IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

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

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CASE NO: HCAA20/2019

CHARLES JOSEPH STOPFORTH	FIRST APPELLANT
AMANDA STOPFORTH	SECOND APPELLANT
BUSESI INVESTMENTS 183(PTY)LTD	THRID APPELLANT
and	
NEDBANK LIMITED	RESPONDENT

JUDGMENT

MULLER J:

[1] The issue in this appeal is whether compliance of the terms and conditions of a deed settlement has put an end to the total indebtedness of the defendant. The appeal is with leave of the court *a quo*. I will refer to the parties as the plaintiff and the defendants for the sake of convenience.

[2] The salient background facts are that all the defendants duly bound themselves jointly and severally as sureties and co-principal debtors for indebtedness of the principal debtor Cape Town Fish Market Polokwane (Pty) (Ltd) (in liquidation) formerly known as K2012206839 (South Africa) Pty Ltd.[1] On 23 June 2017 the parties entered into a written deed of settlement.

[3] The plaintiff, instituted action on 23 November 2017 against the defendants as the sureties and co-principal debtors, for the recovery of the amount of R272 740.30 due and owing in terms of an overdraft facility and also the amount of R996 974.28 due and owing in respect of a written term loan agreement granted to the principal debtor CTFM.

[4] The defendants in their plea specifically pleaded that they paid an amount of R800 000.00 to the plaintiff in full and final settlement of all amounts due and payable in accordance with the terms of a written deed of settlement entered into between the parties on 23 June 2017.

[5] The parties, at a pre-trial conference, foreshadowed a stated case and prepared a document termed “Agreed Facts and Special Case” in terms whereof they agreed on the following facts:

(a) that overdraft facilities were granted to CTFM in terms whereof monies were lent and advanced to it;

(b) monies were also lent and advanced to CTFM in terms of a “Term Loan Agreement;

(c) the first to the third defendants entered into written deeds of suretyship for the obligations of CTFM which has failed to make regular payments;

(d) CTFM was also placed in liquidation;

(e) the National Credit Act is not applicable;

(f) the plaintiff and defendants entered into an agreement termed a “deed of settlement;”

[1] Hereinafter referred to as “CTFM”.

(g) the first to third defendants made payment of R800 000.00 on 11 September 2017 to the plaintiff which payment was recorded and credited to the account of CTFM.

[6] The different points of view with regard to the nature of the deed of settlement were recorded as the following;

(a) the plaintiff avers that the deed of settlement was concluded as an interim payment and that a further arrangement was made in respect of the balance due and owing.

(b) the defendant contended that the deed of settlement constitutes a settlement in full and final settlement of all the obligations of the defendants towards the plaintiff.

[7] The issues which the court *a quo* was called upon to decide on were formulated as follows:

(a) whether the amount of R800 000.00 was paid in full and final settlement of all amounts due and payable by the defendants jointly and severally; and

(b) whether the deed of settlement dated 23 June 2017 precluded the plaintiff from prosecuting the balance which remained after payment of the aforesaid amount.

[8] The statement of “Agreed Facts and Special Case” is not a true stated case as envisaged by rule 33, because the parties left it open to adduce evidence in support of their respective contentions. The document, nevertheless, contains a statement of the agreed facts and what the disputed issues were which were presented for determination by the court. The court is, therefore not at liberty to change the questions to be determined and have to take the respective contentions put forward by the parties into account when it answered the questions of law. The deed of settlement has to be interpreted to determine what its terms are, if it, as contented by the plaintiff, was concluded to provide for an interim payment of R800 000.00 and payment of the balance remaining or if, as contended by the defendants,

that the payment of R800 000.00 was made in full and final payment of all the obligations of the defendants.[2] The starting point in my view when interpreting the written deed of settlement is to adopt the approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[3]

> "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 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."[4]

[9] If parties disagree as to the meaning of the instrument regard may be had to extrinsic evidence as to what was intended, if there is ambiguity or uncertainty.[5] The contextual setting or background is a means by which the intention of the parties may be ascertained from the language used in the contract and in the light of the admissible evidence. There are three classes of admissible evidence. There is, first of all, evidence of the background facts. These may be facts which are part of the factual matrix which explains matters probably present in the minds of the parties when they entered into the contract. The aim is

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[2] *Mtokonya v Minister of Police* [2017] ZACC 33 par16.
[3] 2012 (4) SA 593 (SCA) 13 para 18.
[4] Also *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) 767E-768E.
[5] *Rane Investments Trust v Commissioner South African Revenue Service* 2003 (6) SA 332 (SCA) par 26.

