THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 342/16

In the matter between:

Auction Alliance (Pty) Ltd **APPELLANT**

and

Wade Park (Pty) Ltd **RESPONDENT**

Neutral citation: *Auction Alliance v Wade Park* (342/16) [2018] ZASCA 28 (23 March 2018)

Coram Ponnan, Majiedt, Swain and Dambuza JJA and Mothle AJA

Heard: 19 February 2018

Delivered: 23 March 2018

Summary: Contract – principles of interpretation restated – not sufficient to merely outline well established principles – proper application thereof must be evident from the process of interpretation – appeal upheld.

ORDER

On appeal from: Kwazulu-Natal Provincial Division, Pietermaritzburg (Sishi and Seegobin JJ and Masipa AJ, sitting as court of appeal):

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

'The appeal is dismissed with costs.'

JUDGMENT

Majiedt JA (Ponnan, Swain and Dambuza JJA and Mothle AJA):

[1] The crisp issue in this appeal is whether a suspensive condition in an agreement of sale was fulfilled. The Kwazulu-Natal Local Division, Durban (Olsen J sitting as court of first instance) (the trial court) held that the condition had been fulfilled. On appeal to the Kwazulu-Natal Provincial Division, Pietermaritzburg, however, Seegobin J, Sishi J and Masipa AJ concurring (the full court) upheld the appeal, finding that the condition had not been fulfilled. The matter is before us with the special leave of this court. The factual background was mostly common cause and is as follows.

[2] The appellant, Auction Alliance (Pty) Ltd (Auction Alliance), was mandated by Mophela Housing Project (Mophela) to sell its immovable property in Pinetown, Kwazulu-Natal, on auction. Mophela is a non-profit company which had acquired the property with money lent to it by the Department of Housing, Kwazulu-Natal (the Department) so that the property could be used as an AIDS treatment centre. Mophela later encountered financial difficulties due to the fact that the government subsidies were insufficient to fund the centre's running costs, hence the decision to sell the property.

[3] All the parties were aware of the Department's financial interest in the sale of the property. One of the pertinent conditions of the sale was therefore that the sale was subject to the consent and approval of the Department. At the auction the property was knocked down to one Mr Abdoola for the sum of R26.5 million. In exercising his rights as purchaser, Mr Abdoola nominated the respondent, Wade Park (Pty) Ltd (Wade Park), as purchaser. On the day following upon the auction, Wade Park accepted the sale, thereby confirming the sale as was required in the sale agreement.

[4] Clause 26 of the agreement, which lies at the heart of the dispute, reads as follows:

'26 SUSPENSIVE CONDITIONS

This sale is subject to the written approval and consent of the Department of Housing of KZN, which written consent and approval has to be given within 30 days from date of confirmation of this sale by the SELLER in the absence whereof this sale will be null and void and be of no force and effect'.

The required consent was by way of a letter from the Department (the letter of consent) given on the very last day of the 30 day period stipulated in clause 26 above. This letter is central to the determination of the issue. It reads:

'We refer to the above matter and to our meeting today. We confirm that you agreed to refund the Department of Housing the sum of R4 592 000 00 in respect of the subsidy amount which was provided for the facility. We have no objections to the sale of the premises on condition that the subsidy amount is recovered upon transfer.'

The letter was procured from the Department, as I have said, on the very last day by a Mr Berry of Auction Alliance. Given the importance of fulfilling the suspensive condition before the deadline, Mr Berry had taken the trouble of driving from Durban to Pietermaritzburg to get it from the Department.

[5] Some two months later Mophela purported to cancel the agreement on the basis that Wade Park was in default of its financial obligations. In response thereto, Wade Park adopted the position that the agreement remained valid and was not capable of cancellation. These respective positions were set out in letters written by the parties' attorneys. The letter

written in the response from Wade Park's attorneys contained no complaint that the letter of consent was for some or other reason inadequate. On the contrary, the attorneys made it clear in the letter that their instructions (from Wade Park) were that 'the agreement of sale . . . is still valid . . .' This directly controverted the evidence of Mr Abdoola, Wade Park's directing mind, that his immediate reaction upon receipt of the letter of consent was that it was inadequate in meeting the requirements stipulated in clause 26. This was a material requirement and one would expect Mr Abdoola to have conveyed his misgivings immediately to his attorneys.

[6] In the event, the agreement was ultimately cancelled and the commission and deposit paid to Auction Alliance were retained, which caused Wade Park to sue Mophela and Auction Alliance in the alternative for repayment. A settlement was reached between Mophela and Wade Park. Mophela did not feature at all in the proceedings in the trial court.

[7] The trial court held that the letter of consent constituted fulfilment of the suspensive condition. It interpreted the consent letter in favour of the appellant finding that the word "condition" did not amount to a condition in its true sense but was simply to be read as 'an understanding'. It consequently dismissed Wade Park's claims with costs. Olsen J stated that '. . . (w)hat the letter conveyed, despite the use of the word "condition" was that the Department had no objection to the sale and the transfer of the property and that it expressed its consent on the understanding that it would be paid out of the proceeds of the sale'. The appellant supports the finding by the trial court and submits that on a proper interpretation the words 'on condition that' must be read as meaning 'on the understanding that' or 'on the basis that.'

