REPUBLIC OF SOUTH AFRICA

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

CASE NO: 22511/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) Revised

30 August 2021
DATE

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SIGNATURE

In the matter between:

JAMES B PRODUCTIONS (PTY) LTD	1ST Appellant
RIAAN MANSER	2ND Appellant
VASTI MANSER	3RD Appellant
and	
OXYGEN MEDIA (PTY) LTD	Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 August 2021.)

JUDGMENT

MIA, J

[1] This matter came before the urgent court, where the application was dismissed with costs. The reasons were handed down on 9 February 2021. The appellant brought an application for leave to appeal against

the whole of the judgment and order, including the order for costs. The respondent opposed the application for leave to appeal.

[2] The applicant appealed the judgment on the following grounds:

"1. The learned Judge made the fundamental error in failing to find that there was an enforceable agreement between the parties in terms whereof the respondent had to deliver the content in accordance with the terms and conditions as set out in the Showmax agreements. Pertinently the learned Judge failed to realize the significance of the fact that the respondent failed, in its opposing affidavit, to respond to or address the applicants' averments in paragraph 54 to 59 of its founding affidavit, which deals specifically with the agreement between the parties.

2. The court did not take cogniscance of the fact that the respondent accepted these terms and conditions of the agreement when it reached its finding.

3 The respondent failed to deal with crucial averments in the application which constituted an admission of the contents of the applicants averments, alternatively it constituted a bare denial, with the result that the applicants averments should have been accepted.

4. The court thus failed also to have regard to the terms of the agreement between the parties which determined that the respondent would receive 35% of the license amount, 30 (thirty) days after delivery of the content, and that the agreement did not provide for any cost related to delivery of the content.

5. The learned Judge further failed to take cognisance of the fact that Applicant concluded the agreements with Showmax based on the Respondent's assurance that they would in fact deliver the content on those terms. In the premises the Respondent is in any event estopped from denying the terms.

6. The court erred finding that there was a factual dispute between the parties whereas, on a proper conspectus of the papers there

was no serious, *bona fide* factual dispute which would have prevented the applicants from obtaining the relief that it sought.

7. The court further erred in her finding that the applicants had caused its own urgency, when in fact it was evident from the papers that applicants had been compelled to launch the application on an urgent basis due to the fact that delivery of the content was due to be screened in the immediate future and that applicants were entitled to specific performance, which would otherwise result in irreparable harm being suffered by the applicants. The urgency of the delivery and the consequences of failure to perform same was fully canvassed in the applicant's papers.

8. In the process of finding that there had been an enforceable agreement in place between the parties the Court took into account irrelevant aspects, such as the following:

8.1 The court found that the proportions of remuneration were unfair, and because of the unfairness of the deal, the respondent did not have to carry the cost to deliver the content.

8.2 The court found that the applicant could not expect the respondent to deliver the content when the remuneration the respondent would get for delivery was disproportionate to the importance of their obligation to deliver

8.3That the respondent's remuneration for the delivery was disproportionate.

- The "fairness' of the agreed contractual terms was with respect not a relevant concern, and ought not to have played any part in the court's decision on the matter.

9. The court ought to have found that the respondent's obligation to deliver the content originated from their agreement with the applicants and that delivery was in no way contingent on the proportionality of the respondent's share in the proceeds.

10. Consequent upon the aforementioned, the court erred further by making a cost order against the applicants.

[3] Mr Loots and Ms Manser appeared for the appellants. The court was informed that counsel briefed for the respondent had a personal matter that had just arisen that morning and could not appear. Ms Nyachowe, a candidate attorney at Nyachowe attorneys, was requested to observe the proceedings. She requested that the court regard the heads of argument that had been filed on behalf of the respondent.

[4] Mr Loots proceeded to address the court first on the heads of argument filed on behalf of the respondents to address three points *in limine* which the respondent had raised. The first point raised by the respondent was whether the issue was moot or not given the time frame raised by the applicant in the urgent application. The respondents contended that the applicants' application in the urgent court was to deliver materials by a particular date. The time for delivery of the material had passed; consequently, the issue was moot. Mr Loots argued to the contrary. He submitted that it was incumbent on counsel to bring to the court's attention whether an issue was moot or not when arguing the matter. The present matter was guided by sections 16 and 17 of the Superior Courts Act 10 of 2013.

