Not reportable

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 759/2011

In the matter between:

COMWEZI SECURITY SERVICES (PTY) LTD First Appellant

MOHAMMED SHAFFIE MOWZER NO

(in his capacity as the trustee for the Grapsy Trust) Second Appellant

and

CAPE EMPOWERMENT TRUST LIMITED Respondent

Neutral citation: *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* (759/11) [2012] ZASCA 126 (21 September 2012)

Coram: CLOETE, CACHALIA, LEACH, THERON and WALLIS JJA.

Heard: 31 August 2012

Delivered: 21 September 2012

Summary: Contract – resolutive condition – interpretation – power of relaxation vested in one party – exercise of power – evidence of conduct of parties in implementing contract – admissibility.

ORDER

On appeal from: Western Cape High Court (Louw J sitting as court of first instance)

The appeal is dismissed with costs, such costs to include the costs of two counsel where two counsel were employed.

JUDGMENT

WALLIS JA (CLOETE, CACHALIA, LEACH and THERON JJA concurring)

[1] The first appellant, Comwezi, borrowed R4 million from the respondent (CET). Repayment of this amount was secured by way of a cession and pledge of 20 shares in Comwezi held by the Grapsy Trust, which was represented, as it has been in this litigation, by the second appellant, Mr Mowzer, in his capacity as trustee of the trust. The loan was not repaid on 30 April 2009 in accordance with the loan agreement. On 8 June 2010, the parties entered into a settlement agreement in terms of which the loan would be discharged by way of the issue to CET of 25 shares in Comwezi.

[2] The settlement agreement contained a resolutive condition that had to be fulfilled within three months, relating to the conduct by CET of a due diligence exercise in respect of Comwezi. Failing fulfilment of the condition the settlement agreement would lapse and the parties would

revert to their respective positions under the loan agreement. CET was given the right to waive or 'relax' the resolutive condition. It purported to do so by extending the date for its fulfilment no less than 13 times, on the grounds that Comwezi was in breach of its obligations to co-operate with the due diligence investigation and provide documents to enable the investigation to be undertaken. The issue before us is whether these extensions were effective or whether the condition, and therefore the settlement agreement, failed. In the high court, Louw J held that the extensions were permissible and that the agreement remained in force. He issued an order compelling Comwezi to co-operate with CET in the due diligence investigation. The appeal against that order is with his leave.

[3] The relevant provisions of the settlement agreement are those embodying the right to conduct a due diligence investigation and the resolutive condition. These are to be found in clauses 7 and 10, the relevant portions of which read as follows:

'7 DUE DILIGENCE INVESTIGATION

7.1 CET shall be entitled, immediately after the Signature Date to conduct a comprehensive due diligence investigation in respect of the affairs of Comwezi.

7.2 Comwezi and the Grapsy Trust shall co-operate with CET in conducting the due diligence investigation and shall procure that CET and its duly authorised representatives are given every reasonable assistance in this regard and that all documentation of Comwezi are made available for inspection.

7.3-7.5 …

7.6 CET shall have the sole and absolute discretion to proceed with or abandon this Settlement Agreement based on the outcome of its own findings and conclusions from the due diligence investigation.

7.7 CET shall, for purposes of the resolutive condition contained herein, notify Comwezi by not later than 3 months after the Signature Date whether or not it is satisfied with the outcome of its due diligence investigation and accordingly whether

it wishes to proceed with this transaction, provided that if CET fails to so notify Comwezi timeously CET shall be deemed not to be satisfied.

10 RESOLUTIVE CONDITION

10.1 The Parties agree that this Settlement Agreement is subject to the resolutive condition that CET has completed the due diligence investigation set out clause 7 in respect of Comwezi and has notified Comwezi that it is satisfied with the outcome thereof by no later than 3 (three) months after the Signature Date.

10.2 In the event of CET not notifying Comwezi that it is satisfied with the outcome of the due diligence investigation, this Settlement Agreement will automatically fail and be of no further force and effect and the Parties shall restore the *status quo ante* as near as possible and no party shall have any claim against the other party arising from this Settlement Agreement and for the avoidance of doubt, the Parties will then only be able to rely on the terms of the Loan Agreement to enforce its rights against the other.

10.3 The resolutive condition contained herein is imposed for the benefit of CET and may be waived or relaxed, in writing, by CET prior to the period of 3 (three) months after the Signature Date.'