[8] The full court saw the matter differently. The appellant submits that rather than have regard to the admissible and relevant background circumstances to inform an interpretation of the letter of consent, the full court adopted too literal an approach in interpreting the letter of consent and holding that it could not have regard to background circumstances which contradicted the clear terms of the letter of consent. According to the

appellant the full court rejected the interpretation of the trial court for two reasons. First, it adopted as a first step in interpretation the ordinary meaning of the word 'condition' in relation to the consent letter. It did this without any process of interpretation involving the relevant factual matrix and background circumstances. On this basis the full court held that the letter of consent was in fact conditional. Second, the full court then regarded all background circumstances which may have contradicted its earlier finding that the letter of consent was conditional, as extrinsic evidence which contradicted the express terms of the letter of consent, and which evidence was therefore impermissible on the basis of the Shifren principle. For reasons which will become clear I agree with these submissions. Simply put, the trial court failed to conduct the proper interpretation exercise which this court has repeatedly articulated.

[9] This court said in *Bothma-Botha Transport:* 'While the starting point remains the words of the document . . . **the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being . . . Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise."'** [1] (Emphasis added). Reference was made in the judgment to the following passage in *Society of Lloyd's v Robinson:* 'Loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretation and undue emphasis on niceties of language.' [2]

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[1] *Bothma - Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12.
[2] *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) 545 at 551.

[10] Here the sale was subject to the written consent of the Department. Absent the fulfilment of the suspensive condition no contract came into existence. Put differently, pending the fulfilment of the suspensive condition the contract was inchoate.[3] An important factor in the background context against which the meaning of the words 'on condition' had to be considered, was that the Department wanted its subsidy back. It was well aware that repayment was entirely dependent on the sale proceeding to finality, so that the funds could be disbursed to it upon registration of transfer. And the Department knew very well that without its consent the sale could not go through. It had been alerted to this fact prior to the auction and again just before the deadline imposed by clause 26. The Department therefore furnished the letter of consent to allow the sale to proceed so that it could get its money back. I agree with the submission by the appellant that to interpret the words "on condition" as introducing a conditional consent by the Department, which could be withdrawn should the subsidy amount not be paid to it once the immovable property was transferred and the purchase price paid, would defeat this objective.

[11] During argument, counsel for Wade Park stated that he had no quarrel with the first part of the letter of consent up to and including the word 'premises'. The first part of the letter of consent noted the agreement that the Department would be refunded. And it recorded that the Department had no objection to the sale. Counsel contended that the problem arises with the use of the words 'on condition' - it was argued that not only do those words encapsulate a condition in the true sense of the word, but also impose a (further) suspensive condition at that. The argument is fallacious.

[12] Something does not become a condition merely because it has been given that name.[4] I agree with Olsen J that, read in proper context, the words in the letter of consent mean something along the lines of 'there is no

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[3] GB Bradfield *Christie's Law of Contract in South African* 7th ed, 2016 at 166; and see: *Africast v Pangbourne Properties* [2014] ZASCA 33; All SA 653 (SCA) para 37 where this court stated that '(i)f the [suspensive] condition is not fulfilled, then no contract came into existence'.

[4] *Webb v Davis NO and Others* [1998] ZASCA 10; 1998 (2) SA 978 (SCA) para 12.

objection to the sale on the understanding that (or on the basis that) the Department would be paid out of the proceeds of the sale.' The fallacy of counsel's argument is stark: the Department, well knowing what the factual situation was regarding repayment, imposed a further suspensive condition which self-evidently was incapable of fulfilment before the 30 days contemplated by clause 26, but rather upon registration of transfer. Counsel repeatedly referred to this as 'an absurdity' and a 'catch-22 situation'. It was contended that this would lead to an insensible commercial transaction. But, the so-called 'absurdity' or 'catch-22' arises only on the acceptance of the interpretation advanced by counsel, which found favour with the full court.

[13] The interpretation adopted by the trial court gives the letter of consent commercial efficacy. It is inconceivable that, in the event of Mophela not repaying the subsidy once transfer is effected, the Department would have intended to withdraw its consent and cause the unravelling of the entire transaction. Nor, as a matter of fact of law could that have occurred.

[14] An argument was advanced in Wade Park's counsel's heads of argument that the letter of consent constituted a 'counter-offer' by the Department. When this aspect was debated at the hearing, counsel appeared to be less convinced of its merits, but did not concede the point. The contention is bereft of any merit. The cases which we were referred to in support of the argument *(ACC Bio Kafee (Edms) Bpk v Warmbadplase*, *Raad van Kuratore* 1959 (4) SA 183 (T) and *JRM Furniture Holdings v Cowling* 1983 (4) SA 541 (W) at 544) have no bearing on the facts of this case. The Department was not a party to the contract, nor was this a case of a contract for the benefit of a third party. Terminology such as 'conditional acceptance of an offer' and a 'counter-offer' do not apply here.

