THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 211/2015

In the matter between:

RUSSEL HANGAR	**FIRST APPELLANT**
GARTH HANGAR	**SECOND APPELLANT**
GRAHAM OBERHOLZER	**THIRD APPELLANT**

and

JOHN ROBERTSON	**RESPONDENT**

Neutral citation: *Hangar v Robertson* (211/2015) [2016] ZASCA 102 (10 June 2016)

Coram: Lewis, Leach, Pillay, Petse and Dambuza JJA

Heard: 16 May 2016

Delivered: 10 June 2016

Summary: Contract – interpretation – contract not too vague to be enforceable.

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Koen J sitting as court of first instance):

The appeal is dismissed, with costs.

JUDGMENT

Leach JA (Lewis, Pillay, Petse and Dambuza JJA concurring)

[1] It is truly astonishing how often businessmen conduct their affairs, involving at times huge financial interests, on the strength of crude and vague agreements and then 'rely on hope, good spirits, bona fides and commercial expediency to make such agreements work'.[1] This is another such case, and resulted in successful businessmen finding it necessary to go to court to determine the true meaning of an agreement they had concluded. Dissatisfied with part of the court's interpretation and a declaratory order which obliges them to make a substantial payment to the respondent at some uncertain future time, the appellants appeal to this court with leave of the court a quo.

[1] Per Harms JA in *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* [1996] ZASCA 140; 1997 (2) SA 548 (A) at 561G.

[2] The appellants, first to third defendants respectively in the court a quo, are the directors of a private company, Merlog Foods (Pty) Ltd (Merlog), which carries on business as a wholesaler and distributor of frozen and chilled food products, a large percentage of which is imported. Each appellant has a family trust which holds 25 per cent of the shares in Merlog. The remaining shares are held by the family trust of the first and second appellant's mother. Merlog, essentially a family business, was not as profitable as those involved thought it ought to have been. The profit the company was making certainly seems to have been small when compared to the volume of its turnover.

[3] The respondent, Mr John Robertson, the plaintiff in the court a quo, is a successful businessman who retired and relocated to Australia in January 2006. He had spent the previous 24 years with the McCarthy Motor Holding Group, the last 14 years as managing director of the particularly successful Yamaha Group. In 2005, a mutual friend introduced him to the three appellants to see if he could possibly help them improve Merlog's business. Despite his retirement, he was keen on being involved in some commercial project. After meeting the appellants and having inspected Merlog's books of account, he believed that he could achieve a significant improvement in its profitability. The three appellants had reached a stage in their business lives when they were considering the possible sale of the business. The more profitable Merlog was, the more attractive it would be to a potential buyer. As was said by the third appellant when he testified, the sale of the business if it became more profitable 'would have been an exit strategy for us' and 'would have been a way to realise a large value out of the business'.

[4] After negotiations, it was eventually agreed that the respondent would provide his services as a consultant. In a document dated 19 June 2006, the

parties recorded the terms of their agreement as follows (the initials 'JR' refer to the respondent; while PBT abbreviates 'profit before tax'):

'**JR Role and Reward Agreement**

Through discussion, and with knowledge of and reference to the past and current trading environment, JR is to facilitate a process to:

Define/determine clear business objectives

Set some financial targets/goals

PBT R15M,>R19M,>R24M

PBT/Sales ratio 3% - 4% - 5%

. . .

Assess what has to change to achieve the above.

Develop and implement necessary action plans.

If implemented, this should achieve company value in excess of R60 million within 3 years.

Agreed that

JR basic expenses will be reasonably covered, approx. R5 000 per week

JR will be entitled to 10 per cent of the PBT exceeding R10 mil per financial year. This will exclude abnormal income or expenditure (eg sale of assets, abnormal bonus payments)

JR will be entitled to 10 per cent of the net increase in the value of the company ie of the value in excess of R24 million. This will only be awarded at the time when value is realised, for example when the business is sold

JR will be given the option to purchase up to 10 per cent of the shares in the company, based on the current "value" of R24million, and such option will remain open until 30 June 2009.'

