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

**CASE NO: 38649/2019**
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
9 May 2022

In the matter between:

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| S[....]1 C[....] E[....] | Applicant |
| and | |
| S[....]2 J[....] J[....] O[....] | First Respondent |
| MALHERBE RIGG AND RANWELL INC | Second Respondent |
| VAN DER WALT, MARIE | Third Respondent |

**JUDGMENT**

**CRUTCHFIELD J:**

[1] This application concerns the interpretation of a single clause in a written agreement of settlement concluded between the applicant and the first respondent in finalisation of their divorce proceedings and made an order of Court ('the settlement agreement').

[2] The applicant is C[....] E[....] S[....]1, a major female previously married to the first respondent, J[....] J[....] O[....] S[....]2.

[3] The second respondent is Malherbe Rigg and Ranwell Inc, conveyancing attorneys holding 35% of the proceeds of the sale of an immovable property situated

at [....] New Road (Plot 3) Erand, Midrand, ('the property'), being the sum of R8 034 783.12, pending the outcome of this application.

[4] The third respondent is Marie van der Walt, a major female estate agent, allegedly involved in the sale of the immovable property.

[5] The immovable property comprised an asset in the joint estate of the applicant and the first respondent during the course of their marriage.

[6] The applicant seeks payment of her share of the proceeds of the sale of the immovable property and an order that the first respondent be found in contempt of this Court and committed to gaol for a period of three months, duly suspended.

[7] Clause 6 of the settlement agreement ('clause 6'), is the source of the dispute between the applicant and the first respondent herein. It provides as follows:

> "6.1 Die EISER sal rehabiliterende onderhoud aan die VERWEERDERES betaal en wel in die bedrag van R3 000,00 per maand, jaarlikse eskalasie ooreenkomstig die inflasie koers van tyd tot tyd, sowel die VERWEERDERES se redelike en billike mediese en verwante uitgawes, direk aan die VERWEERDERES en/of haar genomineerde, welke gerhabiliterende onderhoud en mediese en verwante uitgawes betaalbaar sal wees tot en met die datum waarop die EISER aan die VERWEERDERES die ooreengekome 35% van die netto obgrengs gegenereer op en/of uit die verkoop, aldan nie, van die onroerende eiendom bekend as HOEWE 3, ERAND LAMBOUHOEWES (sic) sal betaal en stem die EISER ook hiermee toe tot die aanbring van 'n endossement op die titelakte van die onroerende einendom (sic) wat die VERWEERDERES se ooreengekome belang in die opbrengs sal aandui."

[8] An English translation of clause 6 provides as follows:

> "That the Plaintiff in settlement of any and/or all possible patrimonial claims of whatever nature that the parties may have against one another, shall pay to the Defendant 35% of the net proceeds on and/or from the sale generated, if any, of

the immovable property and the Plaintiff consents to the noting of an endorsement to the deed of the immovable property which shall show the Defendant's agreed interest in the proceeds."

[9] At issue is the interpretation and application of the phrase 'netto opbrengs gegenereer op en/of uit die verkoop' ('the contentious words'). The application of the interpretation of the contentious words will serve to determine the expenses to be accounted for in calculating the net proceeds generated from the sale of the immovable property. It is common cause that the immovable property was sold for R23 500 000.00.

[10] The applicant contends that the contentious words should be interpreted to mean the net proceeds of the sale of the property and that the expenses to be deducted in calculating the net proceeds of the sale are the expenses flowing directly from the sale of the property. These are the expenses in the amounts stated immediately hereunder:

10.1 The mortgage bond: R478 446.30
10.2 Cancellation costs: R5 009.33
10.3 Rates and taxes: R58 060.86
10.4 Section 4(1)(b) application fee: R1 840.30
10.5 Deeds Office Section (4)(1)(b) fee: R120 000.00

[11] The applicant argues that the contentious words must be read within the context of the clause as a whole, being 'net proceeds generated from the sale of the property', and that one should not rely on the words 'net proceeds generated' only as contended by the first respondent.

[12] Regard being had to the 'net proceeds of the sale of the property', the applicant argues that only the expenses alleged by the applicant are legitimate and reasonable expenses to be deducted in calculating the net profit as required by the settlement agreement.

[13] The first respondent disputes the applicant's interpretation of the contentious words and the expenses to be deducted. The first respondent contends that the

relevant words are ‘netto opbrengs gegenereer’. The first respondent relies on the relevant dictionary meanings thereof to the effect that it is the ‘net profit of the property’ that stands to be calculated and from which 35% is to be deducted.

[14] The first respondent provides a list of expenses totalling an amount of R13 516 064.00, that he contends are to be deducted from the purchase price on a proper interpretation of the contentious words.

[15] According to the first respondent, the net proceeds is not the equivalent of the gross proceeds and in determining the net proceeds reliance cannot merely be placed upon the selling price of the property as the starting point.

