REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 86788/15

31/3/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... 31/3/2017
SIGNATURE DATE

In the matter between:

RUDOLF VISSER Applicant

and

DINOKENG LOFTS (PTY) LIMITED Respondent

JUDGMENT

MALI J

[1] The applicant seeks payment of R343 441.76 together with interest. The applicant is an adult male businessman, a resident and a citizen

of Netherlands. He describes himself as a pigeon fancier who actively participates in the sport of pigeon racing at local and international level. The applicant was also appointed by the respondent as one of its international representatives for the 2013 and 2014 racing season.

[2] The respondent is the sponsor of an international one loft race. Fanciers from all over the world send their young pigeons to the respondent for training to compete in local competitions. The owners of the winning pigeons are entitled to prize money as advertised by the respondent.

[3] During August 2014, the applicant entered the main race of 2013-2014 racing season, organised and hosted by the respondent on 24 August 2014 at the Gariep Dam, Pretoria North. He won the main race. The respondent did not pay him the guaranteed first prize of R500 000.00, instead paid him an amount of R156 558.24.

ISSUES TO BE DETERMINED

[4] The issues of determination in the present matter are the interpretation of contract. This is to whether the respondent is liable to pay the guaranteed first prize sum of R500 000.00 or was the respondent entitled to adjust the sum in relation to the number of paid entries received.

INTERPRETATION OF THE CONTRACT

[5] In Absa Technology v Michael 's Bid a House [1] the court held as follows:

" A court may not admit evidence as to what the parties intended it to mean if that has the effect of changing the terms of which they clearly agreed in writing."

[6] In KPMG Chartered Accountants v Securefin[2] it is held that first, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning[3]. Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) para 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent[4]. Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible'[5]. The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms

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[1] 2013 ([ZASCA] 1026 at paragraph 20
[2] 2009 [ZASCA] 7
[3] Johnson v Leal 1980(3) SA 927 (A) at 943B
[4] Johnson& Johnson (Pty) Ltd v Kimberly-Clark Corp 1985 ZA 132 1985 ZASCA 132, 1985 Burrell Patent Cases 126 (A)
[5] Delmas Milling Co Ltd v du Plessis 1955(3) SA 447 (A)

are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice[6].

[7] In KPMG Chartered Accountants (SA) v Securefin Limited and Another[7] Harms DJ stated; *"I should, however, point out that once again much inadmissible evidence was led in this regard. Whether a tacit term can be inferred depends on the interpretation of the document and not on evidence."*

[8] It is common cause that the brochure advertising the competition with indication of the prize money information constitutes the contract between the parties. The relevant clauses of the contract read as follows:

"Main Race- Total Prize Money: R1667.500.00

Main Race Competition

Gariep Dam -623 km- 24 August 2014

1. *R500 000.00*

2. *R150 000.00*

3. *R125 000.00*

4. *R100 000.00*

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[6] Van der Westhuizen v Arnold 2002(6) SA 453 (SCA) paras 22 and 23 and Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltdv [2008] ZASCA 94; 2008(6) SA 654 (SCA) para 7

[7] [2009] 2 All SA 523 (SCA) (13 March 2009)

5. *R80 000.00*

6. *R50 000.00*

7. *R45 000.00*

...

"Prize Money Guarantee:

1. *Advertised Prize Money is based on 600 Paid Pigeons*

2. *500 Paid Pigeons will pay out 85% of the advertised amounts*

3. *400 Paid Pigeons will pay out 70% of the advertised amounts*

4. *The 1st Prize on the Main Race will stay the same and not be adjusted accordingly"*

The terms and conditions in this brochure and also the registration and entry form contains the entire agreement between the parties and no additions to or amendments of this agreement shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties. The payment of prize money is at the sole discretion of Dinokeng Lofts and may vary according to the number of registered entries. Advertised Prize money is calculated on 600 paid entries

received. This agreement with its terms and conditions shall be subject to the laws of the Republic of South Africa."

[9] It has been submitted on behalf of the respondent that the interpretation of the contract constitutes a dispute of fact which the applicant would have foreseen. The applicant could have brought the matter by way of action as a result the Court is urged to refer the matter for oral evidence. The respondent's submission that the terms of the contract were confusing to the applicant and he sought advice from lawyers should be accepted by the court to support the existence of the dispute of fact. I cannot agree with this contention, the exercise of seeking clarity on something does not always equal to a dispute. It is apparent that the applicant obtained clarity and proceeded with the transaction on the agreed contractual terms. The court is capable of disposing this matter on papers as they stand.

[10] From the excerpts of contract stipulated above the applicant submits that the contract is clear that he is entitled to R500 000.00 the guaranteed prize money. The discretion of the respondent is applicable only to other prizes not the main race prize money. The applicant's submission in this regard is based on the fact that in the contract at page 20 no 4 is specifically underlined to emphasise that the said prize money is not subject to any adjustments. It is not affected by the number of entries as submitted by the respondent.

[11] The applicant's submission is that the terms of the contract are only subject to variation when reduced to writing and signed for by both parties as provided in the contract. According to the respondent it sent an email correspondence to the applicant six days before the race varying the terms of agreement.

The email reads as follows:

"*15 August 2017*

Update in connection with paid entries and possible pay-outs. As you are well aware our pay-outs are calculated on the number of paid entries in the final race. At this time we cannot predict the number of reserves that will be activated between today and the main race. I hope that we will be able to reach 325 paid entries. If this is reached, the prize money pay-out will be as follows:

Main race:

Position	*Prize Money*
1	*R200 000.00*
2	*R57 000.00"*

[12] The respondent submits that it could not guarantee the prize money because it depended on the number of entries. This is in total contradiction of the terms of the contract underlined in number 4. Respondent could not explain the rationale for the underlining of 4. I

am in full agreement with the applicant that the respondent's discretion is reserved for other prizes.

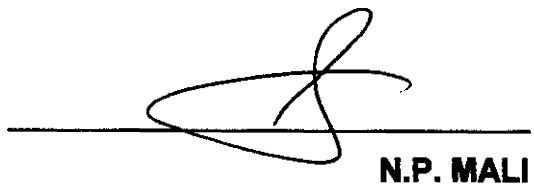
[13] If the intention of the contents of the email were to vary the terms of the contract the respondent as the party introducing the variation would have ensured that the applicant signed for the variation as provided for in the contract. This could have occurred before the applicant took part in the competition. It is trite that the terms of the contract can be varied when the parties agree in writing. In fact, in the present matter the term providing for the variation of the contract is found in the last page of the brochure marked as VR2 in the papers.

[14] Furthermore even if the said email relied upon by the respondent was received by the applicant it would not have the desired effect by the respondent. It intended to change the term of the contract without following the agreed term of variation.

[15] Having regard to the above the applicant has successfully proved that he is entitled to the sum of R500 000.00 being the guaranteed prize money and he only received a sum of R156 558.24

[16] In the result I make the following order;

16.1 The respondent shall pay the applicant the sum of R343 441.76 together with interest, interest to be calculated at 10.5% from the date of this order.



N.P. MALI

JUDGE OF THE HIGH COURT

Counsel for the Applicant:	Adv. Tolmay
Instructed by:	Garratt Hugo & de Souza INC
Counsel for the Respondent:	Adv. Schoeman
Instructed by:	Roestoff & Kruse Attorneys
Date of Hearing:	13 February 2017
Date of Judgment:	31 March 2017