to put the court in the "armchair of the authors of the document."[6] Secondly, there is evidence of surrounding circumstances which will be admissible only if evidence of the context or of the factual matrix fails to clear up ambiguity or uncertainty. And thirdly, evidence of what passed between the parties during the negotiations that preceded the conclusion of the contract will be admissible only when evidence of the surrounding circumstances does not provide sufficient certainty.[7]

[10] The categorization of evidence as 'background facts' and 'surrounding circumstances', was criticized as being artificial in *KPMG Charted Accountants (SA) Ltd v Securefin Ltd and Another*:[8]

> "First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial court. 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 (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter of the court and not for the witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) Phipson on Evidence (16 ed 2005) paras 33-64). Third, the rules about admissibility of evidence in this reard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson v Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) [1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualize the document (since "context is everything") to establish its factual matrix or purpose or for the purposes of identification, "one must use it as conservatively as possible" (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B-C). 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 are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or "factual matrix" ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* 2008 (6) SA 654 *(SCA) para 7."[9]

[11] In clause 4.2 of the deed of settlement the parties recorded:

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[6] *Sun Packing (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) 184A-C.
[7] *Engelbrecht and Another NNO v Senwes* Ltd 2007 (3) SA 29 (SCA) par 7.
[8] 2009 (4) SA 399 (SCA).
[9] Par 39.

"4.The parties specifically record:

4.2 That this agreement constitutes the entire agreement between the parties and no alteration hereof, addition hereto or consensual cancellation hereof shall be of any force or effect unless reduced to writing and signed by the parties or their duly authorized representatives;"[10]

[12] And in clause 4.3 it is provided:

"4.3 that no representation, warranties, undertakings or promises of whatsoever nature have been made by Nedbank its agents or servant, other than these herein contained;"

[13] The parties, in addition to clause 4.2 and 4.3 also agreed that the deed of settlement may be made an order of court. There is no doubt, in the light of the aforegoing clauses, that the parties intended that the written instrument to be the sole and complete memorial of the contract entered into between the parties. Botha JA in *National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel*[11] stated:

"When a jural act is embodied in a single memorial, all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act."

[14] Difficulties do arise when evidence is adduced with regard to the context or factual matrix to determine where the limits of the evidence to be admitted are and to guard against allowing inadmissible evidence. The non-variation clause contained in Clause 4.2 as well as clause 4.3 bolster the applicability of the integration rule with the result that the evidence of the prior discussions between the parties are inadmissible.[12]

[15] It bears mention that interpretation of a document is a matter of law and is thus a matter for the court, and not for the witnesses. The first step, despite the different views held by the parties as to the meaning of the deed of settlement, is to determine, not what the parties say they intended, but what the deed of settlement means, as expressed by the language used in the deed. The court must, therefore, ascertain the nature of the deed of settlement with regard to its substance.[13]

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[10] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) 767*; Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[11] 1975 (3) SA 16 (A) 26C.
[12] *ABSA Technology v Michael's Bid a House* (212/2012) [2013] ZASCA 10 (15 March 2013) par 7.
[13] *Tucker v Ginsberg* 1962 (2) SA 58 (W) 62F-H.

[16] I turn to the deed of settlement. It is recorded in the preamble that the defendants acknowledged that they are jointly and severally indebted to the plaintiff, as sureties, in respect of a medium term loan and a current account which were granted to CTFM. The defendants also acknowledged in clause 1.1 and 1.2 that they are indebted to the plaintiff in the amount of R546 263.17, in respect of the "Term Loan Agreement" and the amount of R963 093.81 in respect of the current account, together with interest.

[17] Clause 2.1 provides:

> "That R800 000.00, will be paid towards the accounts mentioned in paragraph 1.1 and 1.2 *supra* on or before 30 September 2017."

[18] Clause 4.6 provides:

> "that should Charles, Amanda and Bubesi duly comply with all terms and conditions as set out in this agreement, timeously and on due dates thereof, then Nedbank will not pursue any action against them, relating to the indebtedness contained herein;"