[16] Based on the Oxford English Dictionary, ‘net’ is defined as ‘(especially of money) remaining after all necessary deductions, or free from deductions’ and ‘net profit’ is ‘the effective profit; the actual gain after working expenses have been paid’[1].

[17] In terms of the trilingual legal dictionary, ‘opbrengs’ means ‘crop, output, production, return, yield; proceeds, profit, return on capital’. The definition of net proceeds is: ‘the profit from selling goods or services after all costs have been paid.’[2]

[18] Accordingly, the dictionary meaning of ‘net proceeds’ is ‘profit’ and one cannot ignore the costs incurred to obtain the sale price of the property such as the improvements to the land, as that was not what was agreed to by the parties. Net proceeds, according to the first respondent, means the profit from the sale after the deduction of all relevant costs incurred to obtain the sale price.

[19] The net profit is to be calculated by deducting the expenses that contributed to the property being valued and sold at the price of R23 500 000.00. These are the costs necessarily incurred in reaching the sale price of the property and include the purchase price of the land of R35 000.00, the interest paid in respect thereof in the amount of R92 607.00, the costs of various improvements to the land including the building of the house, the swimming pool, garage, workshop, servants’ quarters *inter*

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1 Concise Oxford Dictionary of Current English, 1990 Edition; CaseLines 010-68.
2 CaseLines 010-69 footnote 46 https://dictionary.cambridge.org/dictionary/english/nett-proceeds.

*alia*. Payment of the municipal taxes and insurance as well as the estate agent's commission in the sum of R1 645 000.00 and capital gains tax in the amount of R3 836 822.00, are also included in the expenses that the first respondent submits ought to be deducted in calculating the 'netto opbrengs gegenereer'.

[20] Thus, the first respondent contends that the list of expenses claimed by him is legitimate and reasonable[3] in calculating the nett proceeds of the sale.

[21] It is settled that the proper interpretation of a document, including a settlement agreement, as well as a court order takes place in its context.[4] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* the Court stated *inter alia*:

> "Interpretation is the process of attributing meaning to the words used in a document … 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 of 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. … 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."[5]

[22] The process is objective and requires a simultaneous consideration of' the:

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3 *McDaid v McDaid* 1952 (4) SA 403 (C).

4 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ('Endumeni') at paras [18] and [25] – 26; *Airports Co South Africa v Big Five Duty Free (Pty) Ltd & Others* 2019 (5) SA 1 (CC) ('Big Five') at paras [29] and [30]; *Road Traffic Management Corporation v Waymark Info Tech (Pty) Ltd* 2019 (5) SA 29 (CC) at paras [29] and [30].

5 Id.

"language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, and the apparent purpose to which it is directed."[6]

[23] The Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary & Another*[7] indicated that "from the outset one considers the context and the language together, with neither predominating over the other."

[24] In *Chisuse and Others v Director General Department of Home Affairs and Another,*[8] *i*n respect of statutory interpretation, the Constitutional Court held that the "'now settled' approach to interpretation, is a 'unitary' exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, the context and purpose."

[25] The Supreme Court of Appeal in *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd*[9] stated recently:

> "[50] *Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The … meaning of a contested term of a contract … is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account that the interpreter can provide, making use of these sources of interpretation. It is not a partial section of interpretational materials directed at a predetermined result.

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6 *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC).

7 *University of Johannesburg v Auckland Park Theological Seminary & Another* [2021] ZACC 13 ('Auckland Park') at para [65] – [69].

8 *Chisuse and Others v Director-General, Department of Home Affairs and Another 2020 (6) SA 14 (CC).*

9 *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2021 JDR 1484 (SCA) ('Capitec') at para [50] – [51].

[51] Most contracts … are constructed with a design in mind, and their architect chooses words and concepts to give effect to that design. For this reason, interpretation begins with a text and its structure. … Rather, context and purpose may be used to elucidate the text."

[26] The result of the authorities is that reliance cannot be placed on the words 'net proceeds generated' and their meaning in isolation. Consideration must be given to the relevant text, its meaning and its structure in the context in which the contentious words stand, informed by the purpose of the contentious words in their context.

[27] I do not understand the applicant and the first respondent's counsel to differ significantly on the meaning of the words 'net proceeds.' The words, read individually or together in the phrase, are clear and not ambiguous. Loosely stated, the words 'net proceeds' mean and refer to 'the amount the seller receives following the sale of an asset after all costs and expenses are deducted from the gross proceeds.' That much is apparent from the various dictionary meanings relied on by the first respondent's counsel.

[28] However, it is not sufficient in attributing meaning to words to consider and rely upon the dictionary meaning of the relevant words only.[10] The syntax and structure of the contentious words must also be considered.

[29] The sentence in which the contentious words occur is; "the plaintiff (the first respondent), in settlement of any and/or all possible patrimonial claims of whatever nature that the parties may have against one another, shall pay to the Defendant 35% of the net proceeds on and/or from the sale generated, if any, of the immovable property".