[5] Unfortunately things did not go as well as had been hoped. There were personality clashes, particularly between the first appellant and the respondent, both of whom appear to be strong-willed individuals. It is unnecessary for present purposes to deal with the problems that arose nor to apportion blame, but by mid-2009 it was clear that the relationship was in its death throes.

Whether it was terminated at a meeting held at a coffee shop in mid-year or several months later, an issue that was in dispute in the court a quo, is neither here nor there. The court a quo found the relevant date to have been 22 December 2009. This was not challenged and can be accepted as being the date the contract between the parties ended.

[6] The respondent had considered taking up his option to acquire a shareholding in Merlog, but did not get around to doing so before 30 June 2009. He thereafter received legal advice that the option had lapsed and could no longer be exercised. However, during the time he had rendered his services as a consultant, Merlog's value had substantially increased from the R24 million it had been agreed was its value when the contract commenced. Accordingly, the respondent sought to exercise the clause which entitled him to 10 per cent of that net increase in the company's value. He also claimed payment of 10 per cent of Merlog's profit before tax for the years 2009 and 2010 up to the date his services ceased, which he claimed as due to him under the contract.

[7] The appellants and Merlog resisted these claims and so, in July 2014, the respondent instituted action. The matter came to trial before Koen J who, on 19 January 2015, found in favour of the respondent. Unfortunately, due to a patent error and a corruption that occurred during electronic storage of the original judgment, it was necessary for the learned judge to issue a corrected order on 24 March 2015. Inter alia, this declared the respondent to be entitled to be paid a percentage of Merlog's profit before tax for the tax years 2009 and 2010. This portion of the order has not been challenged in this appeal and no more need be said about it. The appellants, however, seek to impugn the relief granted against them in the second paragraph of the order which reads as follows:

'Judgment against the First, Second and Third Defendants jointly, as follows:

2.1 An order declaring the First, Second and Third Defendants liable jointly to pay to the Plaintiff 10 per cent of any excess by which the value of the Fourth Defendant as a termination of the agreement on 22 December 2009 (calculated as the net profit before tax of the Fourth Defendant for the financial year ending on 30 June 2010, excluding any abnormal items of income or expenditure, multiplied by four),[2] exceeded the sum of R24 000 000, such payment becoming due when either the Fourth Defendant disposes of its business or the First, Second and/or Third Defendants dispose of or realise their direct or indirect interest in the Fourth Defendant, whichever shall occur first; and

2.2 An order granting leave to the Plaintiff to set the matter down for hearing again for the purpose of obtaining judgment when it is contended that the liability of one or more of the First, Second or Third Defendants' liability in paragraph 2.1 above has become due for payment.'

[8] The appeal essentially turns on the interpretation and effect of the clause in the agreement of 19 June 2006 that the respondent would be entitled to 10 per cent of the net increase in Merlog's value over R24 million 'only to be awarded at the time value is realised, eg when the business is sold'. For convenience I intend to refer to this provision as 'the disputed clause'.

[9] The principles applicable to the interpretation of a contract are well known. A commercial contract seriously executed by parties with the intention of being bound thereby should not lightly be held to be unenforceable because they failed to express themselves as clearly as they could have done. Furthermore, the context in which a contract is concluded is often of great importance. It is often said that, in the interpretation of a contract, context is everything. That probably goes too far, but it does emphasise the importance of context in the process of interpretation. Disputed words have to be considered in the light of

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[2] This was the formula the parties used in calculating the value of the company as at the date of commencement of the contract.

all relevant and admissible context, including the circumstances under which the contract came into being.[3] As this court recently said:

'. . . the interpretative process is one of ascertaining the intention of the parties ─ what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. *KPMG* [ie *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 23] . . . explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded ─ the context ─ to determine the parties' intention.'[4]

[10] In the present case, an important part of the admissible factual matrix is the correspondence which passed between the parties leading up to the conclusion of their agreement on 19 June 2006. The crucial parts of this correspondence are the following:

(a) On 27 March 2006 the respondent addressed an email to the first appellant attaching a letter setting out certain strategies and goals. After stating that if the necessary action plans were implemented, the company should achieve a value in excess of R60 million within three years, he went on to state:

'I would want (to be discussed)

My basic expenses covered

10 per cent of the net profit exceeding R10 mil

10 per cent of the net increase in value ie of the value in excess of R24 mil

Option on 10 per cent of shares, based on value of R24mil, open for 3 years

I do not particularly want a "retainer" (although that would be nice) as I want to earn my rewards through results.'