[19] The indebtedness contained in the deed of settlement is clearly the indebtedness of the CTFM as the principal debtor, in respect of the current account and the term loan agreement and the indebtedness of the defendants arising from the surety agreements inclusive of the the amounts due and payable. Payment of R800 000.00 on 30 September 2017 was the only obligation that the defendants had to comply with in terms of the deed of settlement. The deed is silent whether the payment of the R800 000.00 is to be considered as part payment of the total indebtedness of the defendants. Clause 4.6 makes it clear that no action will be instituted by the plaintiff in relation to the indebtedness of the defendants referred to in the deed of settlement, which is a reference to the balance remaining if payment in the amount of R800 000.00 is made on 30 September 2017. No other indebtedness of the principal debtor or the sureties are contained in the deed of settlement. It was argued that the word "towards" in clause 2.1 must be interpreted to indicate that an interim payment was envisaged. The word must be interpreted against the whole of the agreement. The dictionary meaning of the word "towards" is:

> "**1**. in the direction or vicinity of: towards London. **2**. With regard to: her feelings towards me. **3**. as a contribution or help to: money towards a new car. **4**. Just before: towards noon."[14]

[20] The purpose of the settlement was to afford the defendants the opportunity to pay a lesser amount than the amount due in terms of clause 1.1 and 1.2 on or before 30 September 2017 to avoid paying the total indebtedness due and payable. Clause 2.1 simply indicates what the amount is which is required to be paid by the defendants. Put differently; clause 2.1 stipulates, with regard to the total outstanding amounts referred to in clause 1.1 and 1.2, what the contribution is that has to be made by the defendants and also stipulates the date upon which such amount has to be paid before clause 4.6 comes into operation.

[21] Clause 4.6 is in the nature of a *pactum de non petendo,* which is a promise by a creditor not to sue the debtor for the balance outstanding if an amount of R800 000.00 is paid on 30 September 2017. The legal effect of the promise is that the claim becomes unenforceable upon payment of the amount on the due date and provides a debtor with an absolute defence when the creditor instituted an action for the enforcement of its claim in conflict with that promise.[15] The defendants are simply relieved from the obligation to pay because the plaintiff is barred from enforcing its right to payment of the balance that remained unpaid.

[22] The plaintiff instituted the present action for the recovery of the outstanding balance arising from the same current account and Term Loan Agreement and the surety agreements referred to in the deed of settlement on the basis that the amounts claimed were due and payable.[16] No reference was made that the amount of R800 000.00 had been paid in terms of the deed of settlement, prior to the institution of the action. The action to recover the outstanding balance which remained after payment of the R800 000.00 was, therefore, instituted against the defendants in direct violation of the unambiguous promise made by the plaintiff in clause 4.6.

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[14] *The New Collins Concise Dictionary* (1985).

[15] *Erasmus v Du Toit* 1907 TS 891, 893; *Estate Logie v Priest* 1912 AD 312, 321; *Dreyer v Sacks and Goldstein* 1913 CPD 694, 694-695; *Schneider NO v Raitkin* 1955 (1) SA 19 (W) 22A-B; *District Bank Ltd v Hoosain and Others* 1984 (4) SA 544 CPD 548H-I.

[16] The amounts claimed in summons are R272 740.30 in respect of the current account and R454 398.41 in respect of the term of agreement.

[23] Clause 4.4 provides:

> "that this agreement does not constitute a novation of any of Nedbank's rights;"

[24] Counsel for the plaintiff argued that it remained open to the plaintiff to claim the balance outstanding on those accounts by virtue of clause 4.4. The parties stipulated in clause 3.1 that should the amount of R800 000.00 not be paid on or before the due date, then and in that event the full amounts (or the total indebtedness of the defendants) referred to in clause 1.1 and 1.2 together with interest calculated daily and compounded monthly from 15 March 2017, less any payments made, shall immediately become due, owing and payable.In addition, in clause 3.2 the plaintiff would be able to obtain an order to declare two specified properties "specially" executable, together with costs on the scale as between attorney and client.

[25] Clause 4.1 provides that the plaintiff is able to prove the nature and amount of CTFM's indebtedness to the plaintiff together with the annual finance charges payable in respect thereof,may at any time be determined by a written certificate which will be *prima facie* proof of the contents and that such amounts are due and payable. Clause 4.4 makes express provision for the plaintiff to, at its option, institute action on the original claim or on the subsequent settlement agreement, but only if the defendant has failed to comply with the terms and conditions of the deed of settlement.[17] It will be recalled that it is common cause that the defendants in fact duly complied with their obligation in terms of the deed of settlement.

[26] It is important to note, the parties also agreed in clause 4.5 that the agreement be made an order of court and should the defendants not comply with all the terms and conditions on the due dates, the plaintiff may without notice apply to the court to make the agreement an order of court. It is common cause that the deed of settlement was not made an order of court. It would not have served any purpose to approach the court prior to the institution of

[17] Van Zyl v Nieman 1964 (4) SA 661 (A) 669-670; *Antonie en Andere v Koekoe* 1966 (2) SA 610 (T); *Woolfsons Credit (Pty) Ltd (Formally Vavasseur (SA) Credit (Pty) Ltd v Holdt* 1977 (3) SA 720 (N) 726G-H.

the action with a request to make the deed of settlement, an order of court. If the defendants complied with the terms and conditions of the deed before action was instituted, there would have been no need to make it an order of court. A court would not have entertained such a request if the court was approached before action was instituted simply because there was no live dispute before the court to determine.[18]

[27] The language used in the deed, in my considered view, is clear and admits of no ambiguity that the parties intended a *transactio* (compromise) of their dispute, prior to the institution of an action. In *Gollach & Gompers v Universal Mills & Produce CoI* [19] Miller JA sets out the purpose of a *transactio*:

> "The purpose of a *transactio* is not only to put an end to existing litigation but also to prevent or avoid litigation. This very clearly stated by Domat, Civil Law vol 1, para 1078, in a passage quoted in *Estate Erasmus v Church*, 1927 TPD 20 at p 24, but which bears repetition:
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> "A *transactio* is an agreement between two or more persons, who, for prevention or ending a law suit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing.""

[28] The purpose of the settlement agreement fits neatly into the description *supra* and was entered into with a view to averting an action being instituted against the sureties in terms whereof the full amount due and owing by CTFM is claimed. The deed of settlement has not affected the right of the plaintiff to claim against the CTFM as the principal debtor.[20]

[29] The plaintiff, as the author of the deed of settlement, could without any difficulty and with ease included a clause in the deed that payment of R800 000.00 is considered as part payment towards the total indebtedness of the defendants, if that was intended. The construction placed on the deed of settlement by the plaintiff that its purpose was to make provision for part payment of the total indebtedness cannot be accepted. The contents of the deed of settlement considered as a whole does not support such a contention. No

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[18] *Avnet South Africa (Pty) Ltd v Lesira Manufacturing (Pty) Ltd and Another* 2019 (4) SA 541 (GJ) par 35.6.
[19] 1978 (1) SA 914 (A) 921C-D.
[20] CTFM is neither a party to the agreement nor is it a party to the action which was instituted.

provision is made when the balance will be paid and the conditions in terms whereof future payments are to be made. It is improbable that a prominent financial institution, like the plaintiff, will simply allow the balance outstanding to remain unresolved when the plaintiff which bargaining from a position of strength could have included terms and conditions pertaining to future payment of the outstanding balance in the deed. The plaintiff, notwithstanding such knowledge, included clause 4.6 in the deed of settlement, the compliance of which was an incentive to the defendants to pay R800 000.00 on or before the due date, which would effectively have relieved the defendants from their obligation to pay and at the same time would have put paid to the right of the plaintiff to enforce any claim based on the indebtedness of the defendants. The proposition that the provisions of clause 4.6 of the deed of settlement are no bar to the claim instituted for the balance outstanding, must firmly be rejected.

[30] The learned Judge *a quo* erred by allowing evidence in violation of the parol evidence rule with regard to the prior discussions between the officials from the plaintiff and the first defendant when the deed of settlement was negotiated and concluded instead of embarking on an interpretation of the instrument.

[31] The court was required to determine the questions put up in the statement of “Agreed Facts and Special Case.” Question (a) must be answered in the negative. Payment was not made in full and final settlement of all the obligations of the defendants towards the plaintiff. The consequences of the provisions of clause 4.6 which came into effect when the amount of R800 000.00 was paid are that the right of the plaintiff to claim performance of the obligation to pay the outstanding balance from the defendants, has become unenforceable. The result of which is that the defendants are relieved from their obligation to perform in terms the surety agreements to pay the balance which is outstanding. It follows from the aforesaid that question (b) must be answered in the affirmative.

[32] In the result, the appeal should be allowed.

ORDER

(1) The appeal is upheld with costs.

(2) The order of the court *a quo* is set aside and is replaced with the following order:

“The action is dismissed with costs”

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GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO

DIVISION:POLOKWANE

I agree

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EM MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT LIMPOPO

DIVISION: POLOKWANE

I agree

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M NAUDE

ACTING JUDGE OF THE HIGH COURT LIMPOPO

DIVISION:POLOKWANE

APPEARANCES

1.	For the Appellants	: G Diamond
2.	For the Respondent:	: WP Steyn
3.	Date of the hearing	: 13 November 2020
4.	Date judgment delivered	: 18 November 2020