THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 44/2014

In the matter between

SHAKAWA HUNTING & GAME LODGE (PTY) LTD **APPELLANT**

and

ASKARI ADVENTURES CC **RESPONDENT**

Neutral citation: *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC* (44/2014) [2015] ZASCA 62 (17 April 2015)

Coram: Mpati P, Leach, Majiedt, Saldulker JJA and Dambuza AJA

Heard: 18 February 2015

Delivered: 17 April 2015

Summary: Contract – interpretation - written agreement providing that respondent company to pay appellant 10% of its value if sold - meaning of term 'value'- assets of respondent company sold – whether appellant entitled to 10% of selling price.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Kollapen J sitting as court of first instance).

1 The appeal is upheld, to the extent that paragraph 1 of the order of the court below is set aside and replaced with the following:
'1 The defendant is ordered to pay to the plaintiff the amount of R403 600, with interest thereon at the rate of 15.5% per annum a *tempore morae* to date of final payment, both dates inclusive;'
2 The respondent is ordered to pay the costs of the appeal.

JUDGMENT

Mpati P (Leach, Majiedt, Saldulker JJA and Dambuza AJA concurring):

[1] This appeal concerns the interpretation of a written agreement concluded between the appellant (defendant in the court below) and the respondent (plaintiff in the court below) on 1 March 2004. At the time of the conclusion of the agreement the appellant (Shakawa) was represented by Mr Peter Wilkinson (Wilkinson), its sole shareholder and director, while the respondent (Askari) was represented by Mr Paul Ferreira (Ferreira), its sole member. On 15 September 2011 Askari caused summons to be issued against Shakawa claiming payment of the sum of R3 230 600, together with interest and costs of suit, the capital sum claimed being due, so it was alleged in the particulars of claim, in terms of the agreement. The relevant part of the agreement reads:
'Both parties hereby agreed as follows:

1. Paul Ferreira on behalf of Askari Adventures will receive an amount not less than 10% of the value of Shakawa hunting and Game Lodge, if the company is sold or Mr Peter Wilkinson should pass away.
2. This 10% sharing will be calculated after costs. E.g.: Legal fee, agent's commission etc.'

Shakawa operated a game and hunting lodge from five (5) adjoining farms situated in the Limpopo Province. It is common cause that in January 2011 Wilkinson sold the farms and the entire business operation in Shakawa (the going concern) for a consideration of R32 500 000.

[2] Askari alleged in its particulars of claim that, as a result of the sale, it 'became entitled to payment in an amount of R3 230 600 same being ten percent of the aggregate of the gross value of the business and/or its assets (R32 500 000) less accounting and legal fees (R100 000) less a severance payment made to Ferreira (R94 000).' A sales invoice reflecting these calculations – though not indicating in whose favour the severance payment was made – and issued to Shakawa, dated 28 February 2011, was annexed to the particulars of claim. On 8 February 2012 Askari obtained an order in the following terms in an application it had launched on 5 April 2011 against Shakawa, Charles Pieterse Attorneys and Louw Attorneys, as first, second and third respondents, respectively:

'1. THAT the second respondent, alternatively the third respondent . . . retain in trust the sum of R3 230 600.00 from the proceeds of one or more agreements of sale entered into between the first respondent and an unknown third party (in terms of which the first respondent sold to such unknown third party [the five farms].)

. . .

Pending final determination of an action or application to be instituted by the applicant for payment in the sum of R3 230 600.00, together with interest thereon, in terms of a written agreement concluded between the applicant and the first respondent on or about 1 March 2004.'

The second respondent in that application were Shakawa's attorneys, while the third respondent was the conveyancer who was attending to the transfer of the farms.

[3] Shakawa admitted the terms of the agreement in its plea, but denied that Askari was entitled to payment of the amount claimed. In the alternative, Shakawa pleaded as follows:

'8.3 [I]n the event of the Court finding that [Askari] had become entitled to payment in terms of the agreement between the parties, which is still denied, [Shakawa] pleads that:

8.3.1 the nett amount after deduction of all costs amounted to R4 036 000.00;

8.3.2 10% of the nett amount is calculated at R403 600.00;

8.3.3 [Shakawa] tendered payment of the aforesaid sum of R403 600.00 to [Askari];

8.3.4 [Askari] refused to accept payment of the said amount.'

