THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 115/06
Not reportable

In the matter between :

JOINTWO HOLDINGS (PTY) LIMITED	1ST APPELLANT
MALENTINO HOLDINGS (PTY) LIMITED	2ND APPELLANT
PIERRE VOSLOO	3RD APPELLANT
DANIEL FRANCOIS DE VILLIERS STEYN	4TH APPELLANT

and

OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED	RESPONDENT

CORAM : SCOTT, CLOETE et LEWIS JJA

HEARD : 22 FEBRUARY 2007

DELIVERED : 8 MARCH 2007

Summary: Rectification of contracts – the prior common intention of the parties must have been intended to be incorporated in the written document.

Neutral citation: This judgment may be referred to as *Jointwo Holdings (Pty) Ltd v Old Mutual Life Assurance Company (South Africa) Ltd* [2007] SCA 5 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The first and second appellants are private companies. Each hired premises in terms of a written agreement in a shopping centre (the Riverside Mall, Nelspruit) from the respondent, Old Mutual Life Assurance Co (SA) Ltd, for the purpose of conducting a restaurant. The third and fourth appellants, Messrs Vosloo and Steyn, undertook liability as sureties for the obligations the companies owed Old Mutual. Old Mutual, as the plaintiff, sued all four appellants for payment of arrear amounts owing in terms of the leases. Old Mutual's claims were undisputed but the companies counterclaimed for damages for breach of contract on the basis that Old Mutual had allowed a competitor, a Spur restaurant, to operate in the Mall which, they said, adversely affected the profits made by their restaurants. This defence required rectification of the leases. Vosloo and Steyn raised various defences to the claim by Old Mutual based on the suretyships executed by them, but all of these defences also depend for their success on rectification of the leases. The Pretoria High Court (Van der Merwe J) refused the rectification sought but granted leave to appeal to this court.

[2] The primary question on appeal remains whether rectification of the leases should have been granted. They each contain a clause which reads in part:

'5.1 The tenant … acknowledges that it shall not have an exclusive right to any particular type of business being conducted in the building.'

The rectification sought would replace this part of the clause with a clause which reads:

'The landlord undertakes not to let floor space in the building to anyone for the purpose of establishing or running a 'Spur' restaurant, for the duration of this lease.'

[3] The relevant facts, simplified somewhat to avoid unnecessary detail, are the following. The execution of the lease agreements was preceded by negotiations between Steyn and Mr Dukes, who was employed by Colliers RMS. Colliers RMS was the sole letting agent in respect of the Mall. It had no authority to contract on behalf of Old Mutual but it did have authority to inform prospective tenants as to what

Old Mutual's policy was in regard to the 'tenant mix' in the mall. During the course of these negotiations Dukes informed Steyn that it was Old Mutual's policy that if the companies entered into agreements of lease with Old Mutual, there would be no Spur Restaurant in the Mall. That was in fact Old Mutual's intention at the time. Thereafter documents were sent by Colliers RMS to the companies which said:

'Pursuant to our recent discussions, we have pleasure in detailing hereunder the provisions upon which the Landlord will consider entering into an Agreement of Lease.

…

16. ACCEPTANCE OF OFFER

16.1 This letter records the basis upon which the tenant is prepared to enter into an Agreement of Lease with the Landlord for the hire of the leased premises and does not constitute an offer by the Landlord to let the leased premises to the Tenant on the terms and conditions contained herein.

16.2 We confirm that we require you to sign the endorsement appearing below, and once signed, this letter will constitute an irrevocable offer by the Tenant to enter into an Agreement of Lease with the Landlord on the terms and conditions contained herein. Should the Landlord convey its acceptance, the essential elements of a lease will have been agreed and the parties hereby agree to be bound accordingly. Acceptance by the Landlord will take the form of an official letter signed by an authorised representative of the Landlord and will be accompanied by a formal Lease Agreement.'

The documents made no mention of an exclusive right to trade, or the exclusion of a Spur or any other restaurant. Steyn signed these documents on behalf of the companies on 12 December 1997. The project executive of Old Mutual, Mr Klostermann, thereafter on 8 January 1998 approved the companies as tenants and on 9 January 1998 Dukes wrote to the companies in the following terms:

'I am pleased to advise that your offer to lease the abovenamed premises has been accepted by the landlord.

…

The landlord's standard lease documentation is being attended to and will be forwarded to you in due course . . .; we remind you that until it is signed, your offer, having been duly accepted, constitutes the lease.'

On 11 February 1998 Dukes was present at a meeting at which Old Mutual representatives in principle decided to allow a Spur restaurant to hire premises in the Mall. The following day, Steyn told Dukes that he and Vosloo had heard a rumour that a Spur Restaurant was going to be established in the Mall. Dukes categorically denied this. On the basis of the assurance given by Dukes, Steyn and Vosloo signed

the lease agreements on behalf of the companies. The lease agreements were signed on behalf of Old Mutual by Mr Stuart-Finlay only in December 1998. Stuart-Finlay had no intention whatever of granting either of the companies exclusive trading rights in the Mall or excluding a Spur restaurant from operating in the Mall. A Spur restaurant did in fact operate in the Mall for the entire period of the leases which the companies had with Old Mutual. It opened, as did the restaurants run by the companies, before Stuart-Finlay signed the lease on behalf of Old Mutual.

[4] The appellants' case is this: Vosloo and Steyn, representing the companies, at all times intended that if the companies hired premises in the Mall, no Spur Restaurant would be permitted to operate there for the duration of the leases. That was then also the intention of Old Mutual, as (correctly) conveyed to them by Dukes before Steyn signed the offers to hire on behalf of the companies on 12 December 1997. Although Old Mutual changed its intention before Vosloo and Steyn signed the lease agreements, they were not informed of this ─ on the contrary, Dukes expressly said that Old Mutual's policy had remained the same. Accordingly, so the argument concluded, the leases fall to be rectified to accord with the intention of Vosloo and Steyn and the intention of Old Mutual as conveyed to them by Dukes.

[5] The fallacy of the argument is this. In order for rectification to be granted, it must be established that the written instrument did not correctly express what the parties had intended to set out therein. This appears clearly from *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253:

'Proof of an antecedent agreement may be the best proof of the common intention which the parties intended to express in their written contract, and in many cases would be the only proof available, but there is no reason in principle why that common intention should not be proved in some other manner, provided such proof is clear and convincing.'

In the present case, Old Mutual clearly did not, by allowing its letting agent to convey its letting policy from time to time to prospective tenants, intend to bind itself to that policy, as it existed at a particular time, in contracts it might in the future execute with such tenants (when the policy may have changed). It is clear from the evidence that Old Mutual intended itself to agree the terms on which it would contract with

prospective lessees.

[6] There is a difference between authorising an agent to convey a current policy and authorising an agent to agree to a term of a contract. In the former case, the principal can change its mind. In the latter case, it is bound. Dukes had no authority to agree to any terms of the lease agreements and whatever he said cannot constitute an agreement by Old Mutual or a representation binding on Old Mutual as to what the leases would contain, so entitling the companies to rectification of the leases. The same reasoning applies to the fraudulent misrepresentation made by Dukes just before Vosloo and Steyn signed the lease agreements (cf *Ravene Plantations Ltd v Estate Abrey* 1928 AD 143 at 154). It follows that rectification was correctly refused by the court *a quo*.

[7] The appeal is dismissed with costs.

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T D CLOETE
JUDGE OF APPEAL

Concur: Scott JA
Lewis JA