


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2846/2011

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	
SIGNATURE	DATE 21/6/14

4/6/2014

In the matter between:

SURECH MIRCHANDANI

Plaintiff

and

UNICA IRON AND STEEL (PTY) LTD

1st Defendant

MUHAMMAD ASIF QASIM

2nd Defendant

JUDGMENT

MATOJANE, J

[1] This action concerns a claim for specific performance instituted by the Plaintiff against his former employer based on a hand written agreement

signed by the parties on 28 September 2010. The Defendant denies the validity and enforcement of the agreement and pleaded that the handwritten document was an incomplete and provisional document that was subject to the signing of a further formal agreement which was never done, that the parties lacked *animus contrahendi* for the conclusion of the final agreement. The Defendant further pleaded that the house referred to in clause 2 of the handwritten agreement is not the property of the First Defendant and therefore cannot be transferred by it.

[2] The essential facts giving rise to the dispute between the parties can be summarised as follows: The Plaintiff, (Mirchandani) is an Indian Citizen with vast experience in the manufacturing and marketing of iron and steel. He came into the country in 2005 with the aim of setting up a steel processing plant. After negotiations with the directors of the First Respondent, Mr Irshad UI haq ('UI haq') and Mr Mohammed Asif Qasim ('Qasim') a steel processing business was setup.

[3] Mr Mirchandani testified that he identified business premises, went to India in 2006 to purchase plant machinery and brought technical staff from India to assist him in running the plant and introduced all his previous suppliers from India to the First Respondent. He together with other directors arranged finance with the Department of Trade and Industry and based on his technical expertise they were granted a loan at a concessional rate of interest. A residential dwelling was purchased for Mr Mirchandani in the name of Second Defendant because the First Defendant was at that stage not yet in

existence and could not obtain financing in its name. After incorporation, First Defendant made bond repayments over the property.

[4] On the 21 May 2007 the parties entered into an employment agreement.

The parties agreed as follows:

1. That Mr Suresh Mirchandani will be working as a Technical Director on profit sharing basis. He will be a key person and under his leadership and guidance, Unica will source, commission and run the plant successfully.
2. Mr Suresh Mirchandani will be entitled for 17% of the profits of Unica defined herein as follows:
3. Profits will be calculated before tax after providing for depreciation and interest on Shareholders loans.
4. Mr Suresh will be drawing a salary of R40000-00 per month which will be deducted from his profit share at the end of the year; If Unica does not achieve profits it will carry to the next years until Unica achieves sufficient profits of which 17% is equal or higher than the total drawings till that date.
5. As Mr Suresh is sharing profits with Unica and his association with Unica will be on long term basis and unrestricted.

[5] Pursuant to the agreement, Mr Mirchandani caused the First Defendant's steel processing plant to be successfully intalled and commissioned. As a Technical Director, Mirchandani testified that he used to work at the factory until 10 at night and worked on Sundays. Initially the business was running at a loss but later it became a success. During 2009 a dispute arose between the parties concerning Mirchandani's profit share and

other matters. He was served with a retrenchment notice. Mirchandani testified that in response to an email he sent the other directors about his concerns, the other directors wanted him to form a new company to produce oxygen and resign from the First Defendant. He was presented with a settlement agreement in respect of the termination of his employment with the First Defendant and a shareholders agreement for a new company to be formed. He refused to sign the agreement.

[6] On the 28 September 2010 Mirchandani was called to an urgent meeting with Mr Qasim and Ul haq. He testified that he was offered a tax free amount of R3.5 million (three million five hundred thousand rands) to end his contractual relationship with the First Defendant. He insisted that he obtain the cash amount after tax and Mr Ul haq phoned the First Defendant's auditors to discuss how this could be done. After the auditors had confirmed that a tax directive would be required from SARS, Mr Qasim added the word 'net' in paragraph 2 of the agreement and deleted the words 'Tax to be discussed'. The agreement was reduced to writing by Qasim during the meeting, Mr Qasim read the agreement back to Mirchandani point for point and was discussed. He testified that the word "net " was included in the agreement to indicate that he was not liable to pay tax on the package. The mood was tense during the meeting and after the meeting Qasim gave him the registration papers of the vehicle and said he should take the house that he was living in. For reasons that will follow I quote the agreement as it was handwritten:

