THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 802/2012

Reportable

In the matter between:

BOTHMA-BATHO TRANSPORT (EDMS) BPK Appellant

and

S BOTHMA & SEUN TRANSPORT (EDMS) BPK Respondent

Neutral citation: *Bothma Batho Transport v S Bothma & Seun Transport* (802/2012) [2013] ZASCA 176 (28 November 2013)

Coram: **MTHIYANE AP, LEWIS, SHONGWE, WALLIS and PILLAY JJA**

Heard: 21 November 2013

Delivered: 28 November 2013

Summary: Contract – interpretation a unitary process commencing with the words and construing them in the light of all relevant circumstances – no distinction to be drawn between background and surrounding circumstances.

ORDER

On appeal from: Free State High Court (Hancke AJP sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

WALLIS JA (??? concurring)

Introduction

[1] The respondent, S Bothma & Seun Transport (Edms) Bpk (Bothma & Seun), was originally a family company established by a father and handed on to his sons, Louis, Pelham and Tertius. Louis died, and in 2005 Pelham and Tertius went their separate ways. Pelham retained Bothma & Seun and Tertius established the appellant, Bothma-Batho Transport (Edms) Bpk (Bothma-Batho). In dividing the original business between them they had to deal with a tank farm situated in Standerton, which Bothma & Seun were hiring from Omnia Kunsmis Bpk (Omnia) under a contract executed in 1999, but pre-dating that date. In 2005 a new lease agreement was concluded with Omnia to which both Bothma & Seun and Bothma-Batho were parties. It provided for Bothma & Seun to have the use of three tanks, numbers 1, 2 and 3, with a total capacity of some 15 000 cubic metres and for Bothma-Batho to have the use of six tanks, numbers 4 to 9, having a total capacity of some 11 800 cubic metres. In return they became obliged to pay rental to Omnia on a monthly basis.

[2] Although both Bothma & Seuns and Bothma-Batho were parties to the lease, Omnia only wished to deal with one of them. Accordingly the lease provided that Omnia would invoice Bothma-Batho for the entire rental due under the lease in respect of all nine tanks, and that Bothma-Batho would have the exclusive management and control over the tank farm. It would have to enter into a separate agreement with Bothma & Seuns on how to deal with the management and handling costs. It also undertook not to recover more from Bothma & Seun in respect of rental of tanks than the latter was obliged to pay to Omnia under the lease. In addition Bothma & Seuns were to be given free access to the facility to store product in its tanks and to accompany clients there. In practice Bothma-Batho let its tanks to Sasol and Bothma & Seun let its tanks to FFS Refiners.

[3] The present dispute arose from the separate agreements concluded between Bothma & Seun and Bothma-Batho in relation to the allocation and recovery of expenses incurred in the operation of the Standerton tank farm. Two such agreements were concluded, the first in settlement of an arbitration between the parties and the second in settlement of subsequent litigation between them. Bothma-Batho contends that on a proper interpretation of the relevant clause in the second agreement it was entitled to receive the entire benefit from an increase in the rental paid by FFS Refiners to Bothma & Seun during the period from 1 July 2008 to 28 February 2009. That claim was disputed. It was dismissed by Hancke AJP at first instance and the appeal is with his leave.

The contracts

[4] It is convenient to start with the first agreement dealing with the allocation and recovery of the operating costs of the tank farm. It was concluded on 14 February 2007 as part of an overall settlement of issues that were at the time being debated in an arbitration. The clause dealing with these issues was clause 7, which reads as follows:
'Ten opsigte van die Standerton Stoortenks van Omnia sal Bothma-Batho Transport (Edms) Bpk self sy kliënte faktureer ten opsigte van die tenks deur Bothma-Batho Transport (Edms) Bpk gebruik. S Bothma en Seun Transport (Edms) Bpk sal self vir sy kliënte FFS faktureer ten opsigte van die stoortenks wat Bothma en Seun Transport (Edms) Bpk se kliënte van tyd tot tyd gebruik. Bothma en Seun Transport (Edms) Bpk sal die pro rata uitgawe plus 10% bestuursfooi ten opsigte van die bestuur van die stoortenks oorbetaal binne sewe dae na lewering van faktuur van Bothma-Batho Transport (Edms) Bpk welke uitgawes ooreenkomstig die tenkkapasiteit persentasie wat Bothma en Seun Transport (Edms) Bpk se kliënte gebruik van tyd tot tyd.'[1]