In addition to its plea Shakawa filed a counterclaim seeking payment of 'the decrease in value of the sum of R3 230 600.00 against the British Pound Sterling from 6 April 2011 to date of judgment', with interest. The basis for the counterclaim was set out as follows (in para 8 thereof):

'As a result of the continued devaluation of the value of the ZA Rand against the British Pound Sterling [Shakawa] will suffer damages, which damages can only be ascertained with accuracy on the date of judgment in this counterclaim, and which will amount to the decrease in value of the sum of R3 230 600.00 against the British Pound Sterling from 6 April 2011 to date of judgment.'

[4] At the commencement of the trial the court below (Kollapen J) granted an application brought by Askari for leave to amend its particulars of claim to include a claim for rectification of the agreement, so as to reflect what was alleged to be the common intention of the parties. In terms of the amendment Askari sought, in addition, an order rectifying the written contract by inserting the following words into clause 1 thereof, directly after the words 'is sold':

'or if Shakawa Hunting & Game Lodge (Pty) Ltd sells its immovable properties and the improvements thereon, including the Shakawa Game Lodge, as a going concern.'

The basis for the rectification sought was, therefore, that it was the common intention of the parties that the amount of not less than 10% of the value of Skakawa would also be payable to Askari in the event that the company, Shakawa, sold its immovable properties and the improvemnets thereon, including the Game Lodge, as a going concern. After hearing evidence, the court below dismissed Shakawa's counterclaim, with costs. It ordered Shakawa to pay to

Askari the amount of R3 230 600, with interest thereon at the rate of 15.5% per annum, *a tempore morae,* to date of final payment and to pay the costs of the action. The court subsequently dismissed Shakawa's application for leave to appeal. This appeal is with leave of this court.

[5] I should mention at this stage that in its judgment the court below treated its granting of the amendment to the particulars of claim as an order for rectification of the agreement. The court said (in para 7 of the judgment):

'While the written agreement provided that the plaintiff would receive 10% of the value of Shakawa Game Lodge if the company was sold, the parties were in agreement that what was also contemplated was that in the event of the assets of the company being sold as opposed to a sale of the company, the obligation to pay 10% would also be activated (subject to certain conditions). In this regard, the plaintiff applied for an amendment at the commencement of the trial to rectify the written agreement to reflect such common intention. The defendant did not object to the proposed amendment and the written agreement was accordingly rectified.'

It is true that counsel for Shakawa did not object to the amendment sought, but made it clear that what was sought to be inserted in the agreement by way of rectification was 'not the proper version and we will get to that in due course'. No evidence was led to lay the basis for rectification and the court below accordingly erred in stating that 'the written agreement was accordingly rectified'. All that had been granted was an amendment to the pleadings**.** But that error is of no moment, for present purposes, because whatever was sold, Shakawa accepted that the 10% share due to Askari should be calculated on the basis that the purchase price was R32 500 000. The only issue in dispute, therefore, is how the amount due to Askari was to be calculated.

[6] It was never in dispute that at the time of the sale of the going concern Wilkinson had a loan account of R28 270 000 in Shakawa. It was contended on behalf of Shakawa that before calculating the 10% sharing due to Askari the amount of the loan account must be deducted from the purchase price, which would then leave a balance of R4 230 000. From that residue further amounts of

R100 000 (legal fees) and R94 000 (severance payments) must be deducted. The 10% sharing due to Askari should then be calculated from the balance of R4 036 000, resulting in an amount of R403 600, payment of which, according to Shakawa's plea, was tendered to Askari.

[7] In this court it was argued on behalf of Askari that the case presented by Shakawa, both in its pleadings and the questions asked and version put to Askari's witness, was that the amount of the loan account was to be deducted as a cost item in terms of clause 2 of the agreement. In support of this contention reference was made to paragraph 8.3.1 of Shakawa's plea (see para 3 above) and to the record, where, during the cross-examinatiom of Ferriera, it was put to him that he was 'entitled to 10% of what is left over after all the costs have been paid', and that the 10% sharing 'will be calculated after costs, example legal fees, agent's commission etcetera . . . '. It was also put to Ferreira that prior to signing the agreement Wilkinson had asked Mr Pieter Nel (Nel), an accountant who drew up the agreement upon request, in the presence of Ferreira, whether the agreement meant that his (Wilkinson's) loan account 'is included in the costs component' to which Nel answered in the affirmative. Reference was also made to Wilkinson's testimony, where he testified that after reading the agreement he commented to, or asked, Nel: '. . . I presume that "after cost" includes my loan', clearly referring to the wording of clause 2, so it was contended. During his cross-examination Nel conceded that for purposes of Shakawa's calculation of the amount payable to Askari, Wilkinson's loan account should be deducted from the value of Shakawa as a cost item in terms of clause 2 of the agreement. It was accordingly contended on behalf of Askari that insofar as it is now contended that the loan account should be deducted as a liability in order to determine the value of Shakawa as referred to in clause 1 of the agreement, Shakawa should not be allowed to advance that submission. For this contention counsel for Askari relied on *Improfed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-110A.

[8] In that case this court said:

'At the outset it need hardly be stressed that:

"The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed."

(*Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082.)

This fundamental principle is similarly stressed in Odgers' *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* 22nd ed at 113:

"The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision."

The degree of precision obviously depends on the circumstances of each case. More is required when claims are based upon the provisions of a detailed and complex contract, in which numerous clauses confer the right to additional payment in differing circumstances - a contract, moreover, in which such payments are to be determined, calculated and claimed in different ways depending on which clause is relied upon. In addition, as already pointed out, the contractor may choose to base the cause of action on some common law ground (breach of contract, enrichment or delict) quite unrelated to any additional payments for which the contract provides. Particularly in this context, it goes without saying that a pleading ought not to be positively misleading by referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some stage – in this case at the last possible moment – be relied upon. As it was put by Milne J in *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A:

". . . a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another".'[1]

[9] I do not agree with counsel for Askari that Shakawa should not be allowed to advance the submission that Wilkinson's loan account should be deducted as a liability in order to determine its (Shakawa's) value, either because of what was pleaded in paragraph 8.3 of its plea or because of certain evidence testified to by Shakawa's witnesses, or statements put to Askari's witness. Paragraph 5 of the particulars of claim reads:

[1] At 107C-H.

‘5 The express, alternatively tacit, further alternatively implied, terms of the agreement that are relevant hereto were as follows:

5.1 In the event that Wilkinson sold the defendant and/or the immovable property of the Defendant, and/or the lodge to a third party, alternatively in the event of his passing away, the plaintiff would immediately become entitled to an amount of not less than ten percent (10%) of the value of the defendant and/or the lodge at the time of such sale, alternatively at the time of Wilkinson’s death.

5.2 The abovementioned ten percent (10%) sharing would be calculated on the gross value of the defendant and/or the lodge, after certain costs such as legal fees and/or agent’s commission had been deducted therefrom.’

[10] In response, Shakawa pleaded thus:

‘Ad paragraph 5 thereof:

4.1 The defendant denies the contents of this paragrapgh.

4.2 The defendant pleads that the material express alternatively implied terms of the agreement were the following:

4.2.1 The plaintiff would receive an amount of not less than 10% of the nett value of the defendant if the defendant was sold or Peter Wilkinson passed away;

4.2.2 The 10% of the nett value would be calculated after the deduction of all costs of the defendant, e.g. legal fees, estate agent’s commission and the loan accounts of the share-holders of the defendant.

. . . .’

Although there is clearly some confusion in subparagraph 4.2.2, where ‘nett value’ is referred to and yet it is averred that the loan accounts of shareholders will be deducted as part of ‘all costs’, it is specifically pleaded in subparagraph 4.2.1 that the 10% to which Askari would be entitled will be 10% of the nett value of the defendant. And subparagraph 8.3.1 of the plea (quoted in para 3 above) does not detract from what is contained in subparagraph 4.2.1.

