IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION PIETERMARITZBURG

CASE NO. 6555/2019P

In the matter between:

INGELOSI TRADING 92 CC	**APPLICANT**
and	
SHARLENE GOVENDER	**FIRST RESPONDENT**
MILBANK PROPERTIES CC	**SECOND RESPONDENT**

ORDER

---

1. The application, directing and compelling the first respondent to effect payment to the applicant in the amount of R 600 000.00 (six hundred thousand rand) together with all interest accruing thereon, is dismissed.
2. The counter application, directing the first respondent to effect payment of the sum of R 600 000.00 (six hundred thousand rand) together with all accrued interest to the second respondent within 5 days of this order, succeeds.
3. The applicant is to pay the costs of the second respondent.

JUDGMENT

K Govender AJ

Introduction

[1] This matter was argued as an opposed application on 4 March 2020. The applicant was represented by Mr. WB Matthews instructed by Barry Botha & Breytenbach Inc., the first respondent was represented by Mr. D Tobias instructed by Deshan Naidoo Attorneys and the second respondent was represented by Mr. I Veerasamy instructed by MB Pedersen & Associates. I am indebted to the parties for their useful submissions. At the commencement of the hearing, I was informed that the application against the first respondent for costs and that the matter be reported to the Legal Practice Council was withdrawn. An order by consent to this effect was read into the record. In terms of the order agreed to by the applicant and the first respondent, the latter undertook to abide by any order made by this court in relation to the money held in trust by her as the conveyancer in this transaction.

Background and facts

[2] This matter thus focused on the dispute between the applicant and the second respondent.

[3] The applicant is a close corporation with its registered place of business at 21 Granula Place, Sunset Beach, Cape Town. The first respondent is an attorney and was the conveyancer nominated by the second respondent. The second respondent is also a close corporation with its registered address at Office 11 Portston Centre, 42-44 Aiken Street, Port Shepstone.

[3] The applicant and the second respondent concluded an Agreement of Sale (the Agreement) on 5 February 2019. In terms of this Agreement, the second respondent agreed to purchase a property described as Portion of Erf 2094 Shelly Beach, Registration Division ET, KZN from the applicant. The parties agreed that the purchase price of the property including VAT was R4 600 000.00 (four million and six hundred thousand rand) and this amount was paid into the trust account of the first respondent. In terms of the Agreement, the first respondent was required to retain the VAT portion of the purchase price and pay it over to SARS when called upon to do so. However, the sale of the property was zero rated by SARS and hence there was no VAT payable

to SARS in respect of this transaction. Transfer of the property was registered on 11 July 2019.

[4] It was not disputed that the first respondent was entitled to deduct the agent's commission and municipal taxes from the purchase price. After making these deductions, the first respondent transferred the amount of R3 693 115. 81 (three million six hundred and ninety-three thousand one hundred fifteen rand and eighty-one cents) to the applicant for the sale of the property.

The issue and summary of the main submissions

[5] The crisp issue before me is whether, based on an objective interpretation of the Agreement, the applicant was entitled to R600 000.00 (six hundred thousand rand) held in the trust account of the first respondent in addition to the amounts already paid to it. The applicant accepted that it was obliged to pay the agent's commission and the other deductions but contended that it was also entitled to the R600 000.00 held by the first respondent for the payment of VAT. It submitted that the Agreement clearly stated that the purchase price was inclusive of VAT and that if VAT were to be paid it would be for the applicant/ seller's account. If the property was not zero rated, then the applicant/ seller would be responsible for the payment of the VAT and that this would be deducted from the purchase price. However, if no VAT was payable then, according to the applicant, it was entitled to the R600 000.00 as it was part of the purchase price agreed upon by the parties. The applicant requested that the first respondent be directed to effect payment to it of the amount of R600 000.00 together with interest accruing.

[6] In essence, the second respondent argued that as no VAT was payable, the seller had no claim to the VAT component of the purchase price. The second respondent contended that the agreement expressly provided that the purchase price for the property was inclusive of VAT at the rate of 15%. The argument, as I understand it, was that a specific and designated portion of the purchase price was set aside for VAT and once it was determined that there was no VAT due to SARS, this amount should be returned to the second respondent. As a consequence, the second respondent brought a counter application and requested an order directing the first respondent to effect payment to it of the sum of R600 000.00 together with all interest accrued.