[30] The grammatical construction of the sentence is such that the words 'net proceeds' are qualified by the descriptive words thereafter being; 'on and /or from the

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[10] Id.

sale generated if any, of the immovable property'. Accordingly, the net proceeds are described as being those generated on or from the sale of the property.

[31] The words 'net proceeds' do not appear in a vacuum. They are connected grammatically to the qualifying or adjectival words; 'sale generated, if any, of the immovable property' and must be read and interpreted together with the latter.

[32] The settlement agreement is not a purely commercial agreement. It serves to finalise the parties divorce proceedings. The purpose of clause 6 is to provide a capital amount of money sufficient for the future maintenance needs of the applicant. Clause 6 is in full and final settlement of all or any proprietary claims between the applicant and the first respondent.

[33] Accordingly, the 'net proceeds' are the net proceeds generated on or from the sale of the property and not the 'net proceeds generated'.

[34] In the circumstances, the costs to be deducted from the sale price of the property are those costs that flow directly from the sale of the property.

[35] The first respondent's claim to deduction of the estate agent's commission and the capital gains tax in determining the amount of the 'net proceeds' fall on a different footing.

[36] The estate agent's commission is the amount of R1 645 000.00. The third respondent is a party to these proceedings and received service of the application. The third respondent however does not oppose the application and does not dispute that she did not hold a valid Fidelity Fund Certificate at the time of the conclusion of the sale of the property. The requirement of such a certificate is a matter of public interest and persons who are not in possession of a valid fidelity fund certificate are not entitled to receive remuneration in respect of the sale of immovable property.

[37] In the circumstances, the alleged estate agent's commission cost is not a legitimate and reasonable expense and may not be deducted from the sale price in calculating the net proceeds generated from the sale of the property.

[38] In respect of the first respondent's claim that the capital gains tax of R3 836 822.00 should be included in calculating the net proceeds, the property was registered in the first respondent's name. Thus, the capital gains tax attaches to the first respondent himself and not to the property or the sale of the property. In these circumstances, the first respondent is liable for payment of the full amount of the capital gains tax and it is not an expense to be deducted in calculating the amount of the net proceeds generated from the sale of the property.

[39] In the result, the costs to be deducted from the sale price of the property in order to calculate the net proceeds of the sale are those costs contended for by the applicant. In the interests of clarity, they are the expenses in the amounts stated immediately hereunder:

| | | |
|---|---|---|
| 39.1 | The mortgage bond: | R478 446.30 |
| 39.2 | Cancellation costs: | R5 009.33 |
| 39.3 | Rates and taxes: | R58 060.86 |
| 39.4 | Section 4(1)(b) application fee: | R1 840.30 |
| 39.5 | Deeds Office Section (4)(1)(b) fee: | R120 000.00. |

[40] As regards the relief sought by the applicant that the first respondent be held in contempt, the applicant seeks an order for the imprisonment of the first respondent suspended for three months. Given that the applicant seeks criminal contempt, the onus on the applicant overall is to demonstrate without reasonable doubt that the first respondent was wilful and *mala fide.* The applicant must acquit herself of the onus in the founding affidavit and the applicant falls far short of these requirements.

[41] As to the reserved costs of the urgent application determined by Nel AJ in terms of an order dated 28 November 2019, the first respondent denied that the application was urgent. The first respondent argued before me that the application was not of an urgent nature as it was a commercial matter, that there was an existing undertaking by the second respondent that the amount would be held in trust and that the matter ought to have been heard in the ordinary course.

[42] The applicant argued that the application was urgent in that the applicant was indigent at the time. Nel AJ granted an order *inter alia* for immediate payment of certain monies by the first respondent to the applicant from the funds being held in the second respondent's trust account.

[43] Accordingly, the urgent court granted an order in respect of certain of the relief claimed by the applicant as a matter of urgency and to that extent Nel AJ determined that the application was urgent and dealt with it accordingly.

[44] In those circumstances, I am of the view that the costs of the urgent application should be paid by the first respondent and I intend granting an order in those terms.

[45] By virtue of the aforementioned, I grant the following order:

1. The second respondent is ordered to make payment to the applicant, from the amounts held in the second respondent's trust account, of R6 781 814.42, representing 35% of the nett proceeds of the sale of the immovable property known as Erand 3 AH JR less the payments made to the applicant in terms of the order of Nel AJ on 28 November 2019.

2. The costs of this application including the costs reserved on 28 November 2019 are to be paid by the first respondent

**CRUTCHFIELD J**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION**
**JOHANNESBURG**

***Electronically submitted therefore unsigned***

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 9 May 2022.

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| COUNSEL FOR THE APPLICANT: | Mr J H F le Roux. |
| INSTRUCTED BY: | Cuthbertson & Palmeira Attorneys Inc. |
| COUNSEL FOR THE FIRST RESPONDENT: | Mr A L Cook. |
| INSTRUCTED BY: | Jurgens Bakker Attorneys. |
| DATE OF THE HEARING: | 26 January 2022. |
| DATE OF JUDGMENT: | 9 May 2022. |