THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case no: 668/06

In the matter between

I SCHWARTZ NO	**APPELLANT**
and	
S E PIKE	**1ST RESPONDENT**
A VAN DER MERWE	**2ND RESPONDENT**
M M MASITO N.O.	**3RD RESPONDENT**

Coram: **MTHIYANE, HEHER and VAN HEERDEN JJA**

Heard: **3 SEPTEMBER 2007**

Delivered: **19 SEPTEMBER 2007**

Summary: Contract – interpretation – association agreement – disposal of deceased member's interest in close corporation – unilateral appointment by executor of accountant to value interest in conflict with parties' intention – members to be afforded opportunity to reach consensus on appointee.

Neutral citation: This judgment may be referred to as *Schwartz NO v Pike* [2007] SCA 106 (RSA).

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JUDGMENT

HEHER JA

HEHER JA:

[1] The appellant is the executor in the estate of Michelle Ann Pennels (the deceased) who died in a motor accident on 7 December 2002. In the Pretoria High Court he applied for an order that the first and second respondents (hereinafter referred to as 'Pike' and 'Van der Merwe' respectively) each pay to the estate the amount of R1 053 712,00 together with interest at the rate of 15,5% per annum thereon from 17 March 2006 and the costs of the application. As third respondent he joined the liquidator of a close corporation, Lore Marketing 46 CC (hereinafter referred to as 'the corporation') but sought no relief against him.

[2] Bredenkamp AJ dismissed the application with costs but this Court granted special leave to appeal. Pike and Van der Merwe opposed the appeal before us.

[3] The appellant founded his case on a written Association Agreement entered into by the deceased, Pike and Van der Merwe as members of the corporation at Krugersdorp on 5 March 2001. According to its terms the respective interests of the members were to be in the proportions 15 : 60 : 25. The object of the corporation was to conduct a restaurant business ('The Hungry Hunter') in Centurion which was to be managed by the deceased and Pike as full-time employees of the business. According to the appellant's affidavit, the deceased died while returning from work at the restaurant with the night's cash takings of R33 000 belonging to the corporation in her possession.

[4] Clause 16 of the Agreement regulated the disposal of a deceased member's

interest in the event of his or her death as follows:

‘16.1 The remaining Members (“Remaining Members”) and the duly appointed executor of the Deceased’s estate (“executor”) shall within 30 (THIRTY) days from the date of the executor’s appointment as such enter into negotiations with the view of reaching an agreement as to the reasonable and fair value of the Deceased’s Interest as at the date of the Deceased’s death. If the Remaining Members and the executor are unable to reach an agreement, then they shall jointly appoint a chartered accountant to determine the reasonable and fair value of the Deceased’s Interest. If the parties concerned are unable to reach an agreement as to the appointment of a chartered accountant, then either the Remaining Members or the executor may request the acting President of the South African Institute of Chartered Accountants to nominate a chartered accountant for the purpose as aforementioned, in which event any such nomination by such acting President shall be final and binding on all the Remaining Members and the executor.

16.2 Any value that the chartered accountant, appointed in accordance with the aforementioned provisions, [determines] in regard to the value of the Deceased’s Interest as at the date of his death shall be final and binding on all the Remaining Members and the executor.

16.3 Upon the death of the Deceased there shall be deemed to have taken place, with effect from the date of the Deceased’s death an automatic sale by the deceased’s estate of the Deceased’s Interest and his Loan Account (collectively referred to as the “Whole Interest”) . . . to the Remaining Members upon the following terms and conditions:-

16.3.1 The Remaining Members shall in equal shares purchase the Whole Interest, irrespective of the size of their respective Interests;

16.3.2 The purchase price in respect of the Whole Interest to be paid to the Deceased’s estate shall be the aggregate of the value of his Interest (determined as provided above) plus an amount equal to the value of the Deceased’s Loan Account as

reflected in the Corporation's books of account as at the date of the Deceased's death. Unless the parties concerned agree otherwise, such purchase price shall become due and payable to the Deceased's estate within 4 (FOUR) months from the date on which the value of the Deceased's Interest has been agreed upon or determined by a chartered accountant, as the case may be, in accordance with the aforementioned provisions.'

[5] The appellant deposed that he had, on 20 June 2003, written to an attorney who represented Pike and Van der Merwe 'calling on them to agree on the value of Pennels' interest and stating that they are invited to follow the procedures in terms of Clause 16'. That was wildly inaccurate. In fact the terms of the letter, Annexure G to the founding affidavit, were as follows:

'Thank you for your letter dated the 5th June 2003.

I do not accept that the Lore Marketing C.C. did not exist trading as Hungry Hunter. A copy of one of the cheques drawn is attached.

As you are aware I have placed a value on the Lore Marketing C.C. as per my letter dated the 13th May 2003.