[7] Both the applicant and the second respondent claimed the R600 000.00 from the first respondent. It was not disputed that the first respondent initially agreed to pay over this amount to the applicant but decided against this when faced with the conflicting claim from the second respondent. Her initial reaction, according to the second respondent, was premised on an erroneous understanding of the Agreement. There is nothing in the papers that disputes this and I am of the view that the first respondent ought to have considered the issues more carefully before agreeing that the amount of R600 000.00 should be paid to the applicant. Besides creating an expectation on the part of the applicant, not much turns on the initial decision of the first respondent that the amount should be paid to the applicant.

[8] However, the first respondent, when faced with the conflicting claims, acted sensibly in seeking advice from more experienced colleagues. She then informed both the applicant and the second respondent that they had either to negotiate a settlement or obtain a court order determining who is entitled to the R600 000.00. The first respondent then withheld the R600 000.00 and invested it in an interest bearing account pending the occurrence of either of these eventualities.

[9] In short I am requested to determine whether the R600 000.00 which the parties anticipated being paid to SARS as VAT should be paid to the applicant or to the second respondent.

[10] It was accepted that in transactions of this nature and in the absence of an agreement between the parties VAT is payable by the seller. [1] The Agreement signed by the parties on 5 February 2019 dealt *inter alia* with the purchase price and with the issue of the VAT payable. Much turns on the interpretation of the relevant clauses in the Agreement.

Applicable principles of interpretation

[11] Wallis JA provided the following very useful guidelines to be used when interpreting documents in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] which presents a good starting pointing to determine this issue:

[1] *Strydom v Duvenhage N.O en 'n Ander* 1998 (8) SA 1037 (SCA) at 1039
[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 ZASCA 13 (SCA) para 18.

> 'The present state of the law can be expressed as follows: Interpretation is a 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 weighed in the 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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation: In a contractual context it is to make a contract for the parties other than the one they in fact made. 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.'

[12] Wallis JA went on to add that the modern trend in interpretation is 'from the outset…(to) consider the context and the language together, with neither predominating over the other.'[3] The learned judge of appeal also eschewed the necessity to seek the 'intention of the contracting parties.[4]' Wallis JA suggested that when there is ambiguity in selecting the proper meaning to be ascribed to provisions, 'the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation'.[5]

[13] In *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association*[6]*,* the SCA quoted with approval the following principles of interpreting documents laid down by in KPMG (reference omitted)[7]:

---

[3] *Endumeni* para 19.
[4] *Endumen*i para 200
[5] *Endumeni* para 26.
[6] *City of Tshwane Metropolitan Council v Blair Atholl Homeowners Association* [2018] ZASCA 176.
[7] *KPMG Chartered Accountant (SA) v Securefin Ltd and Another* [2009] ZASCA 7.

1) ‘The parol evidence rule remains part of our law and if the document was meant to provide a complete memorial, extrinsic evidence may not contradict, add to or modify its meaning.
2) Interpretation is a matter of law and not of fact and is a question for the court and not for witnesses.
3) The rules of admissibility of evidence do not depend on the nature of the document, whether statute, contract or patent.
4) To the extent that evidence may be admissible to contextualise the document to establish its factual matrix or purpose, one must use it as conservatively as possible.
5) The distinction between ‘background circumstances’ and ‘surrounding circumstances’ is artificial and confusing. The terms ‘context’ or factual matrix should suffice.’

[14] I now turn to an analysis of the Agreement with these principles in mind.

The Relevant provisions of the Agreement of Sale.

The relevant provisions of the Agreement of Sale provides:

3. Purchase Price

The purchase price of the property is the amount of R 4 600 000.00 (Four Million and Six Hundred Thousand Rand) inclusive of VAT and shall be paid by the Purchaser to the Seller on the date the transfer of the property is registered into the name of the Purchaser in the Deeds Registry (the transfer date).