[4] Comwezi argued that the power to relax the resolutive condition did not entitle CET to extend the period within which it was required to conduct the due diligence investigation. Accordingly, it submitted that when that investigation was not completed within the three month period specified in clause 10.1 the settlement agreement was automatically terminated and the parties reverted to their respective positions in terms of the loan agreement. It argued that the power to relax contained in clause 10.3 was limited to a power to make the clause less stringent in its operation and effect. This argument was expressed in the following terms in the heads of argument delivered on its behalf.

' … "relaxing" the resolutive condition is also very different from "extending" it, and also quite distinct from extending the time allowed for complying with the condition. Clause 10.3 notably does not say that the resolutive condition may be extended by CET; nor that CET could extend the time for complying with that condition … Clause

10.3 should therefore not be read as if it did. A power to "relax" a condition does not give licence to "alter" it, as "*relaxation"* and "*alteration*" are different concepts.'

In advancing this argument it relied on *Ex parte Bain*[1] and *Ronnie's Motors (Pty) Ltd & Others v Van der Walt & Others*.[2]

[5] In the heads of argument it was submitted that this approach accorded with the 'plain meaning' of the word 'relax' and that it was not open to us to go beyond that. That contention was based upon an approach to the interpretation of documents that is no longer appropriate. This court recently restated the correct approach in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] in the following terms:

'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. Where more than one meaning is possible each possibility must be weighed in the light of all 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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. 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.'

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[1] *Ex parte Bain* 1964 (2) SA 798 (C) 801D-F.
[2] *Ronnie's Motors (Pty) Ltd & Others v Van der Walt & Others* 1962 (4) SA 660 (A).
[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[6] In argument before us counsel departed from the heads of argument in the light of this judgment. Instead stress was placed upon the portion of the quoted passage where it was said that the invariable point of departure in an exercise in interpretation is the language of the provision under consideration. Taking that as the starting point it was submitted that the parties had stipulated a period within which the due diligence investigation was to take place in the interests of certainty. It was submitted that construing the power to 'relax' the provisions of the resolutive condition as enabling CET to extend that period would undercut the manifest purpose of creating certainty in regard to the acquisition of the shareholding by CET. That certainty was desirable in view of the fact that Command Holdings Ltd, a major shareholder in Comwezi of which Mr Mowzer is the Chief Executive, and CET itself were both listed on the alternative board of the JSE. There was accordingly a public interest in achieving certainty in regard to ownership of the shares in Comwezi. Presumably, for so long as the entire settlement agreement might fall away, this could cause difficulties in filing public accounts for both Command Holdings and CET.

[7] Accepting that the starting point is the language of the provision under consideration, the issue is simply whether the power given to CET in clause 10.3 to 'relax' the resolutive condition afforded CET the right to extend the period within which it had to inform Comwezi that it was satisfied with the outcome of the due diligence and, by necessary inference, the period within which it was to conduct that exercise. Comwezi contended that it did not and CET that it did. That is the sole issue in this appeal as Comwezi did not contend that the exercise of the power was subject to any tacit limitation, such as that it had to be

exercised bona fide and *arbitrio boni viri*[4] and that it was not so exercised.

[8] The word 'relax' in clause 10.3 cannot be read or construed in isolation from the rest of that clause or from the provisions of clause 10.1. In clause 10.3 it is counterpoised with the power to waive fulfilment of the resolutive condition in clause 10.1. That power was given exclusively to CET because the resolutive clause was inserted into the agreement for its sole benefit. In other words, Comwezi was content to have CET as a shareholder, but CET needed to be satisfied that the shares it was acquiring were an appropriate recompense for its foregoing its monetary claim to be paid the four million rand plus interest that it was owed under the loan agreement. This is reinforced by clause 7.6 where it is said that it is in CET's 'sole and absolute discretion' to continue with the contract after concluding the due diligence investigation.

[9] The resolutive condition in clause 10.1 has three elements. These are the completion of the due diligence investigation provided in clause 7, the giving of written notice of satisfaction with the outcome of that investigation and the requirement that such notice be given within three months of the date of signature of the settlement agreement. The power of relaxation is given generally in relation to the condition as a whole. It is helpful to consider how that power could be exercised in relation to each element of the condition.

[10] Whilst the due diligence investigation is described in clause 7.1 as 'comprehensive', it is plain from the fact that CET had the power to

[4] *NBS Boland Bank Ltd v One Berg River Drive CC & others; Deeb & another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) para 25.

dispense with it altogether by waiver that it was primarily for CET to determine the scope of the enquiries that it wished to make pursuant to the investigation and to decide what documents it needed for that purpose. Comwezi was obliged to provide all documents required by CET and to give all reasonable assistance in the conduct of the investigation. It could not demand that CET be more thorough in its enquiries or do more than it wished. In those circumstances, because CET already had the power to determine the precise scope and extent of the due diligence investigation, there can be no question of it needing or exercising a power to relax the requirements of the investigation as suggested to us.

[11] It was not suggested that the power of relaxation could be exercised in relation to the obligation to give written notice of CET's satisfaction with the outcome of the investigation. That seems clear. To relax that provision would indeed throw the operation of the entire agreement into the morass of uncertainty that Comwezi's counsel referred to, because it would never be possible for the parties to know when or whether finality had been reached.

[12] That leaves only the three month period in respect of which the power of relaxation could be exercised. If, as contended by Comwezi, that power cannot be exercised in relation to the time period then it has no operative effect and, contrary to the submission that the starting point of the interpretative exercise is the language of the provision under consideration, we would not be interpreting the contract but altering it by deleting the reference to a power to relax the resolutive condition. That is impermissible. Whilst there may be circumstances in which a court can disregard words in the process of interpretation, where, for example, they

were clearly included in error, those circumstances do not apply in this case.

[13] Once it is recognised that the power of relaxation in clause 10.3 must relate to the three month period in clause 10.1 then its only possible meaning is that it is a power to extend that period. Accepting that conclusion, without conceding its correctness, an alternative argument was advanced in reply that in that event the power could only be exercised once and would thereafter be exhausted. This was based on the provision in clause 10.3 that any relaxation be conveyed in writing prior to the expiry of the three month period. However, that is not a sensible interpretation of that portion of clause 10.3. The power is one to relax a time period. The period of three months in clause 10.3 is the same three month period as that in clause 10.1. If the latter period is relaxed by way of an extension by a further three months the former must likewise be relaxed. That is also consistent with the practicalities, because CET will never be able to determine with certainty what period of extension is necessary to complete the due diligence investigation. If it could only exercise the power once that would tempt it to extend the period by an unreasonably lengthy period. Counsel was unable to explain why it would be permissible for it to extend the period by 12 months, but not by six periods of two months. Nor was he able to suggest why an extension to an indeterminate date, such as two weeks after the conclusion of the due diligence investigation, would be impermissible. Those two examples make it clear that the restriction for which he contended is unwarranted by the language of the clause properly construed.

[14] One final point is worth mentioning. It is that Comwezi's response to the initial extensions of time by CET was to accept them and profess a

willingness to co-operate in the due diligence investigation. On Comwezi's argument the settlement agreement would have lapsed by 8 September 2010. Yet, as late as 26 January 2011 Mr Mowzer sent an e-mail to CET's attorney confirming that the due diligence investigation would be completed by CET by 28 February 2011 'to meet with all other deadlines in terms of the acquisition'. In other words Comwezi accepted that the various extensions of time prior to that date, of which there had been six, were proper and effective. Its conduct in regard to the implementation of the agreement was therefore inconsistent with the interpretation of the agreement for which it contends in this litigation. That is a factor that reinforces the construction I have given to clause 10.3 and its use of the word 'relax'.

[15] It was suggested that for us to place reliance on this conduct is impermissible in the light of the exposition of the law in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, supra. However, that is incorrect. In the past, where there was perceived ambiguity in a contract, the courts held that the subsequent conduct of the parties in implementing their agreement was a factor that could be taken into account in preferring one interpretation to another.[5] Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity,[6] there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how

[5] *Shill v Milner* 1937 AD 101 at 110-111; *Shacklock v Shacklock* 1949 (1) SA 91 (A) at 101; *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A) at 12F-H.

[6] Formerly it was said that 'background circumstances' were always admissible to provide context, but 'surrounding circumstances' could only be considered if there was ambiguity. That distinction was swept away in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39

reasonable business people situated as they were and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties. This does not mean that, if the parties have implemented their agreement in a manner that is inconsistent with any possible meaning of the language used, the court can use their conduct to give that language an otherwise impermissible meaning. In that situation their conduct may be relevant to a claim for rectification of the agreement or may found an estoppel, but it does not affect the proper construction of the provision under consideration.

[16] In the result the appeal is dismissed with costs, such costs to include the costs of two counsel where two counsel were employed.

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M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellants:	I V Maleka SC (with him P B J Farlam) Instructed by: Edward Nathan Sonnenbergs, Cape Town Lovius Block, Bloemfontein
For respondent:	M J Fitzgerald SC (with him P A van Eeden) Instructed by: Hayes Inc, Cape Town Naudes, Bloemfontein.