[5] Some aspects of this arrangement are reasonably clear. Bothma-Batho would incur expenses in the management of the tank farm and those costs would be divided between it and Bothma & Seun in proportion to the tank capacity of the tanks that they and their clients respectively used. As the tanks allocated to Bothma & Seun under the lease with Omnia had a greater capacity than those allocated to Bothma-Batho, the latter would bear a smaller proportion of the expenses. According to a schedule reflecting the period between March and September 2007 Bothma & Seun bore 57.34 per cent of the expenses. The same schedule covering the period from January to October 2008 reflected that it bore 52.1 per cent of the expenses.

[1] 'In connection with Omnia's Standerton Storage tanks Bothma-Batho Transport (Pty) Ltd will itself invoice its clients in connection with the tanks used by Bothma-Batho Transport (Pty) Ltd. S Bothma and Son (Pty) Ltd will itself invoice its clients FFS in connection with the storage tanks used by the clients of Bothma and Son (Pty) Ltd from time to time. Bothma and Son (Pty) Ltd will pay its pro rata share of the expenses plus a 10% management fee in respect of the management of the storage tanks seven days after delivery by Bothma-Batho Transport (Pty) Ltd of an invoice, which expenses shall be determined in accordance with the tank capacity percentages that Bothma and Son (Pty) Ltd and its clients use fro time to time.' (My translation.)

[6] A problem arose in the implementation of clause 7 of the first settlement agreement because Bothma-Batho, instead of furnishing an invoice to Bothma & Seun for the expenses and administration fee, rendered an account directly to FFS Refiners, who paid these accounts and deducted the amount of such payments from the rental that they paid to Bothma & Seun. According to the latter this meant that they had no predictable income and no control over or means of monitoring the expenses raised by Bothma-Batho. They claimed that money due to them from the rental of their tanks had been withheld. Along with other claims this formed the subject of litigation against Bothma-Batho. That is the litigation that lead to the second settlement agreement embodying the clause that gave rise to this case.

[7] The disputed clause appeared in an agreement under which all claims between the parties were settled. This involved a payment to Bothma-Batho by Bothma & Seun that included an amount of R190 000 plus VAT in respect of expenses for the storage tanks for October 2007. It was agreed that Bothma-Batho would not invoice FFS Refiners for these expenses for that month. It was also agreed that apart from this payment and the amounts payable under the disputed clause Bothma & Seun would not be responsible for any additional expenses in relation to the operation of the tank farm.

[8] The clause in issue reads as follows:

‘6. Die partye kom ooreen dat vir sodanige tydperk as wat die Respondente die reg het op die gebruik van (3) drie tenks in terme van die ooreenkoms met Omnia dan in daardie geval sal die respondente hulle kliënt faktureer vir die verhuring van die tenk kapasiteit van die (3) drie tenks wat tans R245 000 (BTW uitgesluit) bedra. Die

Applikante sal die Respondente se kliënt sodanig faktureer ten opsigte van die pro-rata uitgawes asook die administrasie fooi van 10% dat die verhaling van die Respondente se kliënt teenoor die Respondent nie meer sal wees as die bedrag van R190 000 (BTW uitgesluit) nie, met dien verstande dat indien die fakture gelewer vir die verhuring van die tenkkapasiteit sou verhoog of verlaag die fakturering ten opsigte van die uitgawes met sodanige fluktuasie aangepas sal word.'[2]

[9] Bothma-Batho contended that on its proper interpretation this clause entitled it to render an invoice to FFS for R190 000 each month and that Bothma & Seun would be guaranteed an amount of R55 000 per month. If the rentals payable by FFS increased, the invoices Bothma-Batho rendered to FFS would be adjusted ('aangepas') by such ('sodanige') increase, in other words by the gross amount of the increase. Bothma & Seun disputed this. It pleaded that the clause meant that Bothma-Batho could recover a pro rata proportion, calculated on the relative tank capacity used by each of them, of the operating expenses, increased by an administration fee uplift of ten per cent of the expenses, subject to a cap of R190 000. If the rentals that it recovered increased or decreased the cap would be adjusted by a like percentage increase or decrease. The parties joined issue on these contentions.

