

DISPUTE RESOLUTION AND PRO BONO ALERT



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DO NOT BE THE AUTHOR OF YOUR OWN MISFORTUNE – BE COMMERCIALY SENSIBLE AND REASONABLE

There is no denying the fact that the law of contract is one of the most sophisticated branches of South African law and that principles involved in the interpretation of contracts are well developed and established. But are these principles always properly applied by our courts? As appears from the judgment of the Supreme Court of Appeal (SCA) in *Auction Alliance v Wade Park* (342/16)[2018] ZASCA 28 (23 March 2018) it seems not.

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The appellant, Auction Alliance (Pty) Ltd (Auction Alliance), was mandated by Mophela Housing Project (Mophela) to sell its immovable property in Pinetown, Kwazulu-Natal, on auction. The Department of Housing KZN (Department) had a financial interest in the sale of the property and one of the pertinent conditions (suspensive condition) of the sale was therefore that the sale was subject to the consent and approval of the Department.

The Department provided the required consent by way of a letter (the letter of consent) and confirmed that it 'had no objections to the sale of the property on condition that the subsidy amount (owed to it) is recovered upon transfer.'

Some two months after the transaction Mophela cancelled the agreement on the basis that Wade Park was in default of its financial obligations. In response thereto, Wade Park adopted the position that the letter of consent was inadequate and therefore the suspensive condition was not satisfied (and argued that the agreement was inchoate). A settlement was reached between Mophela and Wade Park. Mophela did not feature at all in the court proceedings.

The crisp issue in this matter was whether a suspensive condition in an agreement of sale and transfer of property was fulfilled.

Wade Park argued that the letter of consent did not constitute fulfilment of the suspensive condition. It submitted that it had no quarrel with the first part of the letter of consent up to and including the word 'premises'. The first part of the letter of consent noted the agreement that the Department would be refunded and recorded that the Department had no objection to the sale. Counsel contended that the problem arises with the use of the words 'on condition' and argued that those words encapsulate a condition in the true sense of the word.

On the other hand, Auction Alliance submitted that Wade Park's argument was fallacious. It argued that something does not become a condition merely because it has been given that name. It submitted that the words in the letter of consent meant something along the lines of 'there is no objection to the sale on the understanding that (or on the basis that) the Department would be paid out of the proceeds of the sale. Auction Alliance's argument basically was that the word 'condition' in the letter did not amount to a condition in its true sense but was simply to be read as 'an understanding'. What the letter conveyed, despite the use of the word 'condition', so the argument went, was that the Department had no objection to the sale and the transfer of the property and that it expressed its consent on the 'understanding that' or 'on the basis that' it would be paid out of the proceeds of the sale.

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The trial court held that the letter of consent constituted fulfilment of the suspensive condition. It interpreted the consent letter in favour of Auction Alliance finding that the word “condition” did not amount to a condition in its true sense but was simply to be read as ‘an understanding’. It consequently dismissed Wade Park’s claims with costs. On appeal, the full court saw the matter differently and held that the letter of consent was in fact conditional.

The matter was consequently heard by the SCA. The SCA stated that an important factor in the background context against which the meaning of the words ‘on condition’ had to be considered, was that the Department wanted its subsidy back. It was well aware that repayment was entirely dependent on the sale proceeding to finality, so that the funds could be disbursed to it upon registration of transfer and the Department knew very well that without its consent the sale could not go through. It had been alerted to this fact prior to the auctioning of the property.

The Department therefore, so the SCA held, furnished the letter of consent to allow the sale to proceed so that it could get its money back. The SCA agreed with the submission by Auction Alliance that to interpret the words “on condition” as introducing a conditional consent by the Department, which could be withdrawn should the subsidy amount not be paid to it once the immovable property was transferred and the purchase price paid, would defeat this objective.

The SCA concluded that the interpretation adopted by the trial court gives the letter of consent commercial efficacy. It stated that it is inconceivable that, in the event of Mophela not repaying the subsidy once transfer

is effected, the Department would have intended to withdraw its consent and cause the unravelling of the entire transaction. Nor, as a matter of fact or of law could that have occurred. The SCA held that the full court had therefore erred in overruling the judgment of the trial court. The appeal was upheld.

This judgment confirms that interpreting the text of a commercial contract, instrument or document in its contextual setting is the paramount principle of interpretation. The process of interpreting a contract should not be limited to a consideration of the literal meaning of words, but must consider them in the light of all relevant and admissible context. It further confirms that 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 interpretation and undue emphasis on niceties of language.

In this case the SCA confirmed that while the approach to the interpretation of documents is by now firmly established in our law, it is not sufficient for a court to merely regurgitate the relevant principles and to cite the leading authorities without actually applying them. It must be evident from the interpretive process itself that the principles have been applied. Merely paying lip service to them undermines the entire exercise.

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