[5] He continued to amplify the above point that it was incumbent upon an applicant to inform the court whether the matter had become moot, failing which the matter proceeded on the basis on which it was before the court. He confirmed that he enquired from the appellants whether the matter had become moot. It appeared that due to the ongoing litigation, Showmax is waiting for the outcome and have not as yet cancelled the agreement. Showmax reserved their right to do so at any moment and could cancel at any stage. He continued that it was advanced in the urgent hearing that if the delivery did not take place, Showmax reserved the right to cancel. Showmax had not cancelled as yet. If the court granted leave to appeal and the issue became moot due to the

cancellation by Showmax, it would be incumbent upon the appellant to advise the court.

[6] The second point raised *in limine* was the appealability of the order. This was based on the application being for final relief. The court dismissed the application on the merits as well as on urgency. In their heads of argument, the respondent submitted that the appellant could apply for rescission of the order given the order granted was final relief. Mr Loots argued that this was not an option the appellants could pursue as the court found no consensus between the parties. He continued that rescission would have been an option only in the absence of one of the parties or if an order had been improperly sought or granted. Thus neither option for rescission applied in the present case. The appropriate relief was an application for leave to appeal.

[7] In addressing the appeal's merits, Mr Loots first submitted that he accepted that the test was different and that the standard was higher. He, however, argued that the word "would" was inserted to avoid a flood of appeals and relied on the judgment of the court in *Valley of the Kings Thaba Motswere (Pty) Ltd VAL Mayya Internationa*l 2016 JDR 2120 (ECG) to support a lower standard. He argued that it provided a helpful guide in implementing the current test in respect of applications for leave to appeal where the court stated:

> "There can be little doubt that the use of the word "would" in section 17 (1)(a)(i) of the Superior Courts Act implies that the test for leave to appeal is now more onerous. The intention clearly being to avoid our courts of appeal being flooded with frivolous appeals that are doomed to fail. I am, however, of the respectful view that the "measure of certainty" standard propounded by the learned judge in *Mont Chevaux Trust* (supra) may be placing the bar too high. It would, in my respectful view, be unreasonably onerous to require an applicant for leave to appeal to convince a judge - who invariably would have provided extensive reasons for his or her findings and conclusions - that there is a "measure of certainty" that another court will upset those findings. It seems to me that a contextual construction of the phrase "reasonable

prospect of success" still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party. I shall accordingly consider the arguments advanced on behalf of the applicants on this basis."

[8] Mr Loots submitted by way of illustration of the above that the respondent's answering affidavit failed to advance a case that answered the applicants' case made out in the founding affidavit. He relied on a culmination of the emails between the parties. He referred to Annexure VM15[1] and VM16[2]. VM15 reminds the respondent of the terms of the agreement and attaches the terms and conditions to the email. In VM16, the respondent confirms that the agreement and terms are clear and that they can proceed. Ms Fuller Campbell then requests Ms Manser to prepare the draft clearance letters for both projects, after which the respondents would make any adjustments required.

[9] It is evident from both VM15 and VM16 that whilst Showmax requested uploading via a portal, there was a concern that this would prove to be expensive, and load shedding was a concern. The applicant proposed delivery via hard drive as an inexpensive route, after which the hard drive would be returned to the respondents. The proposal of delivery by the hard drive was made as no provision was made for delivery costs. The applicants also indicated the reduced amount payable to the respondents given the programme HTA not being screened in the diaspora territories. Ms Fuller Campbell accepted these terms in VM16.

[10] Mr Loots thus argued that the respondents admitted the agreement in paragraph 13 of the answering affidavit at paragraphs 25-28, which refer to the salient terms of the contract. This confirmed the respondents received a copy of the terms of the contract. Ms Fuller Campbell

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[1] Record, Caselines 001-86
[2] Record, Caseline 001-87

admitted that it was forwarded to her. She indicated she would sign a license with Showmax. Mr Loots argued what was presented to the court during the urgent hearing was that they had never received the terms and agreement beforehand. He continued that Annexure VM 4 showed that they were provided with the standard terms of the agreement. This was further reinforced by the communication in VM 15 and VM16. In VM5 the amounts were indicated as per the proportion of payment. Ms Fuller Campbell did not contest the proportional split. There were two programmes not permitted to be aired. This affected the amount finally received.

[11] Mr Loots argued that in none of the correspondence leading up to VM 16 was the proportion of the split or the amount payable in terms of the agreement placed in dispute. There was no request for or an indication there was a requirement of upfront payment for delivery. The terms of the agreement were always that Showmax paid within 30 days of delivery. They did not indicate they were unhappy with the split. If they were, it was not clear why they sent an invoice without indicating that.