"Agreement
Between Mr Suresh Mirchandani
And
Unica Iron and Steel (PTY) LTD

Following was agreed upon:-

1. Mr. Sureash will be leaving Unica from 30th September 2010 and he will not be involved in Unica at all. Subject to signing of agreement the completion of following.
2. Unica will pay him as follows for golden hand shake:
 - R1,420000,00 - One million four hundred & 20
Thousand Rand only (Net)
Will be paid upon signing of the agreement.
 - Car which he is using will be transferred to his name upon signing of agreement.
 - House will be transferred to his name ~~after~~ within 3 months of signing the agreement. Transfer and other costs for 3 months will be paid by Unica.
3. All other expenses for Mr. Suresh currently paid by Unica will be transferred for his account or will be cancelled as agreed upon:-
 - Car insurance
 - Telephone (all cell incl.)
 - Medical Aid
 - Life insurance
 - Petrol Card
 - DSTV
 - Car tracking System.
4. He will not be engaging himself in any business directly in competition with Unica Steel/Unica plastic.

5. Mr Suresh will inform all our associates local/overseas including suppliers about this development and will introduce Mr Asif."

[7] It is common cause that pursuant to the signature of the above agreement, Mirchandani vacated his office the following day after drafting an email which Qasim approved, introduced Qasim to First Defendant's suppliers in India. Mirchandani further took over the payment of car insurance, petrol card and the car tracking system. He cancelled the medical aid and life insurance policy and had the Dodge Journey registered into his name. On the 3 November 2010 First Defendant paid Mirchandani an amount of R100 000.00.

[8] Mr Ulhaq testified on behalf of the First Defendant. He is a director of the First Defendant. He testified that Mr Mirchandani facilitated the commission of the plant and got his fees as a consultant. He confirmed that it was agreed that Mr Mirchandani's remuneration was 17% of the net profit and all his expenses were paid by the First Defendant. He testified that their relationship with Mr Mirchandani became strained when he started raising many issues and involving himself in many other projects outside of his work. They served Mr Mirchandani with a retrenchment notice but later offered to finance an oxygen plant provided he resigned from the First Defendant in an attempt to accommodate him.

[9] When they realised that the oxygen project was not workable they met with Mr Mirchandani to finalise his exit. He testified that they agreed to do the heads and the attorneys will finalise a proper agreement. The clauses were

discussed and reduced to writing. He testified that the words "subject to the signing of the agreement" meant that a formal agreement will be signed by the parties. He then telephoned the auditors who said they will first have to apply for a tax directive. They paid a sum of hundred thousand rand into the account of Mr Mirchandani as he was not getting a salary and they thought that he will sign the final agreement. The tax directive was issued later and the tax liability was more than what was expected and they requested Mr Mirchandani to pay 50% thereof. Mr Mirchandani refused to pay part of the tax liability and also refused to sign the final agreement. They resolved to remove him as a director.

[10] Mr Qasim also testified for the First Defendant. He is the third director of the First Defendant and has his own separate company. He testified that the relationship with Mr Mirchandani got strained when he got involved in other businesses and asking questions about wastage and accusing other directors of cheating him. Because they could not work with Mr Mirchandani, they offered to partner with him in an oxygen plant, set it up and later sell their shares to him. When they realised that the oxygen plant was not viable, they met with Mr Mirchandani on the 28 September 2010 where they agreed on heads that were to be sent to the attorneys to be formalised into an agreement.

[11] Mr Qasim testified that the word "net" in the agreement meant "cash" and "Tax" was scratched out as they were awaiting the tax directive. He testified that "on signing of the agreement" refers to the agreement that was to

be drawn by attorneys later. It was decided to remove Mr Mirchandani as a director when he refused to sign the formal agreement.

[12] Counsel for the Defendants submitted in his heads of argument and in court that the use of the words "subject to" by the parties, clearly intended that the provisional agreement was to be superseded by a later formal written agreement drafted by the Defendants attorneys after the obtaining of the tax directive, alternatively the three parties who signed the agreement were not *ad idem* that no real or final agreement on the document was reached.

[13] The immediate difficulty I have with this submission is that the parties clearly intended there and then to create a final contract. The written agreement was not a mere proposal in the course of negotiations which, if successful might lead to the conclusion of the final contract. The agreement had contractual force. See **Pitout v North Cape Livestock Co-op Ltd** 1977 (4) SA 842 (A) at 850D. As per clause 1 of the agreement, Mr Mirchandani vacated his office after signature of the agreement and did not receive a salary thereafter. He introduced Mr Qasim to the First Defendant's business associates in an email approved by Mr Qasim in terms of clause 5 of the agreement. Mr Mirchandani took over the car insurance, telephone, petrol card, DSTV and car tracking system and cancelled the medical aid and insurance after signing the written agreement in terms of clause 3. This in my view, clearly shows the parties intention as expressed in the contract.

