THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 343/2019

In the matter between:

L M	**FIRST APPELLANT**
H M NO	**SECOND APPELLANT**
PP MARÈ (HOËVELD) BOERDERY (PTY) LTD	**THIRD APPELLANT**

and

T M	**RESPONDENT**

Neutral citation:	*L M and Others v T M* (343/2019) [2020] ZASCA 43 (21 April 2020)
Coram:	CACHALIA, WALLIS, SALDULKER, VAN DER MERWE AND MAKGOKA JJA
Heard:	2 March 2020
Delivered:	This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 April 2020.

Summary: Contract – interpretation – undertaking to pay R5,5 million – provision that payment be made from proceeds of sale of game – not condition for coming into existence of obligation to make payment – failure of envisaged source of payment – no effect on obligation to pay – payment due within reasonable time after failure.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Van der Merwe JA (Cachalia, Wallis, Saldulker and Makgoka JJA concurring)

[1] The first appellant, Mr L M, and the respondent, Ms T M, were married to each other. Their marriage relationship broke down and the respondent instituted an action in the Gauteng Division of the High Court, Pretoria, for an order of divorce and ancillary relief. The second appellant, Ms H M, in her representative capacity as the executrix of the estate of the first appellant's late father, and the third appellant, PP Marè (Hoëveld) Boerdery (Pty) Ltd, were subsequently joined as the second and third defendants in the divorce action. The parties to the action entered into a written settlement agreement, which was made an order of the court, in terms whereof an amount of R5,5 million was payable to the respondent on a basis, the failure of which has led to the present litigation. Payment was not forthcoming and the respondent launched an application against the appellants to enforce the settlement agreement. Louw J granted the application and refused leave to appeal. In terms that I shall return to, this court granted limited leave to appeal to the appellants.

[2] The first appellant and the respondent were married on 28 February 1997. Their marriage was out of community of property, but subject to the accrual system specified in Chapter 1 of the Matrimonial Property Act 88 of 1984. Two children were

born of the marriage. On 30 June 2010, the high court made an order in terms of the provisions of Uniform rule 43. It awarded the primary care of the minor children to the respondent and circumscribed the first appellant's rights of access to them. It ordered the first appellant to pay maintenance *pendente lite* to the respondent in the amount of R13 500 per month and for the minor children in the amount of R7 500 per child per month.

[3] The divorce action eventually proceeded to trial. The joinder of the second and third appellants was effected during the trial. The second appellant, the mother of the first appellant, also represented the third appellant. The basis of the joinder, so we were informed from the bar by both counsel, was the respondent's assertion that assets nominally held by the second and third appellants, should, for purposes of her claims in respect of the financial consequences of the dissolution of the marriage, be regarded as the assets of the first appellant. The respondent thus laid claim to assets held by the second and third appellants.

[4] It is against this background that the parties reached a settlement. The settlement agreement was concluded on 18 January 2017. It recorded that the first appellant and the respondent consented to a decree of divorce. The parties agreed that the existing order in respect of the primary care, access to and maintenance of the minor children would remain in force. It provided that the first appellant would pay maintenance to the respondent until 31 December 2016, whereafter this obligation would irrevocably come to an end.

[5] Clause 2 of the settlement agreement provided as follows:

'The First, Second and Third Defendants pay, in full and final settlement of any and/or all claims that the Plaintiff has and/or had, an amount of R5,5 million to the Plaintiff, which amount is payable as follows:

2.1 The Plaintiff selects in cooperation with Messrs Dirk Maree, Killie Williams, Giep Stander and Poon du Plessis, a parcel of game, consisting of sable antelope and buffalo which are kept on the farm situated at Gravalotte, to the value of R5,5 million; and

2.2 Mr Killie Williams pays within a reasonable and fair period of time after the game, as referred to in paragraph 2.1 above, were removed and/or moved from the farm situated at Gravalotte, the amount of R5,5 million to the Plaintiff.' (My translation.)[1]