(b) On 31 March 2006 the third appellant responded:

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[3] See in regard to these principles *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seuns Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) paras 10-12; and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) paras 27-31.

[4] *Novartis* above para 27.

'Thanks for the response which you sent through to Russell [first appellant], we have had a chance to discuss it and would like to take it further. Regarding your remuneration, we would need to define what is covered by "basic expenses" and try to put together some budgeted figures for this. . . .

We are happy with the 10 per cent of net profit exceeding R10m and the share options, but would obviously have to firm up the finer details - timing, etc. The only point we are not comfortable with is the 10 per cent of the net increase in value of the business, as this increase in value would represent an unrealised gain. I assume we would have to define the basis on which we have reached the business valuation and then apply the same method down the line to determine the increase, but until we actually realise this value it doesn't really benefit us. We would like to somehow tie this in with a possible sale of the business?'

(c) The respondent replied to this the same day, saying:

'As I have said from the outset, I must earn my keep from the results. So basic expenses would be about R5k per month . . .

. . .

I don't want to pre-judge the outcome, but my gut-feel is that the strategy will be to have an exit plan for about 3 years hence. So the goals and strategies would be to maximise the value of the business by that time, so as to make it attractive for someone to acquire, or merge with another business; I do have one in mind. Then a new direction, or shareholders enjoy unlocking some serious cash to do what they really want to do. Bearing in mind that a significant transaction would inevitably have some restraint, service contract, profit performance undertakings. So linking some value to a sale (at some point in time) would be fine by me, and makes sense.'

(d) In an email message to the respondent of 2 April 2006, the third appellant stated that 'we are pretty much in agreement in terms of how your remuneration should be structured, so let me know how you would like to progress from here.'

[11] Considering the disputed clause in the light of these background circumstances, the court a quo found that the agreement had been concluded at a time when the parties contemplated the possible sale of Merlog or its business

at a time reasonably soon in the future. The appellants, however, did not want to have to pay out what could be a substantial sum of money before they had received payment for Merlog or its business, and it was to address this concern of paying an 'unrealised gain' that the disputed clause had included the provision that the increased value would only be paid when 'value is realised'.

[12] The appellants argued at the outset that, as appears from the respondent's email of 27 March 2006, he wished to be remunerated in four ways: first his 'basic expenses'; second, being paid 10 per cent of Merlog's net profit exceeding R10 million; third, by payment of 10 per cent of the net increase in Merlog's value; and fourth, having the option to buy a 10 per cent shareholding in Merlog. However, so went a somewhat tortuous argument, this morphed into the agreement of 19 June 2006 providing that the third element of remuneration as set out in the disputed clause was an alternative to the share option (without that ever having been stated to be the case, either in the preceding emails or the written agreement itself). Moreover, as the agreement was to endure only for three years until 30 June 2009, or so the appellants argued, if value had not been realised by then the disputed clause would fall away and there could be no award of value thereafter ─ although the respondent would still have the prospect of long term growth in the company's value if he had taken up his share option before it lapsed. As the business had not been sold during the currency of the agreement with the respondent, the disputed clause had fallen away and, effectively, the respondent had only himself to blame for not exercising the option to purchase his 10 per cent shareholding and thereby obtaining any percentage increase in value of the company.

[13] This cannot be accepted. First, while the parties were hopeful of Merlog being turned around and sold when they concluded the respondent's service agreement, their contract was never one that was due to lapse at the end of June

2009. It was only the share option that was extended to the respondent that would lapse at that time. Indeed, as was found by the court a quo, the respondent's contract only came to an end in December 2009, and there can be no reason to conclude that his entitlement to exercise his right to claim a percentage of the increase in the value of the company had terminated months before then.