[15] It appears as if the full court was influenced in its reasoning and eventual finding by the notion that the letter of consent contained the suspensive condition as a means to secure repayment of the subsidy. The full court reasoned as follows:

‘Furthermore, the learned [trial] Judge’s interpretation involved discounting the use of the word ‘condition’ as used in the consent and holding that this should instead be understood as a mere ‘understanding’. Mere understanding is not what the Department of Housing wanted, nor would it achieve the purpose of the clause. The Department of Housing wanted to secure means for repayment of the subsidy inextricably linked with the transfer to ensure the subsidy is recovered upon transfer. It is therefore clear that withholding its consent or making its consent conditional upon recovery of the subsidy on transfer was its mechanism for doing so’.

The reasoning is fallacious. First, there cannot be any room whatsoever for a suggestion that the Department withheld its consent – it issued a letter of consent which it regarded as adequate. And second, as pointed out above a conditional consent, on the objective facts incapable of fulfilment, would have defeated the very purpose the Department was seeking to achieve, namely repayment of its subsidy. Moreover, the quoted extract is not supported by any evidence. It rests upon pure conjecture. Prior to the auction, Mophela had engaged in discussions with the Department regarding the sale of the property and repayment of the subsidy from the proceeds of the sale. Those discussions started in late 2008. In a letter from the Department to Mophela, dated 6 March 2009, the Department outlined its requirements for the sale to be approved. It did not, in listing the requirements, seek to secure payment to it as envisaged by the full court. Furthermore, in a letter from the transferring attorneys to Auction Alliance, dated 24 April 2009, it was recorded that ‘we [the attorneys] are addressing an appropriate letter to KZN Housing confirming that we will keep them covered for the sum of R4 592 000.00 in accordance with their letter of 17 April 2009 [the letter of consent]’. The transferring attorneys clearly understood that the object of the letter from the Department was not only to consent to the sale, but also to secure payment of its subsidy, on transfer of the immovable property. The significance of this letter was completely ignored by the full court.

[16] The reasoning of the full court in the extract also rests on the wrong premise. Its supposition is that Mophela would not repay the subsidy from the proceeds of the sale once transfer had been registered. Consequently, so it reasoned, the letter of consent was inadequate. Not only is the assumption

unsustainable on the evidence and on the objective facts, but it is also contrary to what this court has held in *Datacolor:* 'parties must be assumed to be predisposed to respect rather than disregard their contractual commitments'.[5] Like the Department, Mophela was keen to get the sale through. It appeared from the evidence that the price fetched at the auction (R26.5 million) was well above the initial forecasts and expectations. A completed sale and subsequent transfer would have enabled Mophela to settle its liability to the Department, leaving a significant balance of the proceeds available.

[17] The full court incorrectly invoked the so-called 'Shifren principle'[6] in its reasoning. It reasoned that clause 26 made provision for written consent and no other form of consent such as oral consent or by conduct. The full court cited the non-variation clauses in the contract and accepted counsel's reliance on Shifren: '(I)t has been submitted correctly, in my view, by appellant's [Wade Park's] counsel, that the no-variation-sale-in-writing clause . . . constitutes a Shifren clause which our courts have consistently held to be valid and binding . . .' On the basis of this Shifren principle, the full court then ruled that Auction Alliance's attempt 'to introduce extrinsic evidence to contradict the express terms of the sale agreement and the written consent should not be permitted'. This finding is misconceived. What was required was for the full court to interpret the letter of consent. As outlined above, it failed to do so properly in accordance with well-established principles. The non-variation clause and the Shifren principle had no role to play at all in the process of interpretation.

[18] The full court appeared to have been swayed in its decision by the consideration that the trial court's decision would leave Wade Park with nothing - no property and no money (the deposit and estate agent's commission). The sympathy is misplaced. First, it is premised on an erroneous interpretation of clause 26, as explained above. And second, the

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[5] *Datacolor International (Pty) Ltd v Intamarket* (Pty) Ltd [2000] ZASCA 81; 2001 (2) SA 284 (SCA) at para 18.
[6] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en ander* 1946 (4) SA 760 (A).

contract was cancelled due to Wade Park's default. Wade Park was therefore the author of its own misfortune.

[19] One last important aspect deserves mention. The approach to the interpretation of documents is by now firmly established in our law. It is not sufficient to merely regurgitate the relevant principles and to cite the leading authorities without actually applying them. It must be evident from the interpretive process itself that the principles have been applied. Merely paying lip service to them undermines the entire exercise.

[20] In summary: the commercially sensible and reasonable interpretation of the words 'on condition' in clause 26, taking into account the objective underlying purpose of the clause, and having regard to all the relevant background facts and circumstances, is, as the trial court correctly found, an 'understanding' or 'a basis upon'. The words do not denote a condition in the true sense of the word. If it did, it would have been a condition incapable of fulfilment. The full court (had) therefore erred in overruling the judgment of Olsen J.

[21] The following order issues:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and substituted with the following:

'The appeal is dismissed with costs.'

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S A Majiedt

Judge of Appeal

APPEARANCES:

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