8. VAT

The parties, in regard to the sale of the property, record and agree that

8.1 The purchase price for the property is inclusive of VAT at the rate of 15% (fifteen percent);

8.2 The seller is a registered vendor, as defined in the Value Added Tax Act No. 89 of 1991, as amended (“the VAT Act”), with VAT registration number: 408 022 8432;

8.3 The purchaser is a registered vendor, as defined in the Value Added Tax Act No. 89 of 1991, as amended (“the VAT Act”), with VAT registration number 4400126274;

8.4 The sale of the property, as herein provided, constitutes as an enterprise capable of separate operation and is that of a going concern and is disposed of as such;

8.5 The property, together with the development plans, constitutes all of the assets necessary for the carrying on of the enterprise referred to in clause 8.4; and

8.6 As at the date of signature of this agreement by the purchaser and as at the date of registration of transfer of property onto his name, the property is and shall be an income earning enterprise;

8.7 Without conceding in any way that the transaction is subject to VAT at the standard rate, if for any reason this sale is not zero rated for VAT as is anticipated by the parties, or if the seller is requested by the VAT Authorities to pay standard rate VAT on this sale, then such VAT implication shall be for the seller's account, as the purchase price is inclusive of VAT. The conveyancing attorney shall retain the VAT portion from the purchase price of R 4 600 00.00 (Four Million and Six Hundred Thousand Rand) and pay same over to SARS when called to do so.

Application and analysis

[15] The second respondent purchased a vacant stand from the applicant and plans had been approved for the development of the property. The Agreement specifically stated that the property together with the development plans were being sold.[8] Both the applicant and the second respondent are registered VAT vendors and the Agreement recorded their respective VAT registration numbers. While there was some equivocation during argument, the second respondent stated quite categorically in its answering affidavit that it 'engaged services of Lowe and Wills to attend to the application to SARS to have the transaction zero rated for its own benefit.'[9] The applicant does not deal specifically with this averment in its replying affidavit but denies the averments of the paragraph generally other than those specifically admitted. The approved plans were used as a motivation to obtain the zero rating from SARS.

[16] It is clear that by recording the VAT registration numbers of both the seller and purchaser, by deeming the purchase price to be inclusive of VAT and by including clause 8.7, it was envisaged that if the R600 000.00 was paid to SARS as VAT, the second respondent would then submit proof of this to SARS as input VAT in order to obtain a refund of the R600 000.00 from SARS. It seems the Agreement was drafted

[8] Section 8.5 of the Agreement.
[9] Para 5 of the second respondent's answering affidavit.

so as to ensure that if the amount of R600 000.00 was paid to SARS, the second respondent would be in a position to obtain a refund. That would make sense from a business perspective. It is also clear that if the VAT was payable then the applicant would only be entitled to R4 000 000.00 (four million rand) from the sale of the property. Clause 8.7 of the Agreement was specifically crafted to enable the second respondent to get a refund from SARS if the R600 000.00 was paid as VAT.

[17] It would appear odd that the second respondent would then take steps to have the sale zero rated with the effect that applicant would benefit solely from this and be entitled to the full purchase price of R4 600 000.00 and that the second respondent would not be able to claim the R600 000.00 as input VAT and obtain a refund. Such an interpretation in the words of Wallis JA would appear to be insensible and unbusinesslike.

[18] I am of the view that the Agreement compartmentalised the purchase price into the amount to be paid to the seller and the amount to be paid to SARS as VAT. Clause 8.7 of the Agreement specifically instructs the conveyancing attorney to retain the VAT portion from the purchase price and pay it over to SARS when called upon to do so. At all times the R600 000.00 was to remain with the first respondent and she was to pay it over to SARS if requested. The R600 000.00 was never transferred as part of the purchase price to the applicant.

[19] Clause 8.1 stated that the purchase price is inclusive of VAT at the rate of 15% (fifteen percent). The specific reference to the amount of VAT (15%) to be paid in Clause 8.1 is an indication that the globular amount of the purchase price was made up of a demarcated VAT component of 15%. It is clear from the Agreement that 15% of the purchase price had to be ring fenced for the payment of VAT.

[20] The applicant placed reliance on clause 8.7 which in part provides '… if the seller is requested by the VAT authorities to pay standard rate VAT on this sale then such implications shall be for the seller's account as the purchase price is inclusive of VAT.' The contention is that the first respondent is only entitled to retain the VAT portion from the purchase price and pay the VAT portion to SARS, if the seller is requested by the VAT authorities to pay VAT. The applicant contended that if the VAT authorities did not make such a request then it (the applicant) should be entitled to retain the R600 000.00.