[14] In addition, the underlying pillar of the appellants' argument, namely that the share option and the disputed clause were ultimately agreed to be alternative and not cumulative forms of remuneration, is unsustainable. Had it been the parties' intention that the option was to be an alternative to the 10 per cent of the net increase in value of Merlog, it would have been both easy and obvious for them to have said so. They did not. They limited the option to a set date but left the duration of the contract open-ended. That is in itself a clear indication that the two clauses were cumulative and not alternative. Indeed the third appellant, in testifying, stated that the various elements of the respondent's remuneration were separate and distinct. He was correct, and that appears from a plain reading of the agreement. As already mentioned, a court must be wary of providing terms that the parties did not agree upon, even if with the wisdom of hindsight it might be of the view that the parties ought to have reached an agreement along those lines.

[15] The appellants, however, argued that the respondent had never had in mind 'a double 10 per cent'(as appellants' counsel put it) being both 10 per cent of the increase in value of Merlog, as well as the right to obtain a 10 per cent shareholding at a price determined before any increase in value had occurred. They sought to find support for this in the respondent's reaction when he raised the possibility of exercising his option in an email he sent to the appellants on 27 June 2007, stating that he had been thinking about exercising his right to

purchase a 10 per cent share of Merlog and asked whether this raised any concerns or points for discussion. In a response emailed to him the following day, the third appellant said:

‘As per our agreement you do have the option of purchasing a 10 per cent shareholding in Mercantile at the agreed value of R24m, so I have no problem with this. In the agreement regarding how you will be remunerated there are five points:

1. Basic expenses
2. Commission on PBT > R10m
3. Commission on value > R24m on sale
4. Option to purchase 10 per cent
5. Commission on negotiating successful sale

Am I correct in my understanding that should you choose to exercise the share purchase option it replaces the commission option in point 3?’

The so-called ‘commission option in point 3’, to which the third appellant referred is, of course, the disputed clause entitling the respondent to an increase in Merlog’s value. The respondent’s immediate reaction in an emailed response was that

‘I had not thought about it, but basically yes. As a shareholder I would invest and thus be entitled to profit shares/dividends, so I guess the point 3 would be superfluous as I will get 10 per cent of the total sale value in the event of a sale’.

[16] It is opportunistic for the appellants to rely upon this as an indication that the parties had always been of a mind that the disputed clause and the share option were alternative provisions. Indeed it is quite clear from the correspondence that the first four points mentioned in the third appellant’s email of 29 June 2007 had at all times been separate and independent forms of remuneration and benefit (as was conceded by the third appellant). It was never suggested in any of the correspondence that the disputed change was ever to be an alternative to the option to purchase a shareholding. And, as the respondent stated at the outset in his response, he had not really thought about the matter

before he replied to the third appellant's question. On testifying before the court a quo, he stated that, to his mind, the situation was that if the business of Merlog was about to be sold he could, technically, have exercised his option to purchase but that it would have appeared to have been 'a little bit excessive' and that 'I did not want to be unduly greedy and we were working all together'. In the circumstances, his reaction can hardly be seen as providing proof of an intention, in concluding his contact to regard the option as an alternative to obtaining a share in the increased value of the company.

[17] On a somewhat different tack, the appellants then argued that the series of emails preceding the conclusion of the agreement on 19 June 2006 demonstrates that the increase in value mentioned in the disputed clause was to be linked to and determined either by the sale of the business, which the parties had specifically in mind, or any other transaction that should realise value. It was argued that this was not a 'formula driven as at the date of termination of the contract and then payable on the realisation of any value at all at some later date,'[5] and that the 'value' had to be determined when it was 'realised' ─ and that to hold otherwise would result in the appellants having to face the situation the parties had sought to avoid, namely, the creation of a liability that could not be met without the funds being at hand. The argument was therefore that if value were to be determined at a particular point of time, and the business sold at a later date when its value might have decreased, the purpose of the provision would be defeated. And thus, so the argument went, on a proper construction of the contract, should value not have been realised when the respondent's contract came to an end, there would be no award.

