FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A1/10

In the appeal between:-

SHOZHALOZA SAFARIS & AIR CHARTERS CC Appellant

and

DIPKA FARMING (PTY) LTD Respondent

CORAM: MUSI, JP *et* CILLIé, J *et* MOCUMIE, J

HEARD ON: 25 OCTOBER 2010

JUDGMENT BY: CILLIé, J

DELIVERED ON: 25 NOVEMBER 2010

JUDGMENT

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[1] This appeal concerns the interpretation of the clause determining the purchase price in a deed of sale of land entered into between the appellant ("seller") and the respondent ("buyer"). It represents a difference of R904 396,28 in the purchase price, depending on which interpretation is favoured. I will henceforth refer to the appellant as the seller and the respondent as the buyer.

[2] Oral negotiations between the parties during April 2006 were based on a purchase price of R7,5 million. A written contract, qualifying this to some extent, was subsequently drawn in August 2006 and signed in September 2006. Registration of the property in the name of the buyer was effected on 7 March 2007.

[3] The seller contends that a correct interpretation of the relevant clause amounts to a purchase price of R8 789 516,12. The buyer holds the purchase price to be R7 875 000,00 and that the said amount was duly paid to the seller on date of registration. The dispute therefore concerns an amount of R904 396,28.

[4] The seller in an application before Van der Merwe J prayed for an order declaring the purchase price to be R8 789 516,12 and ordering the buyer to pay to the seller the shortfall of R904 396, 28. Van der Merwe J favoured the buyer's interpretation of the relevant clause. He accordingly dismissed the application with costs. Leave to appeal against this order was subsequently granted to the seller.

[5] The relevant clause reads as follows:

> "1. **PURCHASE PRICE:**
>
> The purchase price is the amount of **R7,5 million** (SEVEN comma FIVE MILLION RANDS) AT PRICE OF R6,20 TO THE DOLLAR
>
> The PURCHASE PRICE of the **FARMS** is the sum of **R5 380 000,00** (FIVE MILLION THREE HUNDRED AND EIGHTY THOUSAND RANDS)
>
> The PURCHASE PRICE of the **GAME** is the sum of **R2 000 000,00** (TWO MILLION RANDS)
>
> The PURCHASE PRICE of the **EQUIPMENT** is the sum of **R120 000,00** (ONE HUNDRED AND TWENTY THOUSAND RANDS)
>
> and payable by the PURCHASER to the SELLER as follows:
>
> a FINAL PRICE adjustment will be made in favour of the SELLER if the RAND-DOLLAR exchange rate exceeds that of R6,51 to a dollar – the PURCHASE PRICE to be paid into the following account on date of registration:
>
> ACCOUNT NAME SHOZHALOZA SAFARIS AND AIR CHARTERS CC – STANDARD BANK, VREDE – ACCOUNT NUMBER 042323266 – ACB CODE 055043.
>
> A DEPOSIT of 5% (FIVE PERCENT) will be paid on DATE OF SIGNATURE of this CONTRACT to

> PRETORIUS AND BOSMAN TRUST, ABSA BANK, VREDE, Acc no: 2260660161 – payable to the SELLER on date of transfer.
>
> The PURCHASER will provide guarantees for the balance of the purchase price within six (6) months from date of signature hereof."

[6] It is clear that the provision in the deed of sale that is central to the issue, is that which states:

> "a FINAL PRICE adjustment will be made in favour of the SELLER if the RAND-DOLLAR exchange rate exceeds that of R6,51 to a dollar....."

[7] It is common cause that during the initial negotiations in April 2006 the Rand/Dollar ratio was R6,20, on 4 August 2006 when the written contract was settled the ratio was R6,81 and on 7 March 2007 when registration was effected it was R7,26. It is also not in dispute that although the contract does not specifically say so, the question whether a price adjustment was in fact to be made and if so to what extent, would only be answerable at date of registration. As the Rand/Dollar rate reached R7,26 at date of registration, it is

therefore clear that the price adjustment had to be made. The real question is how that adjustment is to be calculated.

[8] Van der Merwe J, after stating that the purpose of the interpretation of a contract is to ascertain the intention of the parties, exhaustively dealt with the legal principles applicable to interpretation. Relying on the now authoritative judgment of Harms JA in **KPMG CHARTERED ACCOUNTANTS (SA) v SECUREFIN LTD AND ANOTHER** 2009 (4) SA 399 (SCA) he held that evidence of the subsequent conduct of the parties cannot contextualise the contract, but that evidence of the negotiations could in an appropriate case be considered without necessarily requiring ambiguity in the language as a prerequisite therefor. However he cautioned that that should be resorted to rarely and in exceptional cases. I cannot find any fault with this statement of the applicable law.

