REPORTABLE

In the High Court of South Africa
(Western Cape Division, Cape Town)

Case Number: A139/2022

In the matter between:

YACHT HARDWARE CC t/a HARKEN SOUTH AFRICA **APPELLANT**

and

ZENITH INTERNATIONAL (PROPRIETARY) LIMITED **RESPONDENT**

Coram:	Erasmus J and De Wet AJ
Judgment:	De Wet AJ
Date of hearing:	12 October 2022
Date of Judgment:	2 December 2022

JUDGMENT
(handed down electronically, via email)

DE WET, AJ

[1] This matter concerns the interpretation of indemnity clauses contained in a contract of sale concluded between the parties during September 2019. The appellant claimed specific performance from the respondent in terms of clause 9.2 in the court *a quo,* who dismissed the claim after allowing and considering extensive evidence

regarding the intention of the parties when entering into the agreement. It is against this decision the appellant now appeals.

[2] For ease of reference the parties are referred to as in the court *a quo*.

Brief factual background

[3] The facts underlying this appeal are common placed and if considered in totality (regardless of whether the court *a quo* allowed and considered inadmissible evidence or not), depicts the normal situation where parties negotiate and finally reach an agreement which is embodied in a written document signed by both parties.

[4] The plaintiff, a close corporation based in South Africa, obtained the right to exclusively manufacture and distribute marine products under the name of Harken in South Africa. Harken is a USA based company who specialises in the design, manufacture and sale of marine hardware and accessory products.

[5] The sole member of the plaintiff, Mr Roux, passed away on 10 May 2018. In terms of his will, Mr Roux appointed Mr Venter, the accounting officer of the plaintiff, as his executor. He bequeathed to each of his three daughters 30% of his membership in the plaintiff and he left the remaining 10% thereof to one Knoetzen, who was an employee of the plaintiff at the time.

[6] On 5 September 2019 the plaintiff, represented by Mr Venter and Mr Knoetzen, who was acting as nominee for a company to be formed, concluded a written contract pertaining to the sale of the assets and stock belonging to the plaintiff ("the contract of sale")[1].

[7] Mr Knoetzen nominated the defendant as the purchaser and it duly accepted the nomination.

[8] The relevant clauses for purposes of this appeal are clause 9.1 and 9.2 of the contract of sale which reads as follows:

> *"9.1 Without prejudice to any of the rights of the Purchaser in terms of this agreement, the Seller indemnifies the Purchaser against all loss, liability, damage, costs or expense (whether actual, contingent or otherwise) which the Purchaser may suffer as a result of or which may be attributable to any liability (including any liability for taxation, whether actual, uncertain or contingent) or obligation of the Seller which arose prior to the effective date, it being specifically recorded and agreed that the Purchaser does not assume any of the Seller's liabilities incurred as at or prior to the effective date".* ("the first indemnity clause") and
>
> *9.2 In light of the fact that the Purchaser is not taking on the employees of the Seller, the Purchaser indemnifies the Seller against any claims brought by employees for*

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[1] In terms of clause 1.2.1 of the contract of sale, assets and stock is defined as the movables, fixtures, fittings and stock in trade of the seller as set out in schedule "A" used by the seller in conducting the business. Schedule "A" consists of 3 motor vehicles, all equipment and office furniture in the premises on the effective date, shelving in the premises on the effective date, computer equipment on the effective date, all stock in trade fully paid by the seller on the effective date, the website being www.harken.co.za and the telephone number to transferred to the purchaser.

compensation of whatsoever nature due to the termination." ("the second indemnity clause")

[9] Following the conclusion of the contract, and prior to 12 September 2019, the effective date stipulated in the contract of sale, the plaintiff, represented by Mr Venter, gave two of the plaintiff's employees, namely Kesse and Barrish[2], notice of the termination of their contracts of employment on the effective date. Kesse and Barrish referred disputes to the Commission for Conciliation, Mediation and Arbitration ("CCMA") against the plaintiff. Barrish cited the defendant as a second respondent in his referral. During conciliation at the CCMA, the plaintiff and the disgruntled employees reached a settlement in respect of their claims and the plaintiff, in terms of this settlement, paid these employees during November 2019 the total amount of R 324 010.

[10] The plaintiff then proceeded, in terms of clause 9.2 of the contract of sale, to claim the amounts paid to the employees from the defendant. The defendant denied liability and the plaintiff instituted a claim in the court *a quo.* In its plea, the defendant *inter alia* alleged that:

10.1 The claim did not resort under clause 9.2 of the contract but under the general indemnity in favour of the defendant contained in clause 9.1, as the plaintiff gave notice of termination to the two employees prior to the effective date;

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[2] It is common cause that the other two employees of the plaintiff at the time of the parties entering into the contract of sale, was Knoetzen and Batt, who negotiated with Harken to obtain the exclusive right to distribute their products in South Africa under the name of the defendant.