[11] As to the evidence of the witnesses on what they believed or thought the agreement meant, it needs be remembered that we are here dealing with the interpretation of a contract. Consequently, what the parties and their witnesses ex post facto think or believe regarding the meaning to be attached to the clauses of

the agreement, and thus what their intention was, is of no assistance in the exercise. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593; [2012] ZASCA 13 (SCA) this court (per Wallis JA) said this with regard to the construction of a document:

'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.'[2]

And further:

'Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, "the intention of the contracting parties", because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself.'[3] (Footnotes omitted.)

[12] What was said in *Endumeni Municipality* regarding the expression 'the intention of the parties' is in line with what was expressed by Greenberg JA more than six decades ago in *Worman v Hughes & others* 1948 (3) SA 495 (A) at 505, namely:

'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 . . . .'

It follows that the testimony of the parties to a written agreement as to what either of them may have had in mind at the time of the conclusion of the agreement is

[2] Para 18.
[3] Para 20.

irrelevant for purposes of ascertaining the meaning of the words used in a particular clause.

[13] It is now convenient to set out briefly the circumstances relevant to the agreement in this case coming into existence. Wilkinson became sole shareholder and director of Shakawa when his co-director and shareholder, a Mr Rigby, passed away in mid-2002. Ferreira, a professional hunter conducting the business of an outfitter under the name Askari Adventures CC, joined Shakawa as a consultant in the year 2000. In addition to the consulting services he also acted as outfitter in respect of safaris on Shakawa's property. In terms of an agreement between it and Shakawa, Askari was paid commission on earnings received by Shakawa, which would be a percentage of the daily rate paid by clients. Ferreira was afforded free accommodation on the property and the relationship between the parties appears to have been cordial and beneficial to both. It appears that in due course and to ensure the continued loyalty and support of Askari in the business of Shakawa, an oral agreement was concluded in terms of which, according to the testimony of Ferreira, Askari would 'receive 10% of what we all knew as Shakawa' if the latter were to be sold. After the demise of Mr Rigby, Fereirra and Wilkinson agreed that the oral agreement should be put in writing. The parties' (Askari and Shakawa) mutual bookkeeper, Nel, was commissioned to produce the written agreement, which was then signed on 1 March 2004.

[14] In its judgment the court below, after setting out the contentions of the parties, expressed the view that in respect of the main claim 'the only issue for determination is the proper interpretation to be given to Clause 2 of the agreement' and '. . . in particular the meaning to be attached to the word "costs"'. Because the abbreviation of the word 'etcetera' (etc) was used after the words 'legal fee' and 'agent's commission', which were recorded as examples of 'costs', the court below went on to establish whether or not Wilkinson's loan account was covered by the term 'costs'. In doing so the court applied the *ejusdem generis* principle of interpretation and concluded that 'the genus established in Clause 2 of the agreement relates to costs relating to the sale transaction . . . .' To arrive at this

conclusion the court had regard to the judgment of Hugo J in *Ovcon (Pty) Ltd v Administrator, Natal* 1991 (4) SA 71 (D) at 76I-J:

'Where a *genus* is in fact established and the word "etc" is added the latter or *ejusdem genus* construction seems to me to be indicated. The more generic words precede "etc", the more limited its effect must be. Thus "oranges etc" may well mean all fruit, simply because no *genus* is established; while "oranges, lemons, grapefruit etc" will almost certainly be limited to citrus fruit. On the other hand, if the preceding words are not confined to a *genus* then "etc" will tend to extend the meaning rather than limit it, so eg "oranges, peaches, etc" will probably include all fruit.'

The court below held that to include Wilkinson's loan account as a cost 'would hardly accord with the meaning of the word "costs" used as it is in the context described above'. It accordingly excluded the deduction of the loan account as an item under 'costs' and granted Askari its entire claim.

[15] The fundamental error the court below committed was to ignore clause 1 entirely in its attempt to interpret the parties' agreement. The process of attributing meaning to the words used in a contract must be undertaken '. . . 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.'[4] The stipulation that Askari will receive an amount not less than 10% of the value of Shakawa on the happening of certain events is contained in clause 1 of the agreement. I agree with counsel for Shakawa that clause 1 contained the nucleus of the agreement between the parties. Clearly, therefore, before effect is given to the deductions referred to in clause 2 the value of Shakawa must first be established.

