

Summary: Contract: use of heading in interpretation; incorporation of tacit term.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Willis J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

CLOETE JA (MALAN, SHONGWE, TSHIQI JJA AND SOUTHWOOD AJA CONCURRING):

[1] Waz Props (Pty) Ltd and Sentinel Mining Industry Retirement Fund (SMIRF) entered into a contract pursuant to which Waz Props caused Werlex Properties (Pty) Ltd to have a guarantee issued by ABSA in favour of SMIRF's attorneys. The guarantee was presented for payment and paid. In the court below, Waz Props and Werlex (the applicants) instituted motion proceedings against SMIRF and its attorneys for repayment of the amount of the guarantee. They succeeded before Willis J, who subsequently granted leave to appeal to this court.

[2] The background to the contract is the following. Waz Props owned properties in Elton Hill, Johannesburg. SMIRF owned the Melrose Arch Development and wished to embark on a project (the project) to upgrade Park Road, Birnam, which is in close proximity to the properties owned by Waz Props. Waz Props applied to the local authority for permission to rezone the properties. SMIRF lodged an objection to the rezoning. The applicants alleged in their founding affidavit that:

'The objection was without any merit, and was aimed at pressuring [Waz Props] into making a contribution to the [project].'

This allegation was admitted by SMIRF in its answering affidavit. SMIRF withdrew the objection when Waz Props entered into the contract.

[3] The contract contained the following terms, which it is unfortunately necessary to quote in full (the 'owner' is Waz Props):

'3. Owner's Obligations

The owner agrees and undertakes to effect payment of its pro-rata share of the Park Road Upgrading Project the total cost in an amount of R115 531.87 (one hundred and fifteen thousand five hundred and thirty one rand and eighty seven cents).

4. Method of payment

The owner will secure its obligations in terms of this agreement in either of the following manners:-

4.1 the owner shall within 7 (seven) days of signature hereto, either:-

4.1.1 effect payment by way of a bank transfer, which the owner undertakes to effect directly into the account of the Attorneys, Nedbank Rosebank Branch, Branch Code 195805, Account Number 1958 506060 which Attorneys Northrand Business Branch, Branch Code 148-905, Account Number 1489-085-586, which Attorneys are hereby authorised to invest such sum in an interest bearing account with a registered bank or financial institution and in terms of Section 78(2A) of the Attorneys Act 53 of 1979. The said account will be in the name of Fluxmans Inc. with a reference to the aforesaid section of the Attorneys Act but will be identified with the name "Park Road Upgrading Project" and the interest earned thereon will accrue for the benefit of the Park Road Upgrading Project;

alternatively

4.1.2 secure payment by way of a registered bank or financial institution guarantee substantially similar to the of the draft guarantee annexed as Annexure "B";

or

4.2 the owner:-

4.2.1 agrees to register the following restrictive condition against the Title Deeds of the property, imposed by and in favour of SMIRF:

"Restrictive Condition:

1. The property shall not be used for any purpose other than in accordance with its present zoning, without the prior written consent of SMIRF or its successors-in-title, first having been had and obtained.

2. In the event of the property being sold or disposed of in any manner whatsoever, then and in such event the owner will ensure that the amount referred to in 3, (which in this instance will escalate at a rate of 10% (ten per centum) per annum, escalated from the date of registration of the restrictive condition until date of payment, compounded monthly), is [to] be

paid to SMIRF out of the proceeds of the sale and the owner shall ensure further that an appropriate registered bank or financial institution guarantee is furnished to the Attorneys, which guarantee shall be drawn in favour of SMIRF or its nominee and expressed to be payable free of exchange against registration of transfer.”

4.2.2 to that end the owner simultaneously with its signature to this agreement gives and grants to SMIRF an irrevocable power of attorney in its name place and stead and at the owner’s own cost and expense, to register the abovementioned restrictive condition against the Title Deed of the property, hereby ratifying, allowing and confirming and promising to ratify, allow and confirm all and whatsoever the said Attorneys shall lawfully do or cause to be done by virtue of this authority, upon and subject to the terms set out in Annexure “C” which Power of Attorney shall remain valid and in full force and effect during the currency of the agreement;

4.2.3 undertakes to contribute the sum of R1 500.00 (one thousand five hundred rand), plus VAT, towards the costs of registering the said restrictive conditions;

4.2.4 undertakes to effect payment of the costs associated with the obtaining of appropriate consents from any bondholders in respect of mortgage bonds registered over the properties.