[6] On 28 February 2017, after exactly 20 years of marriage, a decree of divorce was issued and the settlement agreement made an order of the court. By November 2017, however, the respondent had not received payment of the amount of R5,5 million and she instituted the application in the court a quo. She explained that sub-clauses 2.1 and 2.2 of the settlement agreement did not materialise, because Mr Williams and the appellants, represented by the first appellant, had been unable to reach agreement on the prices for the game in question. Mr Williams was of the view that the prices proposed by the appellants were unrealistic and not market related and he therefore resolved not to purchase the game. The respondent said that as a result, and because she no longer received payment of maintenance, she had no income, found herself in dire financial straits and had no option but to approach the court for an order obliging the appellants to make payment of the amount of R5,5 million.

[7] The appellants elected not to file answering affidavits, but to raise questions of law in terms of Uniform rule 6(5)*(d)*(iii). In formulating the questions, the appellants stated that clause 2 of the settlement agreement provided for a specific method of payment, namely that set out in sub-clauses 2.1 and 2.2. They proceeded to say that the relief sought by the respondent was not in consonance with the provisions of the settlement agreement and that the respondent therefore failed to establish any basis upon which the appellants might be ordered to pay the amount of R5,5 million to the respondent. After this the notice went further and alleged that 'furthermore' the failure of the payment provisions amounted to supervening impossibility and that it rendered the settlement agreement void.

[8] The court a quo determined the matter in favour of the respondent. It said that the case brought before it was not about impossibility of performance but of the non-

[1] '2. Die Eerste-, Tweede- en Derde Verweerders betaal, in volle en finale vereffening van enige en/of alle eise wat die Eiseres het en/of gehad het, 'n bedrag van R5,5 miljoen aan die Eiseres, welke bedrag soos volg betaalbaar is:
2.1 Die Eiseres kies in samewerking met Mnre Dirk Maree, Killie Williams, Giep Stander en Poon du Plessis, 'n pakket wild, bestaande uit swartwit-pense en/of buffels wat op die plaas geleë te Gravalotte gehuisves word, ter waarde van R5,5 miljoen; en
2.2 Meneer Killie Williams betaal binne 'n redelike en billike tydperk nadat die wild, soos na verwys in paragraaf 2.1 hierbo, van die plaas geleë te Gravalotte verwyder en/of geskuif is die bedrag van R5,5 miljoen aan die Eiseres.'

compliance with the appellants' contractual undertaking that the third party would render performance to the respondent. It had regard to, inter alia, *Voet* 45 1 5 (P *Gane's* translation) and G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 471 and concluded:

'It therefore seems clear that the position in our law is that when a party contracts with another that a third party will perform the obligation of the party who undertook the obligation, the party who undertook the obligation will become liable to perform if the third party does not. In terms of clause 2 of the settlement agreement, the respondents incurred the obligation to pay the applicant the sum of R5,5 million. In light of the refusal by Mr Williams to give effect to clause 2 and to pay the said amount to the applicant, the respondents have become liable to make the payment.'

It proceeded to hold that there was no basis for joint and several liability and ordered the appellants to jointly make payment of R5,5 million to the respondent.

[9] As I have said, the court a quo refused leave to appeal, but this court granted leave to appeal, limited to the following issue:

'Whether clause 2 of the settlement agreement provided for payment out of a fund the coming into existence and sufficiency of which was a pre-requisite to the obligation to make payment (*Van den Berg v Tenner* 1975 (2) SA 268 (A) at 275G-H).' (the issue)

This limitation caused the issues of impossibility of performance and resultant voidness of the settlement agreement to fall away.

[10] The issue requires consideration of whether, as a matter of interpretation of the settlement agreement, the coming into existence or continuation of the obligation to pay R5,5 million to the respondent, was conditional upon compliance with sub-clauses 2.1 and 2.2 and, if not, of the effect of the failure of the intended method of payment.