[16] It seems to me that the court below misinterpreted Wilkinson's evidence because, although it referred to his acceptance that the value of the property sold was R32 500 000, it took that to mean that Wilkinson accepted that that was the value of Shakawa. During cross-examination Wilkinson agreed with counsel that the 'value' of the property was R32 500 000, which was the selling price the

[4] *Endumeni Municipality* para 18.

property had fetched. But the value of the property, in the sense of its selling price, and the value of the company, Shakawa, which owned the property, are two different concepts. It was as a result of the misinterpretation of Wilkinson's evidence that the court accepted as correct the calculation contended for by Askari (see para 2 above) and ordered Shakawa to pay to Askari the sum of R3 230 600, with interest.

[17] Nel, a practising accountant, testified that the valuation of a company 'is in terms of assets less liabilities ' and that the value of Shakawa was 'the value of the shares meaning assets at market value plus related costs less liabilities.' It is true that Nel also testified that in terms of the valuation of shares a loan account is a cost, which may well be so in accounting parlance. But what is clear from a proper reading of his evidence is that the value of a company is not just the value of its assets or the value of its shares; it is the value of such assets or shares less its liabilities. In this instance, however, Shakawa was not sold. Its property and business operation were sold as a going concern. It is highly unlikely that a different scenario would have been contemplated when the shares of the company were sold rather than the company itself; indeed, it is inconceivable that Wilkinson (Shakawa) would have agreed that were Shakawa to be sold Askari would receive 10% of its value, while if the shares in Shakawa were to be sold Askari would receive 10% of the selling price without liabilities having been deducted.

[18] I am satisfied that on a proper construction of the agreement, particularly clause 1 thereof, Wilkinson's loan account had to be deducted from the selling price of the farms and business operation of Shakawa before Askari's 10% sharing could be calculated. Moreover, in terms of clause 2 of the agreement, Askari's 10% sharing should be calculated from the residue after further deductions of R100 000 legal fees and R94 000 severance payments, which Askari seem to have accepted as an item under costs rather than a liability of Shakawa. The amount to which Askari is entitled therefore in terms of the agreement is R403 600 (see calculations in para 6 above).

Counterclaim

[19] In my view, there is no merit in Shakawa's counterclaim. The order for the retention in the country of the sum of R3 230 600 granted on 8 February 2012 was obtained pursuant to an application by Askari, which was unsuccessfully opposed by Shakawa. There was no allegation in the papers that the application constituted a malicious legal proceeding. The money was thus retained on the strength of a court order legitimately obtained. No recognised cause of action was pleaded and no basis therefore exists for the counter-claim. It was correctly dismissed by the court below.

Costs

[20] Counsel for Shakawa submitted that because it had tendered payment to Askari of the amount of R403 600, which the latter refused to accept, Askari should not be awarded the costs of the action in the court below. I disagree. The allegation relating to the tender and refusal to accept was pleaded in paragraph 8.3.3 and 8.3.4 of the plea (see para 3 above). But the tender was not repeated in the plea, nor was there an offer of settlement made in terms of rule 34 of the Uniform Rules, or a payment into court. That being so I can find no reason why Askari should not be entitled to its costs in the court below, having succeeded in its claim, albeit in a much lesser amount. The order of the court below, in terms of which Askari was awarded costs of the action, shall therefore remain unaltered. On the other hand, although Shakawa has not succeeded in respect of its counterclaim, the costs attendant thereon were minimal. It had substantial success in the appeal relating to the amount awarded to Askari in its claim and should be awarded costs of the appeal.

[21] In the result the following order shall issue:

1 The appeal is upheld, to the extent that paragraph 1 of the order of the court below is set aside and replaced with the following:

'1 The defendant is ordered to pay to the plaintiff the amount of R403 600 with interest thereon at the rate of 15.5% per annum *a tempore morae* to date of final payment, both dates inclusive;'

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

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L Mpati
President

APPEARANCES

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