IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 9728/2016

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: ~~Yes~~/No
3. Revised: Yes/~~No~~

8 December 2017

(Signature)

MACSTEEL GENPROP (PTY) LTD **Applicant**

and

GROOT, CORNELIS **Respondent**

Heard on: 29 November 2017

Delivered on: 11 December 2017

JUDGMENT

DE VILLIERS AJ:

[1] The applicant seeks enforcement of a settlement agreement, payment of R6 350 000. The material facts placed before me were:

[1.1] On about 19 June 2015 the applicant sold an immovable property to the respondent for R6 350 000;

[1.2] On about 18 March 2016 the applicant issued summons for payment of the purchase price;

[1.3] The respondent defended the action;

[1.4] On about 12 May 2016 the applicant applied for summary judgment;

[1.5] On about 14 June 2016 the applicant and the responded entered into a written settlement agreement.

[2] The interpretation of that settlement agreement is in issue before me. The relevant terms of the agreement read (underlining added):

> '*1. The Defendant admits being indebted to the Plaintiff in the amount claimed in the Summons and agrees to the Plaintiff obtaining Judgment against him, subject to the following:-*
>
> *1.1 The Plaintiff will attempt to re-sell the property (being the property referred to in the Plaintiff's Summons);*
>
> *1.2 If an offer of more than R6,350,000-00 is received, . . . ;*
>
> *1.3 If an offer of less than R6,350,000-00 is received, . . . ;*
>
> *1.4 . . .*
>
> *1.6 In the event of no offer being received and the property not being sold on or before 31 July 2016, the Plaintiff shall be entitled to apply to the above Honourable Court for Judgment against the Defendant for R6,350,000-00 plus interest and costs, as claimed in the Summons;*

1.7 The Defendant accordingly agrees to Judgment being granted against him in terms of paragraphs 1.5 or 1.6, subject to the proviso that the Plaintiff shall only be entitled to apply for Judgment after giving the Plaintiffs attorney, . . . 5 days written notice, by e-mail to . . . and in such Notice setting out details of the Judgment being sought and a Certificate signed by the Plaintiffs Manager setting out details of the amount claimed and how same is made up.

1.8 In the event of the property being sold for more than R6,350,000-00 ....'

[3] It was common cause that no offer had been received by 31 July 2016. The possibilities of such an offer exceeding R6 350 000 (clause 1.2 and 1.8) or not (clause 1.3 to 1.5), therefore did not arise. It was common cause that the formalities in clause 1.7 of the settlement agreement were complied with. The question was if the applicant was entitled to judgment under clause 1.6 of the agreement. The answer to that question is linked to the interpretation of and effect of clause 1.1 of the agreement.

[4] The defences raised in the answering affidavit (prepared when the respondent was represented by a different firm of attorneys), were:

[4.1] Defences based on the original agreement of sale with regard to a rates clearance certificate that had not yet been obtained, the property being occupied by a tenant, and an electricity compliance certificate that had not yet been obtained. None of these defences played any role in the argument before me, correctly so;

[4.2] The respondent was told that the applicant would "*do a deal*" with the tenant in the property before the settlement agreement was concluded, but in the end the applicant told the respondent not to make an offer (to purchase the property) before the end of August 2016. "*It is clear that the Applicant in order to enforce the settlement agreement would have to attempt to re-sell the property which it clearly did not do ...*"

[5] This is a matter that has to be determined on the principles set out in the well-known **Plascon Evans** test (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E-635C).

[6] Neither party asked me to refer the matter to the hearing of oral evidence. In the light to the current law on the impact of context on the interpretation of agreements, oral evidence often will assist to determine context. See in this regard the equally well-known **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) para 18 and 19 (footnotes omitted and underlining added):

> '*[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.

[19] All this is consistent with the "emerging trend in statutory construction". It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in ***Jaga v Dönges NO and Another; Bhana v Dönges NO and Another****, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:*

> *"Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."*

More recently, Lord Clarke SCJ said "the exercise of construction is essentially one unitary exercise".'

[7] Christie, **The Law of Contract in South Africa**, 7th Edition, commences the discussion on the topic of conditional contracts at p155 with "*This part of the law is much bedevilled by semantics. . . .* ". In **R v Katz** 1959 (3) SA 408 (C) at 417D-418D the court held (underlining added):

> '. . . *The word 'condition' in relation to a contract, is sometimes used in a wide sense as meaning a provision of the contract, i.e. an accepted stipulation, as for example in the phrase 'conditions of sale'. In this sense the word includes ordinary arrangements as to time and manner of delivery and of payment of the purchase price, etc - in other words the so called accidentalia of the contract. In the sense of a true suspensive or resolutive condition, however, the word has a much more limited meaning, viz. of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain future event. (See, for example* ***de Wet en Yeats, Kontraktereg en Handelsreg****, 2nd. ed., p. 93.) Where the qualification defers*

the operation of the contract, the condition is suspensive, and where it provides for dissolution of the contract after interim operation, the condition is resolutive. The exact dividing line between the two classes is sometimes difficult to draw, because failure of a suspensive condition may have a resolutive effect, and a resolutive condition in a sense suspends dissolution of the contract. But for present purposes that aspect of the matter need not be pursued. What is of importance is the distinction between true conditions of either kind and ordinary stipulations falling outside their category. In the case of true conditions the parties by specific agreement introduce contingency as to the existence or otherwise of the contract, whereas provisions which are not true conditions bind the parties as to their fulfilment and on breach give rise to ordinary contractual remedies of a compensatory nature, i.e. (depending on the circumstances) specific performance, damages, cancellation or certain combinations of these. Now in the present case the magistrate concluded that the contract testified to by the traps was subject to a suspensive condition, merely because