[18] There is no merit to this. The clear intention of the parties in providing for the increase in value only being 'awarded at the time when value is realised'

[5] I quote from appellants' heads of argument.

was to defer payment of an amount to which the respondent had already become entitled. Indeed the third appellant also testified that his understanding of the word 'awarded' was that it meant 'paid over'. The court a quo consequently correctly concluded that the clause 'awarded at the time when value is realised' emphasises that the realisation of the value would not determine the amount of the payment but that 'it is the time when value is realised which determines when such remuneration is to be "awarded" to the plaintiff.' To conclude that the value had to be realised before the appellants' contract of service came to an end would amount to inserting a clause to that effect into the agreement that had never been agreed between the parties. The appellants' contention in that regard cannot be sustained.

[19] The court a quo also found that in order to give the agreement a business efficacy, and to avoid an absurdity, the agreement cannot be interpreted as meaning that payment of any amount under the disputed clause is dependant only on the extent to which value might ultimately be realised. It commented that the Merlog shares might only be sold after many years and at a time when the value realised could have increased dramatically through no effort of the respondent. On the other hand, it might have been run into the ground after he had left which would result in him receiving no remuneration for his services which had previously increased its value. In the light of this, the court concluded that the parties must have intended that value would be determined either when the business was sold or realised, if that occurred during the currency of the parties' agreement or, if thereafter, at the time the respondent ceased to render services. That indeed seems to me to have been implicit in the agreement between the parties, and there is no reason to interfere with the conclusion of the court a quo in that regard.

[20] As a final string to their bow, however, the appellants argued that the phrase ‘when value is realised’ is impossible to decipher as the parties never properly appreciated the legal complexities of what they were doing when they reached agreement or precisely what it was that they were agreeing to, beyond giving the example of a sale. It was argued that they had not catered for the fact that it was a company that owns the business and that, should it be sold, the appellants themselves will not realise any value as the shares are owned by family trusts which are neither parties to the litigation nor parties to the agreement. In my view there is no merit in these contentions. The respondent may have been short-sighted in agreeing to the appellants’ suggestion to the insertion of the clause, but it is not in my view so vague as to be unenforceable. The amount to which the respondent became entitled on termination of his contract is readily capable of ascertainment, albeit that it will only become payable to him when that value is realised by the appellants. And as counsel for the respondent argued, although it may not be possible or practical to endeavour to specify in advance what particular occurrence will trigger the obligation to make payment, that in itself does not render the contract vague and unenforceable. Should an event occur which the respondent feels amounts to realisation of value in the hands of the appellants, he would be at liberty to demand payment and, should it be refused, to place evidence before a court for it to decide whether the circumstances are such that the payment has become due. Hopefully it will not come to that, and the parties will show more common sense than they have displayed thus far. For these reasons I am not persuaded that the court a quo erred in any way. The appeal must therefore fail.

[21] One further matter should briefly be mentioned. Counsel for the respondent asked for an order for costs, to which the respondent is of course entitled. However, he specifically requested that the costs order should include the costs ‘consequent upon the employment of senior counsel’. This court has

previously observed that such an order is inappropriate and that, where a single counsel is employed no special order is required, it being for the taxing master to determine a fair and reasonable fee on taxation ─ see *City of Johannesburg Metropolitan Municipality v Chairman of the Valuation Appeal Board for the City of Johannesburg & another*.[6] Although the employment of senior counsel in the present case appears to have been a wise and reasonable precaution, it would be wrong for this court to fetter the taxing master's discretion.

[22] The appeal is dismissed, with costs.

L E Leach
Judge of Appeal

[6] *City of Johannesburg Metropolitan Municipality v Chairman of the Valuation Appeal Board for the City of Johannesburg & another* [2014] ZASCA 5; 2014 (4) SA 10 (SCA) para 34.

Appearances:

For the Appellants:	M Pillemer SC
Instructed by:	Goodrickes Attorneys, Durban
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For the Respondent:	S R Mullins SC
Instructed by:	Mark Drummond Attorneys, Kloof
	Webbers, Bloemfontein