10.2 The business of the plaintiff did not terminate; and

10.3 Clause 9.2 pertains to an indemnity in favour of the plaintiff with reference to the employees of the defendant.

[11] The court *a quo* allowed extensive evidence in respect of the intention of the parties when entering into the contract of sale. On perusal of the evidence, it however appears that the following essential aspects were common cause:

11.1 At the time the contract of sale was concluded on 5 September 2019, the plaintiff had four employees: Knoetzen, Batt, Kesse and Barrish. Knoetzen and Batt negotiated the right to use the Harken name and established the defendant.

11.2 The defendant did not want to take over the business of the plaintiff as a going concern, and did not want to take over the other two employees of the plaintiff, Kesse and Barrish.

11.3 The plaintiff's business terminated after the sale of its assets and stock. In this regard Mr Knoetzen testified that "…without the name [Harken] we can close our doors and walk away"[3] and further expressly agreed that the business of the plaintiff would be terminated on the effective date[4].

11.4 Following the conclusion of the contract of sale, Mr Venter notified Kesse and Barrish that their employment with the plaintiff is terminated as at the effective date.

11.5 Kesse and Barrish registered claims with the CCMA.

[3] Record Vol 2 page 127, lines 10-11
[4] Record Vol 2 page 187, lines 1-10

11.6 The plaintiff settled the claims submitted to the CCMA by Kesse and Barrish for R160 000 and R164 010 respectively, the sum total of R324 010 being the amount claimed by the plaintiff from the defendant.

The legal position

[12] The plaintiff claimed specific performance of clause 9.2 of the contract of sale. As the contract places no reciprocal duty on the plaintiff in terms of the indemnity clause, the plaintiff needed to prove the contract, its terms and non-performance by the defendant in order to succeed with its claim.[5] These elements were all common cause. The court *a quo* consequently had to decide whether clause 9.1 or 9.2 was applicable to the plaintiff's claim. This is a question of interpretation.

[13] The contextual approach to contractual interpretation is now mostly settled and "*(the) inevitable point of departure* (in interpreting a contract) *is the language of the provision itself"* as it was explained by the SCA in Natal Joint Municipal Pension Fund v Endumeni Municipality.[6]

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[5] RM Van de Ghinste & Co (Pty) Ltd v Van de Ghinste 1980 (1) 250 (C) at 253H – 254 B

[6] 2012 (4) SA 593 (SCA) at para 18 it was held that: "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 weighted in 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. 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".

[14] Recently in the matter of Z v Z[7] the SCA, albeit in the context of the interpretation of statutes, reiterated that words must be given their ordinary grammatical meaning, unless to do so would result in absurdity.

[15] In the matter of Tshwane City v Blair Atholl Homeowners Association[8] the SCA explained that the court has moved away from a narrow peering at words in an agreement and has stated on numerous occasions that words in a document must not be considered in isolation. Restrictive consideration of words without regard to context should therefore be avoided. It was consequently held that the "distinction between context and background circumstances has been jettisoned with reference to the matter of KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) at 409I -410A.

[16] The Court further noted that *"Since this court's decision in Endumeni, we are seeing a spate of cases in which evidence is allowed to be led in trial courts beyond the ambit of what is set out in the preceding paragraph. We are increasingly seeing witnesses testify about the meaning to be attributed to words in legislation and in written agreements. That is true of the present case in which, in addition, evidence was led about negotiations leading up to the conclusion of the ESA."*

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7 (556/2021 [2022] ZASCA 113 (21 July 2022) at paragraphs 7 and 15.

8 2019 (3) SA 398 (SCA).

[16] Recently and in the matter of Capitec Holdings Limited v Coral Lagoon Investments 194[9], the SCA again commented as follows with regards to courts allowing evidence beyond the ambit of the approach set out in Endumeni:

> *"None of this would require repetition but for the fact that the judgment of the High Court failed to make its point of departure the relevant provision of the subscription agreement. Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni licence judicial interpretation that imports meaning into a contract so as to make it a better contract, or one that is ethically preferable"*

[17] In the matter of Choisy-Le-Roi (Pty) Ltd v Municipality of Stellenbosch and Another[10], Binns-Ward J, with reference to the decision of University of Johannesburg v Auckland Park Theological Seminary and Another[11], held that in a contractual context an enquiry into the meaning of a text should be directed at determining, within the limits defined by the language the parties have chosen to use, what the parties had intended. He further held that in the context of statutory interpretation the rule of law requires the statutory text to speak for itself and that a person cannot be expected, in the context of legislation, to have to "dig into its drafting history to find out whether it really bears the meaning that its language conveys…"[12] As pointed out in Choicy-Le-Roy (supra), I am of the view that the court *a quo* should not have delved into the intention of the parties and why certain clauses were included or excluded during settlement negotiations.

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9 2022 (1) SA 100 (SCA)
10 2022(5) SA 461 (WCC)
11 2021 (6) SA 1 (CC) (11 June 2021)
12 See paragraph 38 of the judgment in this regard.