> *"it is abundantly clear that the accused persons were not prepared to part with the full purchase price until they were satisfied that the substance offered to them was gold",*

and proceeds to say that this conclusion is 'the only inference I can draw from the facts'. In my opinion the conclusion is a non sequitur. A purchaser of land is usually not prepared to part with the full purchase price until he has received due transfer, nor usually is the person who buys goods by description or sample prepared to pay until he has had an opportunity of satisfying himself that the goods delivered conform to the contract description or the sample as the case might be. But in neither of the last-mentioned cases would the arrangement result in the contract being regarded as conditional in the true sense: indeed I think the purchasers themselves would, in the event of defective delivery, be surprised to hear that they are obliged to resign themselves to the position that the contract has failed to come into operation through failure of a suspensive condition, and that they have no claim for specific performance and damages or cancellation and damages. The withholding of part of the purchase price in such cases merely results from ordinary stipulation of contractual terms, the purpose thereof being to safeguard the purchaser against the risk of parting with his money and thereafter being unable either to obtain delivery in conformity with the contract or even to get back his money. . .'

[8] The uncertain event provided for in the alleged condition from the respondent's perspective would be if the applicant would attempt to re-sell the property. However, from the applicant's perspective, such an eventuality was not an uncertain event, it would have fallen within the power of the applicant to fulfil. In our law a condition dependent on the will of the promisor, is invalid. (**Withok Small Farms (Pty) Ltd and Others v Amber Sunrise Properties 5 (Pty) Ltd** 2009 (2) SA 504 (SCA) para 7 and the judgment of Mojapelo AJ, Mogoeng CJ, Nkabinde ADCJ, Jafta J and Zondo J concurring in **Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited** (CCCT248/16) [2017] ZACC 32 (5 September 2017) para 49, both judgments referring to **Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd** 1993 (1) SA 179 (A) at 186F – H/J).

[9] Clause 1.1 is not a valid condition, if it were one. Even if the applicant had failed to "*attempt to re-sell the property*", such a failure did not result in a failure of the settlement agreement.

[10] I am of the view that clause 1.1 was a term of the settlement agreement. I start by reading clause 1 as a whole and give consideration as set out in **Natal Joint Municipal Pension Fund** *"... 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*":

[10.1] The phrase at the end of clause 1 ("*subject to the following*") often would indicate that a suspensive condition is to follow. The question is if this is such a case, or if the clause is a term. (See too **Southern Era Resources Ltd v Farndell NO** 2010 (4) SA 200 (SCA) para 11-12);

[10.2] It is clear that clause 1 and clause 1.1 do not contain wording to the effect that in the event of non-fulfilment of the alleged condition, the contract would lapse;

[10.3] It is also clear that not all the sub-clauses that follow upon the phrase at the end of clause 1 ("*subject to the following*") are

conditions, suspensive or resolutive. Several clauses deal with the parties rights should an offer be received to purchase the property for either more or less than R6.35m. The words "*subject to the following*", in this case, do not introduce a list of conditions, suspensive or resolutive;

[10.4] If the clause were a suspensive condition, a failure by the applicant to attempt to re-sell the property before 31 July 2016, would mean that it can never obtain judgment against the respondent. I point out that no facts have been placed before me as to context why a seller, armed with a written sale agreement, having issued summons, standing on the verge of a summary judgment hearing, would have agreed to such a suspensive condition.

[11] A breach of a contractual term does not mean that a contract lapses. The final submission on behalf of the respondent was that it was the applicant's breach of contract that led to the condition in clause 1.6 of the settlement agreement having been fulfilled (being that the property was not sold to someone else by 31 July 2016). The potential purchaser to date has not made an offer to purchase, reflecting that it was not the applicant that frustrated a sale from having taken place. Nothing would have changed if the applicant had invited the tenant to make an offer or not.

[12] An obligation on the applicant to attempt to re-sell the property could have at least three meanings, (a) an (attempt to) market the property by inviting an offer or offers, (b) an (attempt to) market the property by making an offer or offers to a potential purchaser or potential purchasers, and (c) an attempt to reach an agreement when presented with an offer. If one has regard to the remainder of clause 1 of the agreement, the first interpretation seems the stronger possibility. If so, that raises the question what an attempt would entail. It seems a slight attempt would have sufficed.

[13] Neither party argued that if I were to find that clause 1.1 is a term of the settlement agreement, then in such a case I must find that the payment

obligation it was reciprocal upon fulfilment of this obligation. It is difficult to foresee such an outcome if only a slight attempt would have sufficed to comply with clause 1.1. In addition, read as a whole, especially clause 1.6, the conclusion from the reading the agreement is inescapable that the applicant had to attempt to re-sell the property as required in clause 1.1 before 31 July 2016, despite this date not mentioned in clause 1.1. It is not an obligation that the applicant can still fulfil. I would find it difficult to conclude that the parties had agreed to such an outcome for similar reasons already referred to for finding that clause 1.1 is a term, not a condition.

[14] The remaining defence to the application in the heads of argument was that the applicant has nominated a different conveyancer to the one nominated in the agreement of settlement. The argument was not pursued with vigour. As I read the settlement agreement, the applicant's right to replace the conveyancer, has not been waived.

[15] The applicant has tendered transfer of the property against payment. No issues were raised before me with regard to the tender. I accordingly grant the following order:

1 The respondent is ordered to pay to the applicant:

1.1 The sum of R6 350 000.00;

1.2 Interest on the aforesaid sum at the rate of 10,5% per annum from the date of service of the summons (18 March 2016) to date of payment;

2 The respondent is ordered to pay the costs of suit.

DP de Villiers AJ

On behalf of the Applicant:	Adv D Vetten
Instructed by:	Kasimov & Associates
On behalf of the Respondent:	Adv S D van Niekerk
Instructed by:	BMH Inc