IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG)

JOHANNESBURG

CASE NO: 31309/10

DATE: 2010-11-18

REP0RTABLE

(IN ELECTRONIC REPORTS ONLY)

In the matter between

WAZ PROPS (PTY) LIMITED	1st Applicant
WERLEX PROPERTIES (PTY) LIMITED	2nd Applicant
and	
SENTINEL MINING INDUSTRY RETIREMENT FUND	1st Respondent
FLUXMANS ATTORNEYS INC	2nd Respondent

J U D G M E N T

WILLIS, J:

1. The applicants have approached the Court by way of

motion proceedings seeking an order for the payment of R207 810.25 together with interest and costs. The first applicant is the registered owner of certain properties in the Elton Guild area in Johannesburg. It applied to the Local Authority to receive permission to rezone the properties for the development of a sectional title complex. The first respondent, as the owner of the Melrose Arch development, which was planning to upgrade Park Road, Birnam, near to these properties, lodged an objection to the first applicant's rezoning application.

2. The matter was settled, and an agreement concluded between the parties. The relevant clauses of this agreement read as follows:

> "3. The owner (Waz Props (Pty) Limited), the first applicant, agrees and undertakes to effect payment of its pro rata share of the Park Road upgrading project, the total cost in an amount of R115 531.87.
>
> 4. Method of payment. The owner will secure its obligations in terms of this agreement in either of the following manners:
>
> 4.1 the owner shall within seven days of signature hereto, either:-
>
> 4.1.1 effect payment by way of a bank transfer, which the owner undertakes to effect directly into the account of the attorneys, Nedbank, Rosebank branch, branch code 195805,

account number 1958506060, Northrand business branch, branch code 18905, account number 1489095596, which attorneys are hereby authorised to invest such sum in an interest-bearing account with a registered bank or financial institution in terms of section 78(2)(a) of the Attorneys Act, 52 of 1978. The said account will be in the name of Fluxmans Inc, with a reference to the aforesaid section of the Attorneys Act, but will be identified with the name 'Park Road Upgrading Project', and the interest earned thereon will accrue for the benefit of the Park Road Upgrading Project; alternatively:

4.1.2 secure payment by way of a registered bank or financial institution guarantee substantially similar to the draft guarantee annexed as annexure B."

3. In other words, the first applicant had a choice. It could either advance the funds directly into the bank account of the first

respondent's attorney, or it could secure payment by way of a bank guarantee. It needs to be noted, in passing, that of course a bank guarantee is not money, and this may well explain why the choice is as it is. In other words, it may have made sense for the first applicant to have paid the money directly into the trust account of the attorneys rather than to have incurred the costs of a bank guarantee. Nothing more needs to be said in this regard.

4. The agreement also provided, after 4.1.2:

"or

4.2 The owner:-

4.2.1 agrees to register the following restrictive condition against the title deed of the property, imposed by and in favour of SMIRF."

"SMIRF" is obviously an abbreviation for the Sentinel Mining Institute Retirement Fund. It is common cause that such restrictive condition was not registered.

5. Clause 5 of the agreement provides as follows:

"Non-completion of the Park Road Upgrading Project.

5.1 In the event of the Park Road Upgrading Project is not completed by 1 April 2009, then and in such event, the interest-bearing account referred to in 4.1.1 shall be closed, and the amount referred to in 3, together with the owner's pro rata share of the interest thereon, (less any administration charges) shall be refunded to the owner.

5.2 Upon the happening of the event referred to in 5.1 SMIRF undertakes, at its cost and expense, to procure the cancellation of the caveat referred to in 4.2.1."

6. 4.2.1 refers to the restrictive condition, which, as I have said, is common cause was not registered and has fallen away. It is common cause that the Park Road Upgrading Project was not completed by 1 April 2009.

7. The first applicant arranged for a guarantee to be issued. The guarantee was issued by ABSA Bank, acting on behalf of the second applicant. A completion certificate, certifying that the upgrade project had been completed on 15 February 2010 was issued on 22 February 2010, some 10 months after the date stipulated in the agreement. The first respondent then called up the guarantee from ABSA Bank on 6 April 2009, and ABSA Bank paid in terms of that guarantee as it was required to do. It paid the amount of R207 810.35, being the sum referred to in the agreement of R115 531.08 given, together with interest. Notwithstanding demand, the first respondent has failed to repay the amount claimed by the applicant.

8. The case of the applicant is that it was necessarily a tacit term, if one reads the agreement as a whole, that if the Park Road Upgrading Project was not completed by 1 April 2009, the first respondent would not call up the guarantee. The reasoning is that if the first applicant had paid cash, that would have been refunded by reason of the fact that the project was completed well after 1 April 2009. It makes no sense whatsoever that the first respondent should still be

entitled to call up the guarantee.

9. I am mindful of the fact that a Court must be very slow to imply a term in a contract which is not found there. See *Union Government (Minister of Railways) v Faux Limited*, 1916 AD 105 at 115. It seems to me to be clear that this case stands or falls by the so-called "of course" test. In fact, if I understood counsel for the parties correctly, they both agreed that it stands or falls by the "of course" test. Of course, counsel for the applicant says that the "of course" test operates in its favour, and counsel for the respondents contended that it operates in their favour. I have in mind the well-known quote from *Shirlaw v Southern Foundries (1926) Ltd,* [1939] 2 KB 206 at 227, where the following sentiments were expressed:

> "If an officious bystander suggested some express provision in the agreement, the parties would testily suppress them with a common, 'Oh, of course', and if asked at the time the contract was negotiated what will happen if such a situation, both would have responded, 'Of course so-and-so will happen. We did not trouble to say that, it is too clear'."

Similar views were expressed in the well-known case of *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 1368 to 1373.

10. To my mind, if one was to ask an innocent bystander whether it must have been intended by the parties that if the Park Road Upgrading Project was not completed by 1 April 2009 and if the first applicant paid a sum of money into an interest-bearing trust account and had been repaid, would it have been their intention that the first

respondent would not call up the guarantee issued instead? To my mind the answer to this question has to be, “Of course”. Accordingly, it seems to me that the applicants have to succeed.

11. It is common cause that there should be no costs order against the second respondents, who were the attorneys responsible for the drawing up of the agreement. I entirely agree with this sentiment. I also do not agree that costs should be awarded on an attorney and client scale, although my answer to the, “Of course” question is, “Yes, of course". It cannot be said that there was an "unarguable case”. I do not see why the first respondent should be penalised by attorney and client costs.

12. The only aspect that I need to clarify before making my final order is who gets the money? Is it the first applicant or the second applicant? After some debate with counsel it was agreed that if I am to order a payment of money, it is appropriate that the payment of money should be made to the second applicant, because the guarantee was issued on behalf of the second applicant, by ABSA Bank, and it is the second applicant’s bank account that has been depleted.

13. Accordingly, the following order is made:

The first respondent is to pay to the second applicant the sum of R207 810.35 together with interest thereon calculated at the rate of 15.5% *a tempore morae* and costs.