In terms of clause 16 of the Association Agreement, we are to reach an agreement on the value, failing which clause 16 prescribes the procedure to be followed.

Your clients are invited to advise what value they place on the Lore Marketing C.C. at date of death of Miss Pennels, and your clients are to confirm how they arrived at such value so that I as Executor of Miss Pennels's Estate can give proper consideration thereto.

Once you have provided me [with] the aforesaid valuation and how it is calculated, I will revert to you for purposes of holding a meeting to attempt to resolve the matter, provided, of course, we are not too far apart on the valuation.'

Clearly, the reference to clause 16 was made merely in passing as the main focus was directed to arriving at a value by agreement which, if achieved, would have rendered the subsequent procedures of no concern to anyone.

[6] The appellant did not in his affidavit refer to or rely upon previous correspondence. It is apparent that by the time he wrote Annexure G he was aware of a fundamental dispute between the parties as to whether the corporation was operating the restaurant at the time of the deceased's death.

[7] The appellant's affidavit continues,

'We could not agree on a valuation nor could we agree on the appointment of an accountant. Accordingly, I addressed a letter to . . . the South African Institute of Chartered Accountants calling on them to appoint a Chartered Accountant in terms of the provisions of Clause 16 of the Association Agreement . . . On or about the 8th December 2005 I received a letter from Lucro Auditing ("Lucro") enclosing a copy of a letter from the South African Institute of Chartered Accountants confirming that Lucro had been appointed as Chartered Accountant to determine the valuation of the deceased's interest . . . Liza Julie Wood ("Wood") of the firm Lucro was appointed to do the valuation . . . Wood determined the valuation to be R2 107 424,00 as at the 7th December 2002 as per a copy of the valuation annexed hereto marked "K".'

[8] In letters dated 8 December 2003 the appellant demanded payment from each of Pike and Van der Merwe of a half of the value of the deceased's interest and tendered delivery and transfer of her interest in the corporation and cession of the value of her loan account.

[9] On 14 December 2005 the attorney representing Van der Merwe responded that his client denied being indebted to the estate in any amount whatsoever. According to

his letter,

'2. Our client denies that he was ever requested by your client to agree to the appointment of an auditor as contemplated in clause 16.1 of the association agreement. There was no attempt by the members to agree to such an appointment. Your client's alleged request to the President of the South African Institute of Chartered Accountants for the appointment of an independent auditor was therefore premature and our client accordingly does not deem himself bound by such appointment.

3. In any event, it is quite evident that the valuation by Lucro Auditing was performed upon certain assumptions apparently based on information furnished to them by your client. It is abundantly clear that at least some of the information upon which the valuation was based is incorrect and completely unfounded. We place on record that Lucro Auditing never even approached our client in order to obtain any information from him or to verify any information or facts furnished to them in regard to the close corporation.

4. Our client is adamant that the valuation arrived at by Lucro Marketing is based on a complete misconception of the actual and true facts and circumstances pertaining to the said close corporation as at the date on which the late M.A. Pennels passed away. Therefore our client rejects the valuation furnished by Lucro Marketing and our client most certainly does not deem himself bound by such valuation.'

[10] Pike and Van der Merwe both deposed to answering affidavits. There is conflict between them as to how and when the latter abandoned his interest in the corporation, but, on either version, the deceased was still alive at the time. Pike sets up a case that the remaining members agreed to dispose of the business to a new corporation ('Telegenix Trading 161 CC') which they incorporated for the purpose and which owned and was running the restaurant by November 2002. Because of the

narrow issue on which this appeal turns, further references to the merits of the dispute are unnecessary.

[11] Pike denied in his affidavit that he and the appellant had been unable to agree on the appointment of a chartered accountant as contemplated in clause 16.1. He drew attention to a letter written shortly thereafter by attorneys representing him which suggested to a Mr Jack Roux (who represented the estate) that Roux should nominate an independent valuator and '[s]hould we be satisfied with a nomination we shall both jointly appoint him to value the assets of Telegenix Trading 161 CC'. He attached to his affidavit Roux's reply of 22 December 2003 suggesting the appointment of one Roode and asking whether Pike would be satisfied if Roux were to appoint him. He also attached his reply to Roux's proposal; which read as follows:

'In order to clarify this matter, kindly furnish us with a complete list of all the entities which you allege the deceased held an interest in.

On receipt of the list, we can deal with all the entities individually.

We look forward to hearing from you soon.'

[12] Pike stated on oath that neither he nor his attorneys received any further written communications from Roux or the appellant regarding the appointment of an accountant for purposes of a valuation of the deceased's interest in the corporation. On 5 December 2005, he deposed, 'my attorneys of record were simply advised by the [appellant] that Lucro Auditing had been appointed to value Pennel's interest in the close corporation and that they had placed a value on her interest in the said corporation'.

