THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 271/2016

In the matter between:

STEYN LYELL MAEYANE ATTORNEYS **APPELLANT**

And

JOHAN OELOFSE **RESPONDENT**

Neutral citation: *Steyn Lyell Maeyane Attorneys v Oelofse* (271/2016) [2017] ZASCA 18 (23 March 2017)

Coram: Leach, Tshiqi, Wallis and Mbha JJA and Fourie AJA

Heard: 9 March 2017

Delivered: 23 March 2017

Summary: Written undertaking given by a firm of practising attorneys : whether it constituted an unconditional guarantee to make payment itself : having regard to the factual matrix providing the context in which it was given, the undertaking did not constitute a personal guarantee : evidence pertaining to the parties' intentions regarding the undertaking inadmissible.

ORDER

On appeal from: The High Court, Gauteng Division, Pretoria (Legodi J, Molopa-Sethosa and Tuchten JJ concurring, sitting as court of appeal):

1 The appeal succeeds with costs.

2 The order of the full court is set aside and substituted with an order in the following terms:

'The appeal is dismissed with costs.'

JUDGMENT

Fourie AJA (Leach, Tshiqi, Wallis and Mbha JJA concurring)**:**

[1] The main issue in this appeal is whether a written undertaking (the undertaking) given by the appellant, a firm of practising attorneys, constituted an unconditional guarantee by the appellant itself to pay an amount of R1 million to the respondent. The respondent contended that it did and instituted action against the appellant in the High Court, Gauteng Division, Pretoria, for the payment of R1 million, as well as damages in an amount of R200 000, allegedly suffered as a consequence of the appellant's failure to honour the undertaking. The appellant opposed the action.

[2] In the event, the trial proceeded before Prinsloo J who dismissed both claims with costs. The trial judge, however, granted the respondent leave to appeal to the full court of the Gauteng Division, Pretoria. The full court (per Legodi J, Molopa-Sethosa and Tuchten JJ concurring) upheld the appeal and granted both claims with costs. The present appeal is with the special leave of this court.

[3] The undertaking was given by the appellant in the following terms in a letter dated 1 April 2008, addressed to Messrs Gary Janks Attorneys:

'**RE: PROFIT SHARING: DRAKENSBERG GARDENS DEVELOPMENT**

OUR CLIENT: ABRINA 2537 (PTY) LIMITED

This letter serves as a guarantee for funding required by Dr Johan Oelofse to assist in the purchase of Wiesenhof Business Park, Heidelberg in the name of Plenty Properties.
On instructions of our client, **ABRINA 2537 (PTY) LIMITED**, we confirm that Dr Johan Oelofse has a 10 % interest in the abovementioned development, which profit sharing will take place on or before 11th April 2008.
The 10 % shareholding amounts to R1,000,000 (one million Rand), which remuneration will be paid to him as agreed.
Please provide us with your banking account details in order for us to make the payment directly into your account for the sum of R1,000,000.'

[4] The undertaking has to be construed against the backdrop of the factual matrix providing the context in, and the purpose for which, it was given. As emphasised in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18:
'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.' [1]

[5] In *Frans Jacobus Kruger h/a Kruger Attorneys v Property Lawyer Services (Edms) Bpk* [2011] ZASCA 80 para 8, this court too was concerned with the interpretation of a written undertaking given by a firm of attorneys. The following was said regarding the interpretation of the undertaking:
'The letter of undertaking was issued pursuant to the bridging loan made by the respondent to Mr Bell and the trust. It must be construed in that context, the factual matrix in which the parties operated, so as to give it a commercially sensible meaning. It is clear from the wording of the undertaking that the appellant undertook to pay the amounts stipulated against registration of transfer of the properties . . . The real question, however, is not whether the appellant undertook to pay but what the content of this undertaking was.'
And further at para 10:
'The undertaking is not to pay "regardless" but to effect payment from the receipt of the proceeds of the sales. Nor was it envisaged that the proceeds would vest in the appellant: by virtue of the "cession" the proceeds in the agreed amount had to be paid to the respondent. It would have been absurd for the appellant to have given an unconditional, independent

[1] See also: *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); [2013] ZASCA 176 para 12; *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* [2014] 1 All SA 375 (SCA); 2013 (6) SA 520 (SCA); [2013] ZASCA 120 paras 10-17; *Kingswood Golf Estate (Pty) Ltd v Witts-Hewinson & another* [2014] 2 All SA 35 (SCA); [2013] ZASCA 187 para 19.

undertaking in these circumstances . . . Seen in this context, the undertaking amounts to no more than an undertaking to make payment from the proceeds of the sales.'

[6] It appears from our jurisprudence that the word 'guarantee' is capable of bearing different meanings depending upon the context in which it is used. In *List v Jungers* 1979 (3) SA 106 (A) at 118D the following was said:

'[It is] an unrewarding and misleading exercise to seize on one word in a document, determine its more usual or ordinary meaning, and then, having done so, to seek to interpret the document in the light of the meaning so ascribed to that word.'

And at 118E-G the court emphasized that the context in which the word is used is of prime importance and referred with approval to the following dictum in *Hermes Ship Chandlers (Pty) Ltd v Caltex Oil SA Ltd* 1973 (3) SA 263 (D) at 267:

'The passages from the various judgments I have mentioned deal with popular or ordinary meanings of the word 'guarantee', but it seems to me that they demonstrate only that the word is capable of bearing different meanings depending upon the context in which it is used. It seems to me also that when the meaning of a word in a particular document is being considered, it is undesirable to commence the enquiry on the basis that any one of its possible meanings predominates, and that the proper approach to the question is to be alive to the various meanings which it can bear and by a consideration of the context in which it is used (together with such other circumstances as may be permissible) to decide which meaning must be attributed to it in that context.'

[7] In the instant matter the relevant factual matrix is, fortunately, largely common cause or at least not seriously disputed. It may be succinctly summarised as follows: Abrina 2537 (Pty) Ltd (Abrina) was involved in a development in Vanderbijlpark, known as Drakensberg Gardens. In March 2007, the respondent advanced financing to Abrina which, it was agreed, would entitle him to ten per cent of the net profit to be made upon the completion of the development. It was anticipated that the respondent's share of the profit would be approximately R1.2 million to R1.5 million and the estimated completion date was January/February 2008.

[8] On 26 February 2008, the respondent, acting on behalf of a special purpose vehicle, Plenty Properties (Pty) Ltd (Plenty Properties), concluded an agreement with one Wiese in terms of which the Wiesenhof Business Park in Heidelberg, Gauteng, was sold to Plenty Properties for R3.265 million. The respondent depended on his

profit sharing in the Drakensberg Gardens development to finance part of the purchase consideration due to Wiese. A deposit of R200 000 had to be paid on 26 February 2008, but as the respondent had not yet received his share of the profit in the Drakensberg Gardens development, his father, a co-shareholder in Plenty Properties, advanced the deposit which was paid to Wiese on behalf of Plenty Properties. In terms of this agreement of sale, the deposit would be forfeited to Wiese as rouwkoop in the event of the balance of the purchase price not being paid timeously resulting in the cancellation of the agreement. The balance of the purchase price was payable in cash on registration of transfer of the property, and had to be secured by Plenty Properties by means of approved guarantees on or before 31 March 2008.

[9] Due to Abrina's failure to complete the Drakensberg Gardens development timeously, payment of the respondent's share of the profit in the development was not forthcoming. This resulted in the respondent negotiating an extension for the provision of guarantees by Plenty Properties to Wiese, until 4 April 2008. The respondent, however, had by then lost faith in Abrina and insisted that he be provided with a written undertaking as to the payment of the profit share due to him by Abrina. This, the respondent believed, would provide him with a form of guarantee that would satisfy Wiese as to the ability of Plenty Properties to honour its obligations in terms of the Wiesenhof agreement of sale.

[10] The appellant, acting on the instructions of Abrina, then provided the respondent with the following document on 1 April 2008:

'**RE: PROFIT SHARING: DRAKENSBERG GARDENS DEVELOPMENT**

OUR CLIENT: ABRINA 2537 (PTY) LIMITED

On instruction of our client, ABRINA 2537 (PTY) LIMITED, we confirm that Dr Johan Oelofse has a 10% interest in the abovementioned development, which profit sharing will take place on or before 11th April 2008.

The 10% interest amounts to approximately R1 000 000 (one million rand), which remuneration will be paid to him as agreed.'

[11] The respondent was not satisfied with the contents of this document, and after consulting his attorney, he suggested certain amendments. In response thereto, the

appellant, on the same day, provided the undertaking addressed to Gary Janks, the attorney acting on behalf of Wiese.

[12] As appears from the undertaking, it was anticipated that the profit sharing resulting from the completion of the Drakensberg Gardens development, would take place on or before 11 April 2008. However, Abrina failed to complete the development during April 2008. In fact, it was only completed during April 2009 when the nett profit made from the project was finally determined in the amount of R6 022 608. Abrina then paid an amount of R600 000 to the respondent as part of his share of the profit.

[13] This delay resulted in Plenty Properties being unable to timeously furnish the guarantees due in terms of the Wiesenhof sale agreement. A further extension for the delivery of the guarantees was negotiated, and on 1 May 2008 the respondent requested the appellant to honour the undertaking by paying the amount of R1 million to Mr Janks. The appellant advised the respondent that the funds for the profit sharing had not yet been made available to it by Abrina, and therefore it was not able to transfer any funds to Mr Janks. This resulted in Wiese cancelling the Wiesenhof sale agreement on 5 June 2008, whilst retaining Plenty Properties' deposit of R200 000 as rouwkoop.

[14] Meanwhile, on 21 May 2008, the appellant, on the instructions of Abrina, withdrew the undertaking. The respondent took the view that, in terms of the undertaking, the appellant was itself liable to him for payment of the sum of R1 million and instituted action for the payment thereof. I should add that, due to the subsequent payment of R600 000 made by Abrina, the respondent reduced its claim to R400 000, although no formal amendment of its pleadings was effected. In addition, damages of R200 000 were claimed by the respondent consequent upon the forfeiture of the deposit of R200 000 in terms of the Wiesenhof sale agreement.

[15] When the wording of the undertaking is considered against the backdrop of this factual matrix, the following is immediately apparent:
(a) It is addressed to Mr Gary Janks, the attorney attending to the Wiesenhof transaction.

(b) The preamble declares that the undertaking concerns the profit sharing in the Drakensberg Gardens development, and that Abrina is the appellant's client.
(c) It confirms that the undertaking serves as a 'guarantee' for funding required by the respondent to assist in the purchase of the Wiesenhof property.
(d) It confirms that as per the instructions of the appellant's client, Abrina, the respondent has a ten per cent profit sharing interest in the Drakensberg Gardens development, amounting to R1 million, which will be paid to him 'as agreed', on or before 11 April 2008. It is common cause that the words 'as agreed' refer to the profit sharing agreement concluded by Abrina and the respondent.
(e) Finally, it requests Mr Janks to provide his banking account details in order for the appellant to make 'the payment' directly into such account. In context, 'the payment' refers to the amount that the respondent is to be paid 'as agreed', ie in terms of the profit sharing agreement concluded by Abrina and the respondent. In terms thereof, the respondent's share of the profit would be paid upon the completion of the Drakensberg Gardens development.

[16] It is clear from the plain wording of the undertaking that it does not constitute an undertaking or guarantee by the appellant itself as principal debtor, to make payment of the amount of R1 million to Mr Janks or the respondent. On the contrary, the undertaking amounts to no more than a confirmation by the appellant on behalf of its client, Abrina, of the terms of the profit sharing agreement between Abrina and the respondent, namely that the respondent has a ten per cent interest in the Drakensberg Gardens development, which will amount to R1 million and be paid to him on or before 11 April 2008. The document certainly cannot be construed as an undertaking or guarantee by the appellant to make payment of the sum of R1 million to the respondent or Mr Janks, irrespective of whether or not profit sharing in accordance with the agreement between the respondent and Abrina took place and irrespective of whether it had been put in funds to make payment.

[17] As recorded above, the profit sharing did not take place on or before 11 April 2008. In fact, it only took place upon the completion of the development in April 2009. It is further undisputed that, at the time when the undertaking was issued by the appellant on 1 April 2008, it did not hold any funds in trust on behalf of Abrina from which any payment could have been made to the respondent in terms of the

undertaking. It is therefore improbable in the extreme that the appellant would have bound itself unconditionally to make payment of an amount of R1 million to the respondent on or before 11 April 2008. No reason has been suggested why it would have agreed to do so. In any event, that is simply not the content of the undertaking given by the appellant.

[18] In the course of her argument, counsel for the respondent placed reliance on the evidence tendered by the respondent at the trial pertaining to his intention in regard to the required undertaking. She also criticised the appellant for failing to produce any witness to testify 'as to the appellant's intention in writing [the undertaking]'. This evidence of the respondent was clearly inadmissible – as would have been the case had the appellant tendered such evidence. It is trite that, in construing a document which was intended to be the sole memorial of the agreement between the parties, direct evidence by the parties of their intentions before or at the time of the formation of the written contract is inadmissible. As emphasised in *Van Aardt v Galway* [2011] ZASCA 201; 2012 (2) SA 312 (SCA) para 9, such evidence is also irrelevant and therefore inadmissible as 'context' in relation to the interpretation of the written document.[2]

[19] For the above reasons, I conclude that the full court erred in finding that the undertaking constituted an unconditional guarantee by the appellant. I should add that the full court in any event erred in granting judgment against the appellant for payment of the sum of R1 million, as the respondent had reduced this claim to R400 000. Be that as it may, the claim ought to have failed and, as the second claim for the payment of damages in an amount of R200 000 was dependent on the validity of the claim based on the undertaking, it similarly ought to have been dismissed.

[20] Further, and in any event, I do not believe that the respondent had proved that he had suffered any loss entitling him to claim damages from the appellant. As recorded earlier, the sum of R200 000 forming the subject of this claim was paid by his father on behalf of Plenty Properties. It was Plenty Properties, and not the

[2] See also *Coopers & Lybrand & others v Bryant* 1995 (3) SA 761 (A) at 768D-E and *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39.

respondent, that forfeited this amount when the Wiesenhof sale agreement was cancelled. The respondent testified that he had undertaken to repay the amount of R200 000 advanced by his father to Plenty Properties, but this was a matter between him and his father, and the appellant could certainly not have foreseen that the respondent would have suffered an indirect loss of this nature as a consequence of the cancellation of the Wiesenhof sale agreement. It follows that the appeal against the order of the full court should succeed.

[21] In the result the following order is made:

1 The appeal succeeds with costs.

2 The order of the full court is set aside and substituted with an order in the following terms:

‘The appeal is dismissed with costs.’

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P B Fourie

Acting Judge of Appeal

APPEARANCES:

Appellant:	J S Griessel
	Instructed by:
	Gildenhuys Malatji Inc., Pretoria
	Honey Attorneys, Bloemfontein
Respondents:	I Joubert
	Instructed by:
	Van Zyl's Inc., Centurion
	Bezuidenhout Inc., Bloemfontein