Interpretation

[2] 'The parties agree that, for such period as the respondent has the right to use three tanks in terms of the agreement with Omnia, then in that case the respondent will invoice its client for the hire of the tank capacity of the three tanks, which at present is an amount of R245 000.00 (excluding VAT). The applicant will invoice the respondent's client in such a way in respect of the pro rata expenses as well as the administration fee of 10%, that the recovery from the respondent's client against the respondent shall not be more than R190 000.00 (excluding VAT), provided that if the invoices rendered for the hire of the tank capacity increase or decrease the invoicing in connection with expenses shall be adjusted in accordance with such fluctuations.' (My translation.)

[10] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] the current state of our law in regard to the interpretation of documents was summarised as follows:

'Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: 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.'

[11] That statement reflected developments in regard to contractual interpretation in *Masstores (Pty) Ltd v Murray & Roberts Construction*

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 (footnotes omitted).

(Pty) Ltd; *KPMG Chartered Accountants (SA) v Securefin Ltd & another* and *Ekurhuleni Municipality v Germiston Municipal Retirement Fund*.[4] I return to it and to those cases only because we had cited to us the well-known and much cited summary of the earlier approach to the interpretation of contracts by Joubert JA in *Coopers & Lybrand & others v Bryant*,[5] that:

'The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract … ;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. … ;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents.[6] Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, 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

[4] *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 (6) SA 654 (SCA) para 7; *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39 and *Ekurhuleni Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) paras 12-14.

[5] *Coopers & Lybrand & others v Bryant* 1995 (3) SA 761 (A) at 768A-E.

[6] *Aktiebolaget Hässle & another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) paras 8 and 9.

which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.[7] Accordingly it is no longer helpful to refer to the earlier approach.

Discussion

[13] Clause 6 had its genesis in clause 7 of the earlier settlement agreement that provided for the apportionment of the costs of operating the tank farm between Bothma-Batho and Bothma & Seun. There was no dispute about the way this was to be done by pro rating the expenses in proportion to the relative tank capacity of which each party enjoyed the benefit. The only issue in regard to calculation of the share of Bothma & Seun related to the management fee. Bothma-Batho said that this was to be calculated on the rental payable to Bothma & Seun by its client FFS. However, it is plain from clause 7 of the original settlement agreement that it was to be calculated as a proportion of the expenses ('die pro rata uitgawe plus 10% bestuursfooi'). That language was simply incapable of being construed as requiring that the administration fee be calculated as a percentage of the rentals received by Bothma & Seun.

[14] There was nothing in the background or context of the second settlement agreement and clause 6 dealing with the administration fee to

[7] Per Lord Clarke SCJ in *Rainy Sky SA & others v Kookmin Bank* [2011] UKSC 50 ([2012] Lloyds Rep 34 (SC)) para 21. He relied also on the following passage in *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) 545, 551 '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 interpretations and undue emphasis on niceties of language'.

suggest that the parties had in mind amending the basis upon which it was to be calculated. Their focus was on other issues entirely, more especially those arising from Bothma-Batho's practice of invoicing FFS directly, which was plainly contrary to the provisions of clause 7 of the original settlement agreement. It must be accepted therefore that the administration fee was to be calculated as a percentage uplift of Bothma & Seun's pro rata share of the monthly expenses of operating the tank farm.

[15] The first sentence of clause 6 recorded that Bothma & Seun would invoice their client, effectively FFS, for the use of the three tanks hired by them and that the current rentals were R245 000 per month, exclusive of VAT. The second sentence, by necessary implication, authorised Bothma-Batho to invoice the client for Bothma & Seun's pro rata share of the expenses plus the administration fee, but its main purpose and effect was to qualify that entitlement by subjecting it to a limit of R190 000, exclusive of VAT. It provided that Bothma-Batho was to invoice Bothma & Seun's client in such a way that its recovery from the client would not exceed R190 000. The effect of this was to ensure that Bothma & Seun would receive at least R55 000 per month from the use of its tanks for so long as the rentals it was charging remained at or above R245 000 per month.