5. Non-completion of the Park Road Upgrading Project

5.1 In the event that the Park Road Upgrading Project is not completed by 1 April 2009 then and in such event, the interest bearing account referred to in 4.1.1 shall be closed and the amount referred to in 3 together with the owner’s pro rata share of the interest earned thereon (less any administration charges) shall be refunded to the owner.

5.2 Upon the happening of the event referred to in 5.1, SMIRF undertakes, at its cost and expense, to procure the cancellation of the caveat referred to in 4.2.1.’

[4] There were therefore three options open to Waz Props in terms of clause 4:

(a) To pay the amount mentioned in clause 3 to SMIRF’s attorneys. In that event, the amount was to be invested in an interest bearing account and the interest would accrue for the benefit of the project. (Option 1.)

(b) To provide a guarantee from a financial institution. In that event, the draft guarantee annexed to the contract provided that Waz Props would have to pay the amount mentioned in clause 3 plus interest at ten per cent per annum compounded monthly. (Option 2.)

(c) To register a restrictive condition against the title deeds of its properties in terms of which it undertook, if the properties were disposed of, to ensure that the amount referred to in clause 3, escalated at ten per cent per annum compounded monthly, would be paid to SMIRF from the proceeds of the sale. (Option 3.)

[5] Waz Props chose option 2 and at the suit of Werlex (acting on behalf of Waz Props) a guarantee was issued pursuant to the provisions of clause 4.1.2, in terms of which ABSA undertook to pay SMIRF's attorneys R115 531.87 together with interest at 10% per annum from 27 February 2004 (the day after the contract) to date of payment calculated daily and compounded monthly. The 'conditions of payment' clause in the guarantee contained only one condition, namely:

'Upon receipt of a Completion Certificate signed by the Quantity Surveyor, confirming that construction of the upgrade to the "Park Road Upgrading Project" has been satisfactorily completed.'

The undertaking given by ABSA contained no expiry date. It was not irrevocable and expressly provided that:

'The original of this letter must be returned on payment being effected or upon receipt of notice of withdrawal.'

[6] The project was not completed by 1 April 2009 (the date mentioned in clause 5 of the contract). It was, however, completed on 15 February 2010 and a completion certificate signed by the civil engineer was issued on 22 February 2010. The applicants made nothing of the fact that the completion certificate was not signed by the quantity surveyor as envisaged in the guarantee. SMIRF's attorneys presented the guarantee for payment on 26 March 2010. Despite an objection by Waz Props on 30 March 2010 addressed to SMIRF's attorneys, ABSA on 6 April 2010 paid out R207 810.35, being the amount of R115 531.87 referred to in clause 3 of the agreement plus interest calculated as set out in the guarantee, to SMIRF's attorneys and debited the account of Werlex. The applicants then commenced the motion proceedings in the South Gauteng High Court, Johannesburg, that culminated in this appeal.

[7] It is not disputed that ABSA was obliged to make the payment to SMIRF's attorneys: *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd* 2010 (2) SA 86 (SCA) paras 20 and 21. This is accordingly not the appropriate case to reconsider the correctness of the majority judgment in *Dormell Properties 282 CC v Renasa Insurance Co Ltd & others* NNO 2011 (1) SA 70 (SCA). The applicants' case is that SMIRF's attorneys were not entitled to present the guarantee as Waz Props' obligation under the contract to make payment had lapsed.

[8] The applicants argued that clause 5 of the contract contains a resolutive condition which terminated the obligation to pay the amount of R115 531.87 and any further obligations under clause 4, and which was express in respect of the obligations undertaken under clause 4.1.1 (option 1) and clause 4.2 (option 3), but tacit in respect of clause 4.1.2 (option 2). The respondents argued that clause 3 contained what counsel termed Waz Props' 'primary obligation'; clause 4 dealt with security for payment of that amount; and clause 5 provided that if the project had not been completed by 1 April 2009, two types of security — those envisaged in options 1 and 3 — would be released; but that this did not apply in the case of the security under option 2. Counsel further submitted that in every case the obligation to pay the amount referred to in clause 3 remained, whatever happened to the security in terms of clause 4; and that in the case of option 2, there was no basis to import a tacit term into clause 5 that if the project were not completed by 1 April 2009, the security provided under option 2 should suffer the same fate as the security provided under options 1 or 3.

