

IN THE HIGH COURT OF SOUTH AFRICA



NORTH GAUTENG, PRETORIA

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

16 Apr. 1 2018
DATE
SIGNATURE

CASE NO: A930/2015

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED

Appellant

And

DOROTHEA SOPHIE JENSEN

Respondent

JUDGMENT

MOLOPA-SETHOSA J

[1] On 7 March 2014 the respondent (“Mrs Jensen”) launched an application against the appellant for a declaratory order in the following terms:

“1 That the respondent [the current appellant] be interdicted from conducting business of any sort on the premises known as farm Amandelbult No. 383, Registration Division K Q. Transvaal other than a business which consists of the selling of liquor in a retail outlet, as well as selling cigarettes, tobacco, and such other items as the respondent may be authorised from time to time by the competent authorities to sell in a retail liquor outlet.

2. Declaring that the respondent is not entitled to conduct any other business on the premises known as Farm Amandelbult No. 383, Registration Division K Q. Transvaal other than the running of a retail liquor outlet including the right to sell cigarettes, tobacco and such other items as the respondent may be authorised from time to time by competent authorities to sell in a retail liquor outlet, save with the consent of the respondent (*sic*);

3. That the respondent is precluded from allowing any business to be conducted by any third party on the aforesaid premises, save with the consent of the respondent (*sic*)

4. That the respondent is ordered to pay the costs of the application

5. That further and/or related relief be granted to the applicant.”

[2] The appellant opposed the relief sought by Mrs Jensen.

[3] On 20 March 2015 Mr Justice Makgoka (“Makgoka J”) sitting in the High Court Gauteng Division, Pretoria, delivered a judgment in which he upheld Mrs Jensen’s application. In that regard the court *a quo* held as follows:

“1. The respondent is interdicted from conducting business of any sort (except for mining activities) on the property known as farm Amandelbult No. 383 situated in Rustenburg (the property), other than a business which consists of the selling of liquor in a retail outlet, and the selling of cigarettes, tobacco, and such other items as the respondent may be authorised from time to time by competent authorities to sell in a retail liquor outlet, and the respondent is interdicted from allowing any third party from conducting such business;

2. It is declared that the respondent is not entitled to conduct any other business on the property (except for mining activities) other than the selling of liquor in a retail outlet including the sale of cigarettes, tobacco and such other items as the respondent may be authorised from time to time by competent authorities to sell in a retail liquor outlet, save with the consent of the applicant;

3. The respondent is ordered to pay the costs of the application, including the costs of senior counsel.”

[4] The appellant now appeals to the Full Court of this Division, against the judgment and orders of Makgoka J, with special leave to appeal to the Full Court of the Gauteng Division having been granted by the Supreme Court of Appeal (“SCA”) on 03 December 2015 [application for leave to appeal having been initially refused on 24 August 2015 by Makgoka J].

Background Facts

[5] The following is a summary background to the issues leading to this appeal:

[5.1] Mrs Jensen was the owner of the Farm Amandelbult No. 383, Registration Division K Q. Transvaal, situated in Rustenburg.

[5.2] During 1973 she sold that farm to the appellant-Rustenburg Platinum Mines Limited. The appellant is a wholly owned subsidiary of Anglo American Platinum Mines Limited. The property was sold to the appellant for the appellant to conduct the business of mining on the property, which the appellant has been doing since the property was transferred into its name.

[5.3] Clause 8 of the Deed of Sale dated 16 January 1973 concluded between the appellant and the respondent provides that

“the Seller (referring to Mrs Jensen) reserves unto herself all business rights on the property”

[5.4] On 17 May 1973 a Deed of Transfer was registered in the Deeds Office, and in terms of paragraph E thereof the property was transferred to the appellant subject to the registration of a Servitude in favour of Mrs Jensen of all business rights on the property. Certain buildings were erected on the property in a specified demarcated area of approximately 5 000 square meters, from which the business activities would be conducted.

[5.5] In addition a “*Sertifikaat van geregistreerde saaklike regte*” was issued recording that the applicant is the “*besitter van alle besigheidsregte in en op die grond hieronder beskryf volgens*” the Deed of Transfer dated 17 May 1973.

[5.6] It is not in dispute that since 1973 Mrs Jensen has exercised business rights in respect of the property in question herein. In this regard, during 1975 Mrs Jensen transferred her business rights for a general dealer and an eating house to an entity known as D & D.H Fraser Limited for a period of five years through the registration of Notarial Deed of Real Rights registered on 14 November 1975. Mrs Jensen let the building on the property to two tenants who operated retail outlets.

[5.7] During 1980 Mrs Jensen ceded the right to sell liquor on the property to the respondent. A Notarial Deed of Real Rights in this regard was registered on 13 February 1980. This right also included the right to sell tobacco products and such other items as may be permitted by competent authorities from time to time.

[6] At the court *a quo* Mrs Jensen had submitted that the appellant had violated her business rights set out in the notarial deed by allowing the sale, on the property, of various goods and items beyond what had been agreed to, often in competition with her tenants' businesses. Mrs Jensen submitted that the profitability of the business of her tenants was adversely affected by this. In turn, this negatively affected the potential rental income from those businesses. She submitted that she addressed a letter of demand to the respondent on 13 December 2012 complaining of the alleged violation of her business rights; and that the alleged violations did not stop, hence the application launched at the court *a quo*.

[7] Mrs Jensen thus contended that the appellant's right to conduct business on the property, other than mining activity, was restricted to that transferred to it in the notarial deed referred to above; i.e. the sale of liquor and tobacco related products, and that she, Mrs Jensen holds the remainder of the business rights on the property.

[8] The appellant did not dispute that it had allowed other businesses to operate on the property. It contended that the registration of a servitude in Mrs Jensen's favour in the Deed of Transfer did not result in the

registration of business rights contended for by Mrs Jensen. The appellant submitted that even if Mrs Jensen had business rights, she did not have exclusive business rights over the property.

[9] Thus the issue that was decided in the Court *a quo* was essentially the meaning and content of the reservation of all business rights to Mrs Jensen; the nature of the rights conferred when viewed on a conspectus of the Deed of Sale, the Deed of Transfer and the Certificate of Real Rights which was issued.

[10] The appellant contends that whilst Mrs Jensen asserts that she is the holder of an exclusive business right over the property, Mrs Jensen cannot so assert because such an assertion relies only on an inference of exclusivity; that this is so because exclusivity is not expressly stated in any of the documents conferring or rather preserving the business rights.

[11] The appellant thus submitted that Mrs Jensen's contention is not sustainable; that all servitudes, including a "business right" (which is a personal servitude), must be strictly construed to give the least onerous construction. Further, that Mrs Jensen's interpretation of the business right is extremely onerous as, in the absence of the respondent's permission, the appellant may not allow any third party to provide goods and services to the more than 2800 mine workers who reside on the property. The appellant submitted that this construction would afford the respondent a most powerful monopoly as the appellant's employees require various goods and services on site. Absent the respondent

providing those goods and services the tenants would be in a position to charge excessive prices and/or provide inferior products and services if at all.

[12] The appellant contends that all of the goods and services available on the property are ancillary to its mining activities as they are there for the benefit of the appellant's employees; and that if the appellant was not conducting large-scale mining operations, there would be no need for these amenities.

[13] The appellant consequently submitted that on a proper construction, the business rights, even if enforceable, do not confer an exclusive entitlement on Mrs Jensen to conduct business on the property. The appellant contends that the use of the word "all" in the business right only serves to confirm that Mrs Jensen is entitled to conduct any type of business on the property, without restriction.

[14] The appellant consequently submitted that the business rights of Mrs Jensen do not prohibit the appellant or anyone else from conducting business on the property. It was also contended that the businesses that the appellant has allowed to be conducted from the property are incidental to its mining operations (which is not restricted by the business rights). It was thus submitted that the respondent's business rights do not qualify as a real right capable of registration as it does not subtract from the appellant's ownership of the property.

[15] The appellant subsequently submitted that in the absence of express terms to the contrary, a business right only affords the holder thereof the right to select a site on the property in question and to trade

from that site; that it does not entitle the holder thereof to preclude anyone else from trading on the property nor does it entitle the holder thereof to lease the selected trading site to others.

[16] It was submitted on behalf of Mrs Jensen that it is an entirely wrong approach for the appellant to take the narrow approach that the servitude needs to be interpreted on its own and that the wording of the servitude must be strictly construed to give the least onerous construction. That it is a wrong approach so to construe the meaning of all business rights in the context of the agreement entered into between the appellant and Mrs Jensen when one has regard to all of the facts contained in her founding and replying affidavit, the Deed of Sale, the Deed of Transfer and the registration of business rights all taken together, on a conspectus of the papers read as a whole.

[17] In this regard one has to have regard to the modern approach to the interpretation of documents, whether contractual, statutory or otherwise. Wallis JA stated the following in Dexgroup (Pty) Limited v. Trustco Group International (Pty) Limited and Others 2013 (6) SA 520 (SCA), at paragraph 16:

“In regard to the interpretation of the contract it was submitted that the Arbitrator was bound by the ‘well-established rule that a contract must be interpreted by construing its plain words’ and that it is only in cases of ambiguity or uncertainty that an Arbitrator can take the account of surrounding circumstances ‘or its so-called factual matrix’. It is surprising to find such a submission being made

in the light of the developments in the interpretation of written documents reflected in KPMG Chartered Accountants (SA) v. Securefin Limited and Another and Natal Joint Municipal Pension Fund v. Endumeni Municipality. These cases make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed, and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset.”

[18] In Natal Joint Municipal Pension Fund v. Endumeni Municipality 2012 (4) SA 593 (SCA) at 603 F – 604 D the Supreme Court of Appeal expressed the correct approach on interpretation as follows:-

“[18] ... interpretation is the 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 a 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 of these facts. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or un-business like 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 business-like 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." (My underlining)

[19] The respondent correctly contends that from the outset one considers the context and the language together, with neither predominating over the other.

[20] The submissions by the appellant should thus be considered against the plain language of the certificate of registration, which

reserves all business rights over the property to Mrs Jensen. Before entertaining arguments such as vagueness and lack of exclusivity one must commence with the plain language of the Certificate of Registration, of the Deed of Sale, and of the Deed of Transfer all of which speak of “*all business rights over the property*”. There is no ambiguity about that phrase.

[21] Makgoka J correctly found that there is nothing ambiguous about that. It indeed simply means all business rights, other than for mining activity, shall be for Mrs Jensen. The court *a quo* correctly found that nothing turns on the fact that the word 'exclusive' was not used. It is implicit in the word ‘all’, that the respondent (and any other person) is excluded from exercising business rights. (My underlining).

[22] This position seems to have been accepted throughout by the appellant. Nowhere, prior to the application, was this position denied by the appellant. The correspondence exchanged between the parties prior to the lodging of this application bears witness to this.

[23] It is so that Mrs Jensen was the owner of the property before it was transferred to the appellant. She thus owned all the rights which were those of an owner. In the act of agreeing to sell and transfer ownership of the property to the appellant, she retained to herself all of the business rights in respect of the property. She thus retained to herself all of the business rights that an owner has in respect of a property. No other construction can be placed on the Deed of Sale, the Deed of Transfer or the Certificate of Registration of Business Rights. This is not a situation where a servitude was registered over a property by someone who was

previously a stranger to the property. The person in whose favour the business rights are reserved was the person who held those business rights *qua* owner and retained those business rights for herself upon the sale of the property. Thus Mrs Jensen sold and transferred every aspect of ownership to the appellant *minus* business rights. Save for the right to conduct mining activities on the property, the appellant could not have obtained ownership of any right to conduct business on the property. No *ex post facto* interpretation of the documents can compel one to conclude otherwise.

[24] In giving meaning to the phrase “all business rights” which were reserved to Mrs Jensen, one has to have regard to the behaviour of the parties since the servitude was registered in Mrs Jensen’s favour; which are listed in the judgment of the court *a quo* and are manifest from the papers as a whole, viz.