[13] Van der Merwe, in his answering affidavit, denied that the appellant ever requested him to agree on the appointment of an accountant as provided for in clause 16.1. With regard to the valuation he denied that he chose not to be involved in the process. He stated that until he received a copy of the valuation report during December 2005 he had been unaware of the appellant's request to the Institute to appoint an accountant or of the fact that Lucro Auditing had performed a valuation. If he had been informed of the situation he would, he deposed, certainly have become involved.

[14] The denials by the respondents that the appellant had complied with the terms of clause 16.1 in so far as that related to the choice of a chartered accountant cried out for a reply setting out facts that substantiated the appellant's bald averments in the founding affidavit. But the appellant could not rise to the challenge. The paragraph in which he deals with their denials encapsulates the argument which was addressed to us by his counsel in the appeal:

'10. It is apparent from the aforementioned that either the remaining members or the executor "*may*" request an appointment from the president of the South African Institute of Chartered Accountants. It is common cause that there was no agreement reached as to the identity of the chartered accountant to be appointed. Even on the first and second respondents' version no agreement is contended for. The only issue therefore is whether there was an obligation upon the executor to request the first and second respondents to agree to an appointment. The clause does not specify the need for such a request. The first and second respondents have accordingly misunderstood or deliberately misconstrued the provision of the agreement. The only requirement is that no agreement should have been reached. On their own version, no such agreement was reached.

There is accordingly no dispute of fact on this issue which is relevant to the determination of this application.'

[15] Bredenkamp AJ did not swallow the argument and neither can we. The matter is one of interpretation. The essential exercise is to extract the parties' true intention from the words which they used to express that intention, accepting that life can only be given to the language by a proper regard for the context in which the words appear together with any admissible background facts.

[16] The substance of clause 16.1 shows that the parties chose a four stage process to give effect to the disposal of a member's interest. In the first stage the parties were to negotiate with each other to try to reach agreement on the price. Then, if they failed, they were to try to agree on the identity of a chartered accountant who, as their joint appointee, would undertake the valuation of the interest. Thirdly, if they were unable so to agree, any member of the corporation or the executor could approach the Institute to make the appointment. Finally, the person so appointed would make the valuation, impliedly after receiving the input of interested parties. This last step was a dispute-breaking mechanism which could only be invoked once the preceding procedures had been exhausted - such is clear from the conditional nature of stages two, three and four. Counsel's submission that the appellant would have been entitled to proceed directly to the third or fourth stage is in conflict with the words and the apparent underlying intention to resolve matters by agreement without the trouble, delay and cost involved in employing an accountant if that could be avoided. The co-operative efforts which the clause envisages should be understood in this light rather

than, as counsel suggested, be treated merely as wishes which can be disregarded. Moreover the members would know that, until it could fairly be said that they were unable to reach agreement as to the identity of the joint appointee, they would not have to expect an appointment by the Institute or deal with its consequences. The exhaustion of the opportunity thus served a practical purpose in the whole scheme. The contention of appellant's counsel that absence of agreement was the equivalent of inability to agree in the circumstances of this case cannot be sustained. Inability to agree may readily imply absence of consensus but the reverse is not necessarily the case. How could it be concluded that they were or would be unable to agree on the appointment simply because they were poles apart on the question of value, as counsel argued? The clause clearly contemplates that all parties shall have the reasonable opportunity to arrive at agreement on a joint nominee. The evidence shows without any possibility of doubt that the appellant did not afford the respondents such an opportunity. To that extent he failed to prove a necessary precursor to his reliance on the valuation procedures of clause 16.1.

[17] Appellant's counsel sought to avoid the logic of the clause by submitting that the second stage of the parties' design was nothing more than an agreement to agree which, in accordance with established principle, could not be enforced against his client. He relied particularly on the formulation by Schutz JA in *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at 431G-H. I am by no means sure that a court will, in determining whether a party has complied with a contractual term, necessarily allow the unenforceability of that term to override the

clear intention of the parties; *cf* the remarks of Grosskopf JA in *Whyte v Da Costa Couto* 1985 (4) SA 672 (A) at 683D-E. In any event, on the interpretation which I have placed on the second stage of the agreed process, the appellant was under an obligation to afford a reasonable opportunity to the other members to reach consensus on a joint appointment before approaching the Institute. Whether he did or did not do so is a simple question of fact which is capable of ready proof. It is irrelevant to that obligation that agreement would or would not result from proper compliance or that the parties could not be compelled to reach agreement in consequence of compliance. As Ponnan JA pointed out when considering an analogous situation in *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) at 208D:

'The contract under consideration in *Firechem* contained no deadlock-breaking mechanism. