



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1206/2016

In the matter between:

K2014/49699/07 t/a TIEKIEDRAAI EIENDOMME (PTY) LTD

APPELLANT

and

SHELL SOUTH AFRICA MARKETING (PTY) LTD

FIRST RESPONDENT

H L HALL & SONS (GROUP SERVICES) LTD

SECOND RESPONDENT

REGISTRAR OF DEEDS, PROVINCE OF MPUMALANGA

THIRD RESPONDENT

Neutral citation: *Tiekiedraai Eiendomme v Shell South Africa Marketing & others*
(1206/2016) ZASCA 41 (28 March 2018)

Coram: Swain and Mbha JJA and Mothle, Hughes and Schippers AJJA

Heard: 27 February 2018

Delivered: 28 March 2018

Summary: Lease agreement –lessee - right of pre-emption – interpretation - lessor obliged to inform lessee of identical terms and conditions in all respects upon which prepared to sell property to third party – failure by lessor to do so – sale agreement with third party invalid - right of pre-emption validly exercised by lessee - appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Bertelsmann J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Mbha JA (Swain JA and Mothe, Hughes and Schippers AJJA concurring):

[1] This appeal, with leave of this court, concerns the interpretation of clause 21 of the lease agreement concluded between Shell South Africa Marketing (Pty) Ltd (Shell) the first respondent and H L Hall & Sons (Group Services) (Pty) Ltd (Hall & Sons) the second respondent, in terms of which Shell was granted a right of pre-emption to purchase the leased property described as Portion 1 of Erf 49 Mataffin Township. The issue for determination is whether or not Shell validly exercised its right of pre-emption. The Gauteng Division of the High Court, Pretoria (Bertelsmann J), held that Shell had validly done so and granted a declaratory order that the agreement of sale purportedly concluded between Hall & Sons as the seller, and K2014/49699/07 t/a Tiekiedraai Eiendom (Pty) Ltd (Tiekiedraai), the appellant, as the purchaser, was deemed to have been concluded between Hall & Sons and Shell.

[2] Tiekiedraai contends that the right of pre-emption was triggered when Hall & Sons gave notice to Shell on 30 October 2014 of Tiekiedraai's offer to Hall & Sons to purchase the property. Shell however contends that such right was only triggered when the agreement of sale concluded between Tiekiedraai and Hall & Sons was sent to it on 5 December 2014. If it is found that the right of pre-emption was triggered by the notice of 30 October 2014 then the appeal must succeed, as Shell failed to accept it within 30 days of its receipt in terms of clause 21.3 of the lease. If, however, this notice did not trigger clause 21.3, which was only triggered by the receipt by Shell of the agreement concluded between Tiekiedraai and Hall & Sons on 5 December 2014, then Shell accepted the offer within the period of 30 days, and the appeal must fail.

[3] The detailed factual matrix giving rise to the dispute, is as follows. On 30 October 2014, Hall & Sons advised Shell by e-mail that Hall & Sons had been made an offer by Tiekiedraai for the purchase of the property for R17 million. In the e-mail Hall & Sons stated that:

'(A)s you are aware Shell [has] a pre-emptive right to match this offer per the existing lease.'

Tiekiedraai's offer, dated 28 October 2014, was attached to Hall & Sons' e-mail.

Tiekiedraai's offer to Hall & Sons reads:

'Mr Lewis,

RE: OFFER TO PURCHASE: PORTION 1 OF ERF 49, MATAFFIN TOWNSHIP

The purpose of this letter is to confirm the recent discussions relating to the purchase of the above property.

We hereby confirm:

1. That the subdivision of Erf 49 has been approved.

2. That a Filling Station is erected upon Portion 1 of Erf 49 and which is presently leased to Shell in terms of a notarial long term lease.

3. That your company has indicated that it is prepared to accept offers for the purchase of Portion 1 of Erf 49, Mataffin Township.

4. That Shell has a right of first refusal.

5. That an offer of R17 000 000.00 (Seventeen Million Rand), with VAT being zero rated, is hereby made to your company for the purchase of:

5.1 Portion 1 of Erf 49 whereupon a Shell filling station is erected;

5.2 the notarial long term lease agreement concluded with Shell;

5.3 the site licence.

6. That the offer as set out herein is subject to:

6.1 the terms and conditions of the bond granted by Nedbank, a financial institution, subject to the normal lending criteria for commercial loans of a similar nature;

6.2 the purchase price in point 5 is the full purchase price with the exception of transfer and conveying costs;

6.3 that the offer is made in my capacity as director of Tiekiedraai Eiendomme (Pty) Ltd, registration number 2014/49699/07;

6.4 that in order for the sale to be zero rated Tiekiedraai must be VAT registered;

6.5 that the offer as contained herein will be referred to Shell to enable them to exercise their right of first refusal;

6.6 that in the event of Shell failing to exercise its first right of refusal to purchase, will a formal Sale Agreement be concluded upon acceptance of the offer as set out herein;

6.7 *that the further terms and conditions to be incorporated in the Sale Agreement to be agreed upon.*' (Emphasis added)

[4] On 30 October 2014, Shell acknowledged receipt of Hall & Sons' aforesaid e-mail together with Tiekiedraai's offer dated 28 October 2014, and stated that: '[w]e [Shell] are seriously considering it and will revert soon'.

[5] On 1 December 2014, Shell sent an e-mail to Hall & Sons advising that Shell was close to getting Board approval. Shell asked to be furnished with a draft of the sale agreement and suggested in the alternative that its attorneys draft one. Hall & Sons responded to Shell on 2 December 2014, recording that in terms of clause 21 of the lease agreement, the 30 day period within which Shell had to exercise its right of pre-emption, had expired on 30 November 2014. Hall & Sons had accordingly prepared a sale agreement and sent it to Tiekiedraai.

[6] Undeterred, and on the 3 December 2014, Shell sent a further e-mail to Hall & Sons advising that Shell had full board approval for the R17 million purchase price for the property plus VAT, and requested that the parties discuss the issue.

[7] On 5 December 2014, Shell addressed a further e-mail to Hall & Sons recording that the latter's e-mail and offer by Tiekiedraai forwarded on 30 October 2014, did not comply with clause 21 of the lease. It recorded further that once Shell had sight of the sale agreement or an offer to purchase with all the terms and conditions spelt out, Shell had 30 days from the date of delivery, to match the offer. In response and on the same day Hall & Sons sent an e-mail to Shell, enclosing a copy of the sale agreement it had purportedly concluded with Tiekiedraai.

[8] On 9 December 2014, Shell sent an e-mail to Hall & Sons acknowledging receipt of the signed sale agreement between Hall & Sons and Tiekiedraai and averring that clause 17 thereof, which recorded that Shell had not exercised its pre-emptive right to purchase the property, was incorrect. Shell added that the agreement between Hall & Sons and Tiekiedraai would have to be cancelled, and a new agreement on the same terms and conditions would have to be concluded between Hall & Sons and Shell.

[9] I turn to consider Clause 21 of the lease agreement which reads as follows:

'21. SALE

At any time during the currency of this lease or any extension thereof the Lessor undertakes that it will not sell, or otherwise dispose of, the premises or any portion thereof, to any third party without first having offered to Shell to sell or dispose of it, or the relevant portion thereof, to Shell, *on the identical terms and conditions in all respects upon which the Lessor was prepared to sell or dispose of it*, or the relevant portion thereof, to the third party, and to this end the Lessor further undertakes –

21.1 that it will, before selling or otherwise disposing of the premises or any portion thereof to any third party, first offer to sell or dispose of its, or the portion thereof in question, to Shell in writing *on the identical terms and conditions in all respects upon which it is prepared or is desirous of selling or disposing thereof to the third party*;

21.2 in the offer referred to in 21.1, *furnish the terms and conditions in all respects upon which it is prepared or is desirous of selling or disposing thereof to the third party*, save that it shall not be obliged to disclose to Shell the name and address of the third party;

21.3 the offer referred to in 21.1 shall remain open for a period of 30 (thirty) days from the date of receipt thereof by Shell;

21.4 should Shell decline the said offer, or not accept it within the said period of 30 (thirty) days, the Lessor will not thereafter dispose of the premises, or the portion thereof in question, to the said third party at a price lower or on terms and/or conditions more favourable in any way at all, to such third party, than the price, terms and conditions upon which the offer was made to Shell in terms of 21.1;

21.5 failure on Shell's part to accept any offer made to it in terms of the foregoing shall entitle the Lessor to dispose of the premises, or the relevant portion thereof, to the third party in question, but no-one else, upon terms not more favourable to such third party than the last offer refused by Shell, upon condition that any such sale or disposal shall not be concluded without first binding the third party to the terms and conditions of this lease. Failure on Shell's part to accept any such offer shall in no way affect the obligations undertaken by the Lessor as set forth elsewhere herein.' (Emphasis added)

[10] The key question that arises is whether the offer of 30 October 2014 complied with the terms set out in clause 21 of the lease agreement, namely, that it contained 'the identical terms and conditions in all respects', upon which Hall & Sons was prepared to sell the property to Tiekiedraai.

[11] The law relating to the interpretation of documents is now well settled. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) paras 18 and 26, this court expressed itself as follows on the subject:

'...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. ... 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

...in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

The *Endumeni* judgment was followed in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA).

[12] Counsel for the appellant relied on the following paragraph in the answering affidavit for the argument that Hall & Sons were 'prepared to sell or dispose of the property' within the meaning of clause 21 of the lease agreement, on the terms set out in its email of 30 October 2014:

'16. During October 2014, Hall & Sons was approached by the Second Respondent ("Tiekiedraai"), who offered to purchase the Property for an amount of R17 million, which offer was acceptable to Hall & Sons.'

In reply, Shell stated that it did not dispute the contents of paragraph 16. Shell's response on 30 October 2014, that it was seriously considering the offer and would

revert soon, so it was argued, confirmed that Shell understood the email by Hall & Sons (to which Tiekiedraai's offer was attached), to convey the desire on the part of Hall & Sons to sell the property on the terms offered by Tiekiedraai.

[13] The argument is unsustainable on the facts, and the plain wording of Tiekiedraai's offer and clause 21 of the lease agreement. First, the papers make it clear that from the outset, Shell had taken the position that the email of 30 October 2014 by Hall & Sons did not constitute notice in terms of clause 21, as it did not contain the identical terms and conditions in every respect upon which Hall & Sons were prepared to sell the property to Tiekiedraai. Indeed, Shell considered that Tiekiedraai's offer was an outline of the basis upon which Hall & Sons were prepared to contract. Further, in the answering affidavit, Mr Craig Lewis, a director of Hall & Sons, stated that Tiekiedraai's offer contained 'the *essentialia* of the sale between Hall & Sons and Tiekiedraai', which 'placed Shell SA in a position where it understood clearly the *material terms* upon which the property was available to it (emphasis added); and that upon a proper construction of the lease agreement, the *material terms* of the sale of the property had to be disclosed to Shell. On his own version therefore, the offer did not contain *all* the terms of the sale to Tiekiedraai. Second, that much is clear from Tiekiedraai's offer itself: further terms were to be agreed upon, as is explained below.

[14] Viewed against the clear provisions of clause 21, the offer of 30 October 2014 omitted patently, in my view, to reflect the identical terms and conditions in all respects upon which Hall & Sons was prepared to sell the property to Tiekiedraai.

[15] Clearly, Hall & Sons had no intention of selling the property on the conditions as set out in the said offer. I say so because the offer states that it was subject to, '...the further terms and conditions to be incorporated in the sale agreement to be agreed upon.'

[16] Plainly the offer does not contain and was never intended to, '... furnish the terms and conditions, in all respects, upon which...' Hall & Sons was '... prepared or is desirous of selling...' the property to Tiekiedraai. The offer merely contains a description of the property to be purchased, the parties seeking to contract, the purchase price, that Shell has a right of pre-emption and that the purchase price is to be financed by a way of a bond. Self-evidently, a binding agreement could not and was never intended to be concluded on the terms set out in the offer, in the absence of agreement on the further terms.

[17] In accordance with *Endumeni*, regard must also be had to the context in interpreting clause 21, to determine whether its provisions were complied with by Hall & Sons. The property was a commercial property consisting of a filling and service station, which prior to subdivision, was agricultural land on which no engineering services were installed. It is for this reason that the agreement of sale concluded between Hall & Sons and Tiekiedraai, deals extensively with the provision of engineering services to the property such as sewer, water and electricity, who will be responsible for maintaining the supply of water, electricity and sewerage pending such installation and the acquisition of zoning and a regulation 38 certificate. An agreement of sale could not be

concluded without consensus being reached on all of these issues and it is for this reason that Shell was entitled to be furnished with the identical '.... terms and conditions in all respects upon which...' Hall & Sons was prepared to sell the property. It is accordingly not surprising that the offer was made subject to agreement being reached on further terms and conditions as set out in clause 6.7 of the offer.

[18] Simply put the phrase 'identical terms and conditions in all respects' has a clear meaning. All of the terms and conditions of the proposed agreement between Tiekiedraai and Hall & Sons, had to be furnished to Shell. The terms and conditions that had to be supplied to Shell were not simply the material terms and conditions, but all of the terms and conditions, because they had to be provided 'in all respects'. This interpretation is consistent with the surrounding circumstances set out above. Shell had to be afforded the opportunity to conclude an agreement with Hall & Sons, on the identical terms and conditions as any agreement to be concluded between Shell and Tiekiedraai, in order for Hall & Sons to fulfil its obligations to Shell in terms of its right of pre-emption, contained in clause 21. The absence of agreement between Tiekiedraai and Hall & Sons on all of the terms and conditions on which they were prepared to contract, precluded fulfilment by Hall & Sons of its obligations to Shell in this regard. In the light of this conclusion it becomes unnecessary to consider the further arguments advanced by Tiekiedraai.

[19] In light of what is stated above, I agree with the court a quo's finding that the offer of 30 October 2014 did not comply with clauses 21 and 21.2 of the lease agreement

and did not, as a consequence, trigger the commencement of the 30 day period within which Shell had to exercise its right pre-emption. I also agree with the court a quo's further finding that there was only compliance with these clauses on 5 December 2014, when the sale agreement signed by Hall & Sons and Tiekiedraai, was sent to Shell. Shell exercised its right pre-emption upon receipt thereof, within the requisite period and validly exercised its right of pre-emption. The appeal must accordingly fail.

[20] The following order is made:

'The appeal is dismissed with costs.'

B H Mbha

Judge of Appeal

APPEARANCES:

For Appellant: C H J Badenhorst SC (with him L V R van Tonder)

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