Analysis

[18] It appears from clause 9.2 itself, that it was included to provide for the fact that the defendant had elected not to take over the said employees of plaintiff resulting in such employees' employment having to be terminated by the plaintiff. To regulate the situation where such employees may bring a claim for compensation of whatsoever nature against the plaintiff arising therefrom, clause 9.2 specifically provides for and refers to claims of the (former) employees of the plaintiff whose employment was to be terminated as a result of the contract of sale being concluded, and the defendant not taking over such employees as part of the sale transaction.

[19] Further to this, clause 1.2.2 of the contract of sale defines "business" as "shall mean the business Harken SA which the Seller conducts at the premises at 46 Marine Drive, Paarden Island, Cape Town, 7405" and clause 2 of the contact of sale, states that the plaintiff sold the assets and stock, and "the right to use the name 'Harken SA' to the Purchaser". Thus, by selling the assets and stock as well as the right to use the name 'Harken SA', the plaintiff's business as defined in clause 1.2.2 was effectively terminated.

[20] Against this background, the court *a quo* simply disregarded the fact that it should use the express and plain words of clause 9.2 of the contract of sale as its point of departure. Instead, it veered down a slippery slide of what the parties' opinions were pertaining to the meaning of clauses 9.1 and 9.2 of the contact of sale and further,

allowed and considered, evidence which was brought to vary, add to or contradict the written terms of the contract of sale.

[21] In reaching its conclusion, the court *a quo* misdirected itself in allowing and considering inadmissible evidence under the guise of context, for purposes of interpreting clauses 9.1 and 9.2 of the contract of sale, as a plain reading of clause 9.2, shows that the defendant had indemnified the plaintiff in respect of any claims by employees, such as Kesse and Barrish *"in light of the fact that Purchaser is not taking on the employees of the Seller…".* As set out in the University of Johannesburg (supra), the parol evidence rule still renders extrinsic evidence inadmissible if it is tendered to add to or modify the meaning of a document which was intended to provide a complete memorial of a jural act. Clause 9.2 contains no ambiguity and if the correct approach was adopted by the court *a quo*, from the outset, the costs and legal resources employed in determining this relatively small claim would not have resulted.

[22] Insofar as the court *a quo* held that clause 9.1 is applicable, a comparison of clause 9.1 and 9.2 shows that clause 9.1 deals with an indemnity by the plaintiff in favour of the defendant for any general claims pertaining to loss, liability, damage, costs or expenses without prejudice to any rights of the plaintiff in terms of the agreement, whilst clause 9.2 deals with an indemnity by the defendant in favour of the plaintiff against any claims brought by employees due to the termination of the business and *"in light of the purchaser not taking on the employees of the Seller"*.

[23] There can, in my view, be no doubt that the claims of Kesse and Barrish, who were admittedly both previously employees of the plaintiff and had lost their employment due to the termination of the business and the fact that the defendant did not want to take over their employment contracts, fall squarely within the ambit of clause 9.2 of the contract.

[24] The evidence of Mr Knoetzen, that in his opinion clause 9.2 meant that should his or Mr Batt's services with the defendant terminate for any reason, the plaintiff would be indemnified in respect of any claims by them (and not Kesse or Barrish), was simply far-fetched and contrary to the clear wording of the contract of sale.

[25] In respect of whether, within the context of clause 9.2, the business of the plaintiff terminated, the common cause facts speaks for themselves: without the assets and stock which includes the name Harken, there was no business. The business terminated on 12 September 2019 and the defendant indemnified the plaintiff in respect of any claims by its previous employees, Kess and Barrish. Mr Venter did not need to inform nor did he need to obtain the consent of the defendant in order to settle the claims of these employees at the CCMA in order to rely on the indemnity clause. The evidence in the court *a quo* pertaining to whether or not the defendant was aware of the claims by employees of the plaintiff and had agreed to the amount settled upon for purpose of their claims, similarly unnecessarily burdened the proceedings in the court *a quo*.

[26] Accordingly, the payments made by the Plaintiff in respect of the said employees' claims, were payments made in respect of claims by employees, as provided for in terms of clause 9.2 of the sale agreement, which payments are covered by the Indemnity provided by the defendant contained in clause 9.2 of the agreement.

[27] In the circumstances, the following order is made:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced with the following:

    2.1 The defendant is ordered to make payment to the plaintiff in the amount of R324 010.00;

    2.2 The defendant is ordered to pay interest on the aforementioned amount calculated at the rate of 7,25% per annum from 26 August 2020 to date of payment; and

    2.3 The defendant is ordered to pay the plaintiff's costs in the action.

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A De Wet
Acting Judge of the High Court

I agree:

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N Erasmus
Judge of the High Court

IT IS SO ORDERED

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Attorneys for Respondent:	Abiding Hancock Attorneys Email law@hancock.co.za

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