[9] I have difficulties with the interpretation placed on the contract by SMIRF's counsel. The obligation imposed on Waz Props is not confined to clause 3. Nor is clause 4 confined to the provision of security. Further financial obligations are imposed on Waz Props by each option in clause 4: in the case of option 1, Waz Props loses the interest on the amount in clause 3 and the interest accrues to SMIRF's project; in the case of option 2, Waz Props has to pay interest on the amount in clause 3 to SMIRF; and in the case of option 3, Waz Props has to pay the amount in clause 3 increased by ten per cent per

annum. It cannot therefore be said that clause 3 contains a primary obligation and clause 4 contains provisions solely relating to security for payment of that primary obligation. Undoubtedly clause 4 provides for security, but that is not its only effect. It also determines the amount to be paid, which will vary depending upon the option chosen.

[10] Furthermore, it seems to me that the three options for which clause 4 provides, also constitute the three agreed methods of payment (impliedly in the case of option 1). That accords with the scheme of the contract. Clause 3 begins '[Waz Props] agrees and undertakes to effect payment . . .'. The immediately following clause is headed 'Method of Payment'. In the absence of express provision to the contrary, headings in contracts can be taken into account in interpreting the contract.¹ It seems to me common sense that where a heading conflicts with the body of the contract, it must be the body of the contract which prevails because the parties' intention is more likely to appear from the provisions they have spelt out than from an abbreviation they have chosen to identify the effect of those provisions;² but that where the heading and the detailed provisions can be read together, that should be done. And in the present case, they can. Clause 4 is headed 'Method of Payment'. The body of the clause begins 'The owner will secure its obligations in terms of this agreement in either of the following manners . . .'. The respondents' counsel argued that because method of payment and security for payment are different concepts, regard could only be had to the provisions of the clause and that the heading should be ignored. But if the terms of the three options provided in clause 4 are considered, it is apparent that each serves the purpose both of securing the amount payable and specifying the method of payment in terms of that option (as I have said, in the case of option 1 by necessary implication). I cannot agree with the respondents'

¹ *Parkinson v Mathews & Drysdale* 1930 WLD 58; *Bekker v Western Province Sports Club (Inc)* 1972 (3) SA 803 (C) at 818-819.

² Contrast the position where writing appears in the margin or elsewhere in a typed or printed contract: *Robertson & Thompson v Finch* 4 East 130 at 136 and 140-141, 102 ER 779 at 782-4; *Wessels Law of Contract in South Africa* 2 ed (1951) paras 1981-1982; *Hayne & Co Ltd v Central Agency for Co-operative Societies (in liquidation)* 1938 AD 352 at 365-366; *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 (1) SA 7 (A) at 15A-C and authorities there quoted.

counsel that in the two cases dealt with by clause 5 (options 1 and 3) the obligation to pay the amount mentioned in clause 3 survives. There is no provision as to how payment shall be made other than in clause 4, and the amount payable depends on the option chosen. There is no express residual obligation to pay the amount in clause 3 at some future and undefined date. In the circumstances I am of the view that clause 4 is exhaustive of the methods by which payment can be made.

[11] I therefore interpret the effect of clause 5 of the contract, read with options 1 and 3, to mean that if the project is not completed by 1 April 2009, the obligation to pay — and not merely the obligation to provide security — lapses. Consequently in regard to option 1, if the resolutive condition is fulfilled, the amount referred to in clause 3 and the accrued interest has to be refunded to Waz Props; and in regard to option 3, the restrictive condition has to be cancelled because there is no longer an obligation to secure. In both cases, the method of payment falls away because the debt is no longer payable.

[12] The interpretation I have given accords to my mind with commercial sense: the objection by SMIRF to Waz Props' rezoning application was, it is common cause, without any merit and made for an ulterior purpose. The date referred to in clause 5 is some five years after the contract was concluded. I can therefore readily understand a property developer in the position of Waz Props adopting the attitude that it would only make a contribution to SMIRF's project, which it would otherwise not be obliged to make and which escalated as time went by, if the project were to be completed by a certain date. The position is not analogous to that of a house owner whose house is completed late, as the respondents' counsel submitted, because the project was not being constructed at the instance of Waz Props.

[13] I now turn to the question whether a tacit term should be incorporated into clause 5 of the contract to the effect that if the project was not completed by 1 April 2009, the guarantee in option 2 would also lapse — ie a term that

the guarantee would not be presented in such a case because the amount guaranteed would no longer be owing.

[14] The respondents relied strongly on the decision in *Union Government (Minister of Railways) v Faux Ltd* 1916 AD 105 where Solomon JA said at 112:

'Now it is needless to say that a Court should be very slow to imply a term in a contract which is not to be found there, more particularly in a case like the present, where in the printed conditions the whole subject is dealt with in the greatest detail; and where the condition which we are asked to imply, is one of the very greatest importance on a matter which could not possibly have been absent from the minds of the parties at the time when the agreement was made.'