[11] It is convenient, at this juncture, to analyse the decision in *Van den Berg v Tenner* 1975 (2) SA 268 (A). There the plaintiff had paid the amount of R10 000 to the defendant in terms of a sale agreement that was subsequently cancelled by agreement between them. The cancellation agreement provided that the defendant would repay the sum of R10 000 to the plaintiff from the proceeds of the sale of the business of a company controlled by the defendant and upon registration of transfer of immovable property that he had sold. Its terms were that the sum of R10 000 '… shall be provided from the sale … and … shall be paid … on date of finalisation of such

sale and registration of transfer of the property … .' Both these agreements were, however, cancelled as a result of the failure of the respective purchasers to comply with their obligations. When the plaintiff sued the defendant for payment of the sum of R10 000, the defendant argued that these provisions of the cancellation agreement had to be interpreted as suspensive conditions. As they had not been fulfilled, so the argument went, the cancellation agreement and the obligation to repay the sum of R10 000 did not come into existence.

[12] This court rejected this argument. It held that, on a proper construction of the cancellation agreement, the obligation to repay was unconditional. It held that the only effect of the provisions in respect of the source, manner and time of payment had been to postpone compliance with the obligation to repay until after finalisation of the transactions in question, or until it became clear that they would not take place. Thus, so Botha JA said for the court, it was not a case where parties had agreed that payment would exclusively be made out of a specific fund, and where the obligation to pay was subject to the coming into existence and sufficiency of the designated fund.

[13] The decision of *Gowan v Bowern* 1924 AD 550 constitutes an example of the latter type of case. Mr Gowan mandated Mr Bowern to sell his ship for commission. As a result of the efforts of Mr Bowern, the ship was sold to Mr Nemazee for £140 000. Mr Bowern claimed commission and the issue was what the terms of the contract between Mr Gowan and Mr Bowern were. Wessels JA determined the issue by ascribing the following to Mr Gowan (at 570):

'I am willing that you should act as my agent to sell my ship and you can make out of it whatever you can get provided I get £120 000. As you have got £140 000, I shall transmit to you £20 000 when I get the second instalment. I am quite willing to hide from Nemazee the fact that you are getting £20 000, and will pretend that the whole £140 000 comes to me. I am also willing to consider the second instalment as an instalment due to me, plus the £20 000 you are to get out of the business and this latter amount I will send to you if, and when, I get it.'

[14] As Mr Nemazee never paid the second instalment, the claim had to fail. De Villiers JA put the matter as follows (at 565):

'If Bowern had been satisfied with the ordinary commission payable by the seller, he would have been entitled to it when the contract with Nemazee was concluded, and the subsequent fate of the contract would have been a matter of indifference to him. But he chose to make a

special contract under which he was to obtain a portion of the purchase price thereby linking up his claim with the fate of the contract of sale, with the result that when the principal contract was cancelled by the parties his claim of necessity, in the absence of an expressed provision to the contrary, went with it.'

[15] It is trite that the interpretation of the settlement agreement entails giving meaning to the words used in the context in which they were used, including the apparent purpose of the agreement. As to the context, the first appellant and the respondent were married for 20 years under the accrual system. There is no suggestion of any dispute that the respondent was entitled to be paid something under the accrual system. The evidence, as supplemented by the information about the course of the proceedings described above in para 3, shows that the disputes related to the identification of the assets that were to be taken into account in determining the claim and ascribing a monetary value thereto. The purpose of the settlement agreement included the final determination of the financial consequences of the dissolution of this marriage and the claims to the assets of the second and third appellants. It did not provide for payment of maintenance to the respondent after the divorce. Her evidence that she was financially entirely dependent on the payment of the sum of R5,5 million was not disputed. In this context, the settlement agreement contained a clear recognition of the family law rights of the respondent to a financial award. Therefore, it is highly improbable that the parties could have intended that the respondent's right to payment would be entirely dependent on whether Mr Williams would purchase the game or not.

[16] The language of clause 2 also points to an unconditional obligation to pay. It will be recalled that it provided that the appellants 'pay, in full and final settlement of any and/or all claims that the Plaintiff has and/or had, an amount of R5,5 million to the Plaintiff, which amount is payable as follows …'. The existence of the obligation was not in any terms subjected to an occurrence or event; and sub-clauses 2.1 and 2.2 were not couched in the conventional language of conditions for the coming into existence of the obligation. In the light of what I have said, clear wording to that effect would have been required. And the obligation to 'pay in full and final settlement' strongly indicated that the obligation would continue even if, contrary to the provision 'which amount is payable as follows' that prefaced sub-clauses 2.1 and 2.2, payment

by those means would not be forthcoming. The latter expression is compatible with those clauses being merely matters of manner and form rather than being fundamental to the obligation to make payment and the context suggests that this was the case. In the result, the failure of the envisaged source of payment had no effect on the coming into existence or the continued existence of their obligation to pay.

[17] The point of departure in *Van den Berg* was the common law right to repayment of part of the purchase price following the cancellation of a sale. In this matter it was the family law rights to a financial award following the dissolution of the marriage. It follows that the matter is very different from *Gowan* and indistinguishable, in principle, from *Van den Berg.*

[18] As to the effect of the impossibility of the agreed source, manner and time of payment, *Van den Berg* provided two answers. In my view both are applicable here. The first is that, as a result of the impossibility, the amount became payable within a reasonable time after it had become evident that Mr Williams would not purchase the game. See *Van den Berg* at 276B-F. I perceive this proposition to be founded on a construction of the agreement and the application of the common law.

[19] Secondly, I entertain no doubt that had an officious bystander at the time of the entering into the settlement agreement asked the parties 'what would happen if Mr Williams did not purchase the game?', they would have answered that the appellants would be obliged to make payment from another source within a reasonable time thereafter. See *Van den Berg* at 276H-277C. In the circumstances, the respondent could hardly be blamed for not pleading such a tacit term. And when, on the facts, such a reasonable period had commenced, was not implicated by the issue.

[20] At best for the appellants, clause 2 is ambiguous. On this basis this court may adopt an equitable construction of the settlement agreement. In *Trustee, Estate Cresswell & Durbach v Coetzee* 1916 AD 14 at 19 Innes CJ said:

'The expression therefore which occurs in paragraph 6 of this lease is capable of two constructions, and if there is nothing in the context which points specially to one of them, it would be proper to apply the meaning which would avoid a manifestly inequitable result.'

In *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) at 468G-H Corbett CJ similarly stated:

'In a case such as this, where the meaning of the words used in the contract is not clear, there is room for the rule of interpretation which puts an equitable construction on the contract and does not adopt a meaning which gives one party an unfair or unreasonable advantage over the other ...'

Corbett CJ inter alia referred to Wessels' *Law of Contract in South Africa* 2 ed by A A Roberts (1951) § 1974 to1977. At § 1977 the esteemed author said:

'The Courts ought not to assume that the one party intended to get an unfair or unreasonable advantage over the other, but should presume the contrary. Hence, if the language of the promisor may be understood in more senses than one, the Court will interpret it in that sense in which the promisor at the moment the contract was concluded knew, or had good reason to believe, that the other party understood his words.'

In *South African Forestry Co Ltd v York Timbers Ltd* [2004] ZASCA 72; 2005 (3) SA 323 (SCA) para 32, Brand JA formulated this principle as follows:

'While a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different when a contract is ambiguous. In such a case, the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith.'

See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 26 and *Bradfield* 256-257.

[21] On the interpretation raised by the issue, the respondent would simply have to walk away with nothing. This would be a most inequitable result, as counsel for the appellants readily conceded. His attempt to soften this impact by saying that should the appeal succeed, the divorce action would proceed as if it was not settled, is untenable. The issue raised the interpretation of the settlement agreement and not the existence thereof. On this basis, too, the issue must be answered in the negative.

[22] In the result I make the following order:

The appeal is dismissed with costs, including the costs of two counsel.

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C H G VAN DER MERWE
JUDGE OF APPEAL

APPEARANCES

For appellants:	M C Erasmus SC
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	Van der Merwe & Sorour, Bloemfontein
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