[9] Counsel on behalf of the parties on appeal, accepted that the **KPMG**-judgment is now authoritative and that "context" or "factual matrix" (see **KPMG** at 510 B) is decisive. In the light hereof it is unnecessary to deal with the judgments referred

to by counsel in this regard during argument as all previous judgments on interpretation now cannot be considered without reference to **KPMG**. Mr. Van Rhyn's submission, on behalf of the seller, was that the ordinary grammatical meaning of the relevant clause is clear and unambiguous. The effect of what Mr. Van Rhyn submitted is, that the exchange rate of 6,51 referred to in the relevant clause, is to be understood as a "trigger" or a starting point in the sense that as soon as that is exceeded, the rate as at date of registration would be applicable. Mr. Du Plessis, on behalf of the buyer, on the other hand, argued that it was intended as a maximum or a "cap". He submitted that this clause envisaged a situation where the Dollar/Rand rate might from time to time move upwards, but also downwards of R6,51 resulting in a fluctuating purchase price until date of registration "finalize" the purchase price at a maximum of R6,51 in favour of the seller if the ratio is in excess of that at date of registration. This interpretation he submitted renders a meaning to the use of the words "final" and "in favour" as it appears in the clause, whilst on the seller's suggested interpretation these words would be superfluous and meaningless.

[10] I must say that I find it difficult to, without more, make sense of the words used in the clause for the simple reason that accepting that an adjustment had to be made if the rate exceeds R6,51, it fails to clarify how that adjustment is to be made. Van der Merwe J had the same problem. After stating that the ordinary grammatical meaning of the words does not provide an answer, he approached the matter on the following lines:

> "[12] To me the decisive factor is the following. It is common cause that at the beginning of April 2006 the rand/dollar exchange rate was in the region of R6,20 to the dollar and on 4 August 2006 it was R6,81 to the dollar and that the parties were aware thereof on 4 August 2006. The number of R6,51 to the dollar is midway between R6,20 and R6,81 to a dollar. The number of R6,51 to a dollar therefore is clearly a very significant matter. In my judgment the number R6,51 to a dollar obviously signifies a compromise. On the respondent's construction of the contract it is easy to find the compromise. The respondent would not pay a purchase price adjusted to more than half of the difference between R6,81 to the dollar and R6,20 to the dollar. It was therefore a case of "split the difference". On the other hand, on the

> applicant's construction, the number of R6,51 to a dollar is essentially meaningless and there is no actual compromise included in the contract. On 4 August 2006 the rand/dollar exchange rate was already R6,81 to the dollar and the parties expected that that rate might very well continue to rise in rand terms until transfer of the properties takes place which, it was realised, could take some months, as it did. In effect therefore there would simply be an unlimited price adjustment in favour of the applicant. On this basis, the applicant's construction in my view gives no real effect to the number R6,51 to a dollar and is wrong."

[11] This approach appeals to me. It is in accordance with my own view of the matter. It is common cause that it was the seller who wanted to sell and then offered the land to the buyer. The buyer intended to conduct cattle farming on the land and the seller was aware of that. This coupled with the improbability that the buyer would be agreeable to an open-ended purchase price unconnected to the intrinsic or market value of the property is a decisive bulge in the matrix in which this contract was moulded. My conclusion therefore is that it was the intention of the parties that the purchase price would be calculated at the Rand/Dollar exchange rate of

R6,51 if that rate is exceeded at the time of registration.

[12] There is however another way of viewing the matter. Allowing registration to take place at the lower price, i.e. the price as contended for by the buyer, was a tactical mistake by the seller. It resulted in the seller having to approach the court for the relief set out in his notice of motion. (See paragraph 4, *supra*.) That being so it was upon the seller to convince the court that either the wording of the clause is not ambiguous and clear and that without more his interpretation thereof is correct or that the context favours his interpretation. If, at the end of the day and after considering the context and matrix in which the contract was cast, the court remains in doubt what this badly drawn clause really means, the seller did not show that he is entitled to the relief sought in his notice of motion. Friedman J dealt with this situation in **KRIGE v WALLACE EN ANDERE; WALLACE EN ANDERE v KRIGE** 1990 (3) SA 724 (C) at 737 A – D as follows:

> "Dit was op die pleitstukke sowel as in die verloop van die verhoor gemene saak dat A1 nie so ondubbelsinnig is nie dat dit

slegs met verwysing na die bewoording daarvan uitgelê moet word. Inteendeel om aan eiser die regshulp te verleen wat hy aanvra, moet A1 uitgelê word soos eiser gepleit het. Daardie uitleg kom nie letterlik ooreen met die bewoording van die dokument nie. Die bewyslas het die eiser beswaar om die Hof te oortuig dat A1 die betekenis het wat eiser voorhou en wat onontbeerlik is vir sy sukses in die aksie."

For these reasons the appeal is dismissed with costs.

C.B. CILLIé, J

I agree.

B.C. MOCUMIE, J

On behalf of the appellant: Adv. A.J.R. van Rhyn SC
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Rosendorff Reitz Barry
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On behalf of respondent: Adv. Brahm du Plessis
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/sp