[12] Mr Loots submitted that the negotiations deteriorated after the respondents attempted to obtain payment before delivery. The respondents attempt to repudiate the agreement were not accepted by the applicants who never intended not to pay the respondents. It was merely a case of payment in terms of the agreement. The applicant thus sought to enforce the agreement by bringing an application in the urgent court as they stood to lose the benefits of the agreement they negotiated with Showmax.

[13] In interpreting the agreement between the parties the applicant relied on *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA) at para 21 and 22. This requires that the court ascertain the intent of the contracting parties by considering:

13.1 the words used by the parties in the relevant clause;

13.2 the contract as a whole;

13.3 the factual matrix of (or context in which) the contract was concluded, whether or not there is ambiguity in the meaning of the words used.

[14] In *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) the court stated at para [18]

> "Over the last century there have been significant developments in the law relating to the interpretation 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."

[15] In considering the above principles and applying them to the agreement and the record, it is apparent that there is merit in Mr Loot's submission that VM15 and 16 confirmed the agreement. Furthermore, the remaining annexures support the conclusion of the agreement and provide the contextual background that supports the conclusion of the agreement which culminated in in VM 15 and VM 16. VM 17 served merely to repudiate the agreement to secure to the respondents a benefit after the agreement had been reached which the agreement had not provided.

[16] In applying the rule in *Plascon-Evans v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), *"where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order...where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted",* the respondents have admitted the agreement and were ready to proceed on the basis thereof until the communication in VM17.

[17] Mr Loots addressed the court on the point raised in the respondents' heads of argument relying on the case of *Afrox Health Bpk v Strydom* 2002 (6) SA 21(SCA). He submitted that the reference to the case by the respondents was misplaced as it referred to an imbalance in bargaining power between two parties. He submitted that there was no imbalance of bargaining power between the present parties as they were equal as opposed to the *Afrox* case above, which was distinguishable as there was an imbalance of power between the company and an individual. In support of his submission, Mr Loots referred *Barkhuisen v Napier* 2007 (5) SA 323 at para [70] and argued that the parties in the present matter were bound by the contract they negotiated. In *Barkhuisen* above, the Court endorsed the principle of '*pacta sunt servanda*'. Mr Loots submitted that the language of the emails evidenced a protracted negotiation but pointed to an agreement. Thus he submitted that *Afrox*

did not apply to the present case and was distinguishable because there was equitable bargaining power.

[18] In the case of *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), the Court stated:

> "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."

Given the respondent's admission, as argued by Mr Loots, there is no genuine dispute raised by the respondents. The agreement was not clear when the matter was argued in the urgent court. On reconsidering the papers, the submissions made, it is evident that the respondents did not raise relevant disputes that prevented the granting of the relief requested by the applicant. It follows that another court would thus come to a different conclusion to the decision reached by this court on the merits and the question of urgency. This is so as the applicants and respondents were aware of the agreement with Showmax and the time frames. The negotiation before the launching of the application did not detract from the urgency.[3]

[19] In considering the submission and the heads of argument submitted by both parties, the applicant made out a case that an agreement was reached based on the communication in annexures VM15 and VM16. This court is thus satisfied that another court would reasonably come to a different conclusion that an agreement was reached. Consequently, it is appropriate that leave to appeal be granted to a Full Bench of this Division. It follows furthermore that the costs of this application will be costs in the appeal.

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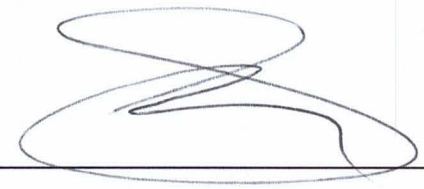
[3] Nelson Mandela Metropolitan Municipality and Others v Greyvenouw and Others 2004(2) SA 81 (SE); South African Informal Traders Forum and Others v City of Johannesburg and Others 2014(4) SA 371 (CC)at [37]

ORDER

[20] For the reasons above, I grant the following order:

1. The applicants are granted leave to appeal to the Full Court of this Division.

2. Cost of this application will be costs in the appeal



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JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the appellant	: Adv H Loots
Instructed by	: Malan Lourens Viljoen Inc leon@mlalaw.co.za
On behalf of the respondents	: Daphne Nyachowe (observing for Nyachowe Attorneys)
Instructed by	: Nyachowe Attorneys pnyachowe@pnn-attorneys.co.za
Date of hearing	: 7 June 2021
Date of judgment	: 30 August 2021