The respondents also emphasised that the court must be satisfied not that it would be reasonable to incorporate the term, but that incorporation was necessary. I unhesitatingly agree that ordinarily a court would be very slow to incorporate a tacit term so fundamental that it constituted a resolute condition which would put an end to the contract altogether, and the passage quoted from *Faux* would be directly in point. But here, as I have already found, the contract expressly contained such resolute conditions in the case of options 1 and 3 read with clause 5. And I cannot accept that if the project was not completed by 1 April 2009 SMIRF would lose the interest under option 1 or the ten per cent per annum increase under option 3, but not the interest under option 2. It was suggested in argument on behalf of SMIRF that the security provisions under option 1 and 3 were more onerous than the security provisions under option 2; and that the parties accordingly contemplated that if five years passed, the more onerous securities would be released. I am by no means convinced that the premise on which this argument is based is correct. But I remain unconvinced why the parties should intend that in the case of two of the options SMIRF would lose significant pecuniary advantages but not in the case of the remaining option. That anomaly has not been explained. And, as I have said, clause 4 does not merely provide for security.

[15] The court below reasoned as follows:

'To my mind, if one was to ask an innocent bystander whether it must have been intended by the parties that if the Park Road Upgrading Project was not completed by 1 April 2009 and if the first applicant paid a sum of money into an interest-bearing trust account and had been repaid [option 1], would it have been their intention that the first respondent would not call up the guarantee issued [under option 2] instead? To my mind the answer to this question has to be, "Of course".'

I agree. The same reasoning applies if option 3 is used in the place of option 1; and both together are to my mind conclusive.

[16] It may well be asked why the contract makes express provision if option 1 or 3 is chosen and the project is not completed by 1 April 2009, but makes no such provision in respect of option 2. There is, however, a difference between options 1 and 3 on the one hand, and option 2 on the other. It was necessary in the case of option 1 to provide expressly what would happen to the interest, which until then had accrued for the benefit of the project, because the parties intended the interest to be paid to Waz Props; and it was also necessary in the case of option 3 to provide expressly for the cancellation of the caveat and the fact that such cancellation would be at SMIRF's expense. But it was not necessary to provide expressly what would happen in the case of the guarantee. The parties could of course have done so, but it was not essential. The right to present the guarantee would simply have lapsed.

[17] I am not prepared to find, as submitted on behalf of the respondents, that the applicants' failure to ask for the return of the guarantee after 1 April 2009 evidences an interpretation of the contract inconsistent with the interpretation which they now advance, and consistent with the interpretation the respondents place on the contract. That conduct is equally consistent with lax administration or a belief that SMIRF would not act in bad faith and cause its attorneys to present the guarantee. Waz Props certainly reacted immediately after it was brought to its attention that SMIRF's attorneys intended presenting the guarantee for payment. Nor do I attach significance to the fact that the applicants caused a guarantee to be drawn up which did not

provide that it would lapse on 1 April 2009. The guarantee provided was not irrevocable. It could accordingly have been withdrawn after 1 April 2009.

[18] I should also deal with the argument advanced on behalf of the respondents that the applicants are not entitled to the relief sought because there is a dispute of fact, in as much as the applicants assert a tacit term and the respondents deny that there was one. The argument rests upon a misconception. There is no dispute in regard to the facts on which the applicants rely for a tacit term to be inferred. Those facts — particularly the express terms of the contract — are common cause.

[19] Finally, I should deal with the suggestion made during argument that the tacit term for which the applicants contend would, if inserted in clause 5, contradict the express terms of the guarantee, which, because they are incorporated by reference in an annexure to the agreement, form part of the agreement itself. But that is not so. The express condition of payment to which the guarantee was subject, is receipt of a completion certificate signed by the quantity surveyor confirming that the project had been satisfactorily completed. The insertion of a tacit term in clause 5 that the guarantee would not be presented after 1 April 2009, would supplement the express term and not contradict it.

[20] To my mind, once the contract is read as a whole, the intention of the parties can readily be ascertained. Waz Props, which had no obligation to do so, agreed to pay an amount to SMIRF to be calculated, secured and paid in one of three ways. If the purpose for which the amount was to be paid had not been achieved within five years, Waz Props' continually increasing obligation fell away — expressly in respect of options 1 and 3, and tacitly in respect of option 2.

[21] The appeal is dismissed with costs.

T D CLOETE
JUDGE OF APPEAL

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