[14] Mr Qasim testified under cross examination that he asked Mr Mirchandani to sign the agreement so that the lawyers can see what they have agreed upon and so that Mr Mirchandani cannot the next day claim more. He stated further that he would not have permitted Mr Mirchandani to change any term unilaterally and the attorneys could not add or change what they had agreed upon. It follows therefore that the terms contained in the written agreement were those that were agreed upon and no further terms were outstanding.

[15] The golden rule of interpretation is that language in contracts is to be given its ordinary grammatical meaning unless this results in some absurdity or repugnancy or inconsistency with the rest of the instrument. See **Coopers and Lybrandt and others v Bryant** [1995] ZASCA 641995 (3) SA 761. The ordinary grammatical meaning of the word "net" in clause 2 of the agreement is unambiguous, it was agreed that Mr Michandani will be paid a golden handshake of one million four hundred and twenty thousand rands after taxes, allowances and deductions. Mr Ul haq being a chartered accountant and Mr Qasim, a businessman could never have understood the word "net" to mean "cash" as alleged by Mr. Qasim, this in my view, explains why the words "tax to be discussed" was deleted by Mr Qasim.

[16] The First Defendant has pleaded that the house, referred to in paragraph 10.2.4 of the particulars of claim and clause 2 of the handwritten agreement is not the property of the First Defendant. On this basis it was submitted that it could therefore not be transferred by it. Once again, the

immediate difficulty I have with this contention is that clause 2 clearly state that the parties agreed that the First Defendant would cause the property to be transferred into the name of the Mr Mirchandani. The rule of interpretation on actions based on contract was clearly set out by Greenberg JA in the matter of **Worman v Hughes and Others** 1948 (3) SA 495 (A) at 505 where he stated that:

"It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract. As was said by Solomon, J, in *Van Pletsen v Henning* (1913 A.D., p. 82 at page 89): 'The intention of the parties must be gathered from their language, not from what either of them may have had in mind'."

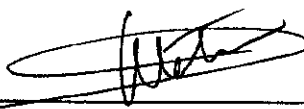
[17] It was submitted on behalf of Mr Mirchandani, correctly in my view, that if the parties had intended that the hand written agreement be depended on the drafting of a full and proper agreement and the obtaining of a tax directive, the parties would have said so. I also agree that the words "subject to the signing of agreement" in the preamble and elsewhere, simply refer to the agreement itself.

[18] In view of my finding that the hand written agreement is not provisional but a completed contract, there is no room for the implication of prayers (a) and (b) of defendant's counterclaim which falls to be dismissed.

[19] In the result the following order is made: Judgment is granted in favour of the Plaintiff as follows:

1. Payment of R1,320.000.00 together with interest at 15.5% per annum from 1 October 2010 to date of payment;
2. Payment to the bondholder of such amount as may be outstanding in respect of the bond currently registered over the property situated at 30 Blesbuck Avenue, Aldo Manor, Centurion, Pretoria ('the immovable property');
3. Defendants are ordered to transfer the immovable property into the name of the Plaintiff;
4. Payment to the Plaintiff of the amount income tax may become due and payable to SARS as a result of payment of the amount of R1,420,000.00 to Plaintiff and the transfer of the Dodge Journey (registration number YRV552GP) and the immovable property into the Plaintiff's name;
5. Second Defendant is ordered upon demand to sign such documentation as may be necessary to effect registration of the immovable property into the name of the Plaintiff;

6. Should Second Defendant and/or the Defendant refuse to sign such documentation as may be necessary to give effect to the order in paragraph 3 above, the Sheriff of the Honourable Court is authorised and ordered to sign such documentation on behalf of the Second Defendant and/or the Defendant to give effect thereto;
7. Costs of suit;
8. The relief sought in prayers a), b), c) of Defendants counterclaim is dismissed with costs;
9. The relief sought in prayers 4 and 5 of Plaintiff's Particulars of Claim and the relief sought in prayer d) and e) of the Defendant's Counterclaim is postponed *sine die*.



MATOJANE J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA