.'

[Sub-clause numbering 3.4.1 – 3.4.6 added to bullet points for ease of reference]

- [4] Clause 3.4.6 is anything but a model of clarity. But, if read and considered as against the background facts, to which I shall presently refer, the meaning thereof becomes apparent. The trust was established and registered on 15 July 2003. Its objective was to achieve certain empowerment objectives to the benefit of historically disadvantaged persons. The initial beneficiaries were full-time employees of MTN as at July 2003 with commencement date 1 January 2003. It existed and acted independently from MTN. The trust acquired and held all the issued share capital in Newshelf, which in turn initially acquired 309 million MTN shares at the end of 2002 beginning of 2003, at the prevailing market price at the time which was approximately, R13,98 per share. The trust accordingly, as the owner of 100% shareholding in Newshelf, became entitled to the nett value of the shares, in other words after deduction of the purchase cost of the shares and related finance costs and expenditures. The trust would run for a period of 6 years and upon termination payment of the nett benefit to beneficiaries would occur (the distribution event). The beneficiaries

of the trust were those persons who had been allocated a participation ratio in the trust which is defined in the trust deed as the beneficiary's interest or potential interest in the net assets of the trust expressed as a percentage to four decimal points arrived at by dividing such beneficiary's interest by the total interests or potential interests of all other beneficiaries. The participation ratio was eventually used at the distribution event as the basis for calculating the benefit each beneficiary was entitled to. The participating beneficiaries were not required to, nor did they pay for their participation ratio in the trust. The full allocated participation ratio benefit as at the distribution event was payable only if the beneficiary had been in employment of MTN for the full 6 years duration of the trust. In respect of beneficiaries who had been in MTN's employment for less than the full 6 years, benefits vested at an annual percentage rate (calculated at 16,6666% for each completed 12 month period of employment during the 6 year life of the trust). To this provision certain exceptions applied, one of which is relevant for present purposes: retrenched employees were entitled to 100% of their benefit notwithstanding having served less than 6 years in the employment of MTN.

[5] In February 2003 Mr Visagie (the deceased) in a letter from the trust containing all information, was invited to become a participant of and beneficiary in the trust. The deceased accepted the invitation which was followed by a formal letter by the trust, dated 30 July 2003, confirming the allocation to the deceased of a participation ratio of 0.043762% and informing him that 'the participation ratio is intended to convey the percentage interest which you will hold in the nett assets, if any, of the trust from time to time' which 'would be made up by the amount by which the value of the assets of Newshelf may exceed its liabilities'. In addition the deceased was furnished with a leaflet styled 'Presentation to Beneficiaries' containing all relevant information concerning the trust, its objectives, operation and benefits. The deceased was retrenched just more than 16 months after the commencement date of the trust, which but for the exception referred to, would have entitled him to 16.6666% participation ratio. The agreement, in clause 1 thereof, records the termination of the deceased's employment on 'special grounds of operational reasons' which brought him squarely within the retrenchment exception, entitling him to 100% of his participation ratio. After the distribution event and on 27 February 2009 the deceased was paid the sum of R1 374 589,68,

being 100% of his participation ratio in the trust.

[6] The deceased after payment had been made, expressed his dissatisfaction therewith and in a number of emails to the trust advanced his perception of his entitlement to benefits. In summary he was of the view that he was not only entitled to payment of his participation ratio but also, and in addition thereto, '135 000 shares allocated to me as part of my retrenchment'. The reference is clearly to the agreement. MTN in their response informed the deceased as follows:

'According to our records, you were allocated a participation ratio of 0.043762% in 2003, of which you retained the entire amount as part of your retrenchment package. The original letters distributed gave an approximation of how many MTN shares your participation ratio equated to.

However, your participation ratio represents your share in the net asset value of the Alpine Trust, not shares in MTN. It is therefore not possible to equate your participation ratio to shares any longer because while Newshelf 664 still owns MTN shares, it also has a complex financing structure (finance which was used to buy those shares).'

The deceased's view concerning his entitlement to the benefits lies at the heart of the plaintiff's case and is in effect what the plaintiff is claiming in this action.

[7] The plaintiff was the only witness called to testify. The defendant closed its case without calling any witnesses. I am constrained to adversely comment on the evidence that was led. The plaintiff was obviously not a party to the agreement. Nor did she, apart from what her husband had related to her, have any personal knowledge of the events relevant to the adjudication of this matter. Counsel for the plaintiff, however, laboriously dragged her through the email correspondence between the deceased and the trust most of which, if not all, was not only unnecessary but also irrelevant. But counsel for the plaintiff had another string to his bow. Concerning the plaintiff's testimony that she was unaware of a trust with the name MTN Staff Incentive Trust, which is referred to in clause 3.4 of the agreement, counsel bolstered his argument in advancing the startling proposition that this court also in the absence of evidence by the defendant to the contrary should find as a fact that no such entity existed. The mere

mention of the proposition warrants its outright rejection.

[8] At the heart of the plaintiff's proposed interpretation of clause 3.4.6 lies the submission advanced by counsel for the plaintiff that the entity MTN Staff Incentive Trust (the MTN trust) did not exist and that clauses 3.4.1 to 3.4.5 are therefore of application to the Alpine trust and not the MTN trust as specifically mentioned. In support of the submission counsel sought to have discovered by way of some artificial reasoning, that this indeed was admitted on the pleadings. The argument is fallacious and falls to be rejected. The agreement, where mention is made of the MTN Staff Incentive Trust, is clear and no ambiguity exists. There is no prayer for rectification of the agreement so as to allow for a departure from its express wording. Clauses 3.4.1 to 3.4.5 of the agreement are clearly of application to the MTN trust only and cannot in any way be reconciled with the Alpine trust if regard is had to the provisions of the Alpine trust deed. For one, the date referred to in clause 3.4 was long before the establishment of the Alpine trust. The reference to '100% share option', 'Newshelf shares', and the 6 year period in the clause explicitly and neatly fit into the provisions of the Alpine trust deed. And, finally one searches in vain for a reference

to debentures and a conversion thereof into M-cell shares (clause 3.4.1) in the Alpine trust deed. The edifice on which the plaintiff's

proposed interpretation was advanced accordingly crumbles into oblivion.

[9] As correctly pointed out by counsel for the defendant the wording of clause 3.4.6, considered against the background facts I have already alluded to, makes it clear that it is nothing more than a recordal of a factual position which is the deceased's entitlement to the benefit in accordance with his participation ratio in the trust, which as I have mentioned, was paid in full to him. Even the acceptance that clause 3.4.6 does not correctly record the benefit to which the deceased was entitled, as was submitted by counsel for the plaintiff, does not support plaintiff's proposed interpretation. An incorrect recordal does not create a contractual obligation. The wording of clause 3.4.6 is plainly not susceptible to any other interpretation. On the plaintiff's proposed interpretation of the clause the deceased would have been entitled not only to his participation ratio

but in addition thereto the gross value of 135 000 shares 'at the time of payment to the deceased' and then notably, and inexplicably, less the payment he had already received. Counsel for the plaintiff experienced considerable difficulty in identifying

which shares the prayers in the summons relate to. No basis for the claim for payment exists. Lastly, it is hardly conceivable as business-like or probable that a large commercial entity such as MTN, would record a contractual undertaking or obligation of the magnitude and complexity as the plaintiff would have it, by way of a recordal in a sub-paragraph in the agreement and then in the most inexact terminology. The round peg simply does not fit into the square hole. Finally, the possibility of MTN performing in accordance with the plaintiff's proposed interpretation of the clause is plainly at odds and irreconcilable with any of the provisions of the Alpine trust deed. The arguments advanced in support of the plaintiff's contentions are so far-fetched and legally untenable that they require no further consideration. For these reasons the plaintiff's claim was misconceived right from the outset and it is accordingly doomed to failure.

[10] Finally, and leaving aside the merits of this case, I consider it prudent to add one comment by way of a compliment. Counsel for the defendant in cross-examining the plaintiff, patiently and painstakingly referred her to and dutifully, in her mother tongue, explained to her the contents, meaning and effect of the relevant documents in an attempt to help her understand the true legal position concerning her claim, which quite obviously she was not aware of. In doing so, counsel ventured beyond his official duty of presenting and advancing the defendant's case to this court. I carefully observed the plaintiff while she testified in the witness stand where she was unwittingly required to enter the world of legal intricacies. As the cross-examination progressed some enlightenment as to the true legal position concerning her claim became quite apparent. This counsel has done upholding the best tradition of the Bar for which he is to be commended.

[11] In the result I make the following order:

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the costs of the action.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF ADV AR VAN DER MERWE

PLAINTIFF'S ATTORNEYS ZOUTEDYK ATTORNEYS

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ATTORNEYS FOR DEFENDANT MATHESONS ATTORNEYS

DATES OF HEARING 29 & 30 OCTOBER 2013

DATE OF JUDGMENT 31 OCTOBER 2013

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