[16] The problem of interpretation arises from that portion of clause 6 commencing with the words 'met dien verstande' ('provided that'). In the appellant's argument this was said to be the third sentence of the clause. That introduced the fundamental error, one often identified by our

courts,[8] of treating a proviso as a separate substantive provision, rather than as qualifying that to which it stands as a proviso. The latter is the correct approach. In this case it means that this part of the clause must be construed as qualifying the obligation of Bothma-Batho to render invoices to Bothma & Seun's client in respect of operating expenses and the administration fee in such a way as not to exceed R190 000 per month.

[17] The proviso would take effect if the invoices for rental raised by Bothma & Seun either increased or decreased. In that event the invoicing in respect of the expenses had to be adjusted in accordance with that fluctuation in rental. The argument on behalf of Bothma-Batho was that this meant that the whole of the adjustment in rental had to be added to or subtracted from the invoices it was entitled to render in respect of expenses and the administration fee. However, that would not in any way qualify the provision preceding it, which was that Bothma-Batho was to invoice Bothma & Seun's client in such a way as not to recover more than R190 000 per month. Indeed in the events that occurred, where the monthly rental increased by nearly R192 000 per month, it would have rendered the cap nugatory. It would also have altered the basis upon which Bothma-Batho was rendering those invoices. In terms of the contract that was that the invoices reflected the pro rata share of tank farm expenses allocated to Bothma & Seun plus the administration fee. On the appellant's argument it would, by virtue of the operation of the proviso, not only have recovered that share of the expenses plus the administration fee, but also a share of the rentals due to Bothma & Seun unrelated to these items. It would have acquired a share in the profits accruing from the operation of a business in which it had no interest.

[8] *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A) at 645C – F.

[18] There is not the slightest indication in the terms of the settlement agreement or any of the background that such a result was contemplated by the parties. They were addressing the problems that had arisen from Bothma-Batho invoicing FFS directly for Bothma & Seun's share of the costs and the administration fee. The cap was plainly directed at meeting the latter's concerns about an absence of control over the level of expenses in the operation of the tank farm, that had the potential to undermine its ability to exploit its interest in the tank farm in a profitable manner. In addition the suggested construction of the proviso raises the question of why, in that event, Bothma & Seun would have bothered to obtain a higher rental from its client if the whole of that increase would enure to the benefit of Bothma-Batho. The history of the relationship between the parties excluded any possibility that brotherly love or some other ground of charitable benevolence had motivated the conclusion of the settlement agreement.

[19] It was submitted that this construction of the proviso was justified by the fact that Bothma-Batho had incurred substantial capital expenditure in upgrading the facilities at the tank farm in order to bring them up to current international requirements for such storage facilities. The weakness in that, however, is that Bothma & Seun had made it clear that they were not willing to make any contribution to the costs of the upgrade. The fact that the increased rental they negotiated with FFS may have been influenced by the upgrade does not affect the matter. It is not a reason for giving the proviso a meaning that its language cannot bear, that is inconsistent with the balance of the provisions in clause 6 and that finds no support in the context in which the agreement was concluded.

[20] It is unnecessary to reach a final conclusion on how the cap was to be adjusted in the light of an increase or decrease in the rentals chargeable by Bothma & Seun, although a pro rata increase or decrease in line with the increase or decrease in the rentals would appear to be logical. It is only necessary to conclude that the interpretation contended for by Batho-Bothma that on a proper interpretation of clause 6 it was entitled to payment of the increase in the amount of the invoices rendered to the client of Bothma & Seun, is not correct.

[21] For those reasons the appeal must fail and it is dismissed with costs.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	P Ellis SC (Heads of argument prepared by P Ellis SC and P G Leeuwner) Instructed by: Naudes, Bloemfontein
For respondent:	C Acker Instructed by: Basson Bester Prokureurs, Three Rivers; Vermaak & Dennis, Bloemfontein.