[21] The Agreement is silent on what should occur to the R600 000.00 held by the first respondent in the event, as occurred, the transaction is zero-rated. This is so even though the parties anticipated this as a possibility. I am of the view that the objective of clause 8.7, analysed in context, was to enable the first respondent to retain the VAT portion and pay it over to SARS thus enabling the second respondent to claim the R600 000.00 as input VAT and obtain a refund from SARS. Clause 8.7 was intended to protect and safeguard the interests and rights of the second defendant in this regard. The objective of the clause was not, by implication, to afford the applicant the right in the event of the transaction being zero rated to claim the R600 000.00. In any event, the interpretation suggested by the applicant is not consistent with clause 8.1 which clearly delineates the VAT portion as being 15% of the purchase price of R4 600 000.00. Once that delineation had been made and if SARS did not claim the VAT, then the applicant has no claim to it as it has been demarcated as payment to the fiscus.

[22] I am satisfied that Clause 8.7 read with clause 8.1 and the other sub-clauses in clause 8 do no more than establish a mechanism to facilitate the second defendant getting a refund from SARS if the R600 000.00 was paid as VAT. In the light of the other clauses, it was not intended to enable the applicant to claim the R600 000.00 if the sale, as was the case, was zero-rated.

[23] In *Royal Anthem Investment*[10], the court albeit dealing with materially different facts, held:

> 'Apart from the appellant's instruction not to pay it over, I cannot understand why the first defendant could ever have thought it should not be immediately repaid to the respondents. They had received R264 723 from the respondents in order to pay SARS and not to pay the appellant. That sum was never payable to, nor paid over to, nor held by or on behalf of, the appellant; it could thus never have been an amount the appellant was entitled 'to keep' under clause 6. This is all the more so as, at the time of cancellation, the duty had already been paid over to SARS and was not available to the appellant to keep. Consequently, SARS repaid the sum of R233 000 after the sale had fallen through and at a time when neither the first defendant nor the appellant had any entitlement to retain it, as was correctly pointed out by respondents' attorney in his

[10] *Royal Anthem Investments 129 (Pty) Ltd v Yuen Fan Lau and Another* {2014} ZASCA 19 (26 March 2014 para 22.

letter of 28 June 2011 quoted above. In the circumstances, the respondents were entitled to be repaid the transfer duty of R264 723.'

[24] I am satisfied in the matter before me that as a consequence of clause 8.1, the sum of R600 000.00 was payable to SARS as VAT. Once it was determined that sale was zero rated and therefore SARS was not entitled to this amount, it had to be returned to the second defendant as the appellant was not entitled to keep it in terms of clause 8.1. read with the rest of the Agreement.

In the circumstances the following order is made:

Order:

1. The application, directing and compelling the first respondent to effect payment to the applicant in the amount of R 600 000.00 (Six Hundred Thousand Rand) together with all interest accruing thereon, is dismissed.
2. The counter application, directing the first respondent to effect payment of the sum of R 600 000.00 (six hundred thousand rand) together with all accrued interest to the second respondent within 5 days of this order, succeeds.
3. The applicant is to pay the costs of the second respondent.

CASE INFORMATION

Counsel for the Applicant	:	M.W. Matthews (Mr)
Instructed by	:	Barry, Botha & Breytenbach Inc. 16 Bisset Street Port Shepstone Tel: (039) 682 5540 Fax: 086 615 7240 Email: mark@bbbinc.co.za
Counsel for the First Respondent	:	D. Tobias (Mr)
Instructed by	:	Deshan Naidoo Attorneys 23 Reynolds Street Port Shepstone, 4240 Ref: Naidoo/AG887 Tel: (039) 682 0777
Counsel for the Second Respondent	:	I. Veerasamy (Mr)
Instructed by	:	M.B. Pedersen & Associates 10 Sevenfold 10 Derby Downs Westville Ref: M B PEDESEN Tel: (031) 072 0324 Email: admin@durban-law.co.za
Date of hearing	:	04 March 2020