[24.1] The fact that a building was erected by Mrs Jensen for the purpose of exercising her business rights on the property.

[24.2] The appellant bought the liquor rights from Mrs Jensen in 1980. As rightly pointed out by the court *a quo* the appellant would certainly have not done so if the right to conduct business on the property was not an exclusive right. The appellant could simply have started selling liquor itself without purchasing that right from Mrs Jensen.

[24.3] The appellant allowed Mrs Jensen to erect a building from which it would exercise its business rights, which in fact the respondent exercised since inception, to date.

[24.4] The right to conduct business from the property was in fact exercised on an ongoing basis without any hindrance or prevention of entry of Mrs Jensen's tenants onto the property.

[25] Against this background, not only is there no ambiguity in the reservation of business rights but the parties had previously conducted themselves in conformity with the recognition of the exclusivity of those business rights. It is only when the appellant started behaving inconsistently with its previous behaviour that the correspondence flowed which led to the application being brought.

[26] It is so that that the business activities that the appellant had allowed on the property are incidental to its core business of mining. This however, does not mean that the appellant can simply ignore what was agreed to in the Deed of Sale. As correctly found by Makgoka J, it was clearly envisaged that the rights to the mining activities of the appellant would all accrue to the appellant. All it means is that it cannot be inferred, from all the relevant documents, that the appellant reserved for itself any business rights other than mining activities. As clearly put by Makgoka J, simply put, the appellant reserved for itself the rights to mining activities, while Mrs Jensen reserved for herself all other business rights on the property.

[27] The authorities of Willoughby's Consolidated Company Limited v. Copthall Stores Limited 1918 AD 1 and the 1913 AD Willoughby's Consolidated Company Limited v. Copthall Stores Limited 1913 AD 267, relied upon by the appellant at paragraph 18 of its heads of argument, do not find application on the facts in this case. The facts of those cases are very far from the far clearer facts when taken in comprehensive whole of Mrs Jensen. The case of Hollmann and Another v. Estate Latre 1970 (3) SA 638 (A) is distinguishable from the facts of this case as the distinction between a positive and a negative component of a servitude in the form of a right to trade arose only in the context of prescription in that case but do not arise on the facts of this case.

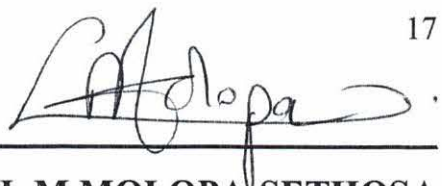
[28] The facts of this case are peculiar to the four corners of that which was placed before the Court *a quo* and that which is before this Court. As stated above, on the facts of this case 'all' means all business rights. Consequently this is the underpinning rationale for the exclusivity. Mrs Jensen's business rights apply to the entire property. The fact that she has chosen to enforce the business rights over time only on a certain portion of the property and to give up certain rights to the appellant by means of a sale of those rights (the liquor sale right) is evidence of the fact that she can exercise those rights on any portion of the property. She does not need an order or an agreement to define which portion of the property she can exercise her rights on. Any part of the property is part of the whole of the property and the right extends to the whole of the property.

[29] Looking at the matter on all the documents that were before it, it cannot be said that the court *a quo* erred in upholding the respondent's application as it did. The court *a quo* was thus correct in coming to the conclusion that it was in the premises enjoined to give effect to the parties' agreement and to grant the order prayed for.

[30] Having regard to all the factors herein, the appellant has thus not made out a case that would justify this Court to interfere with the decision by the Court *a quo*. Under the circumstances, the appeal cannot succeed.

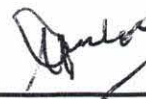
[31] In the premises, I make the following order:

1. The appeal is dismissed;
2. The appellant is ordered to pay the costs of the appeal, such costs to include the costs of senior counsel.



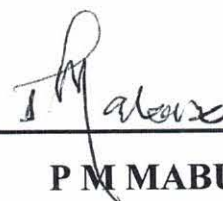
L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree



W R C PRINSLOO
JUDGE OF THE HIGH COURT

I agree



P M MABUSE
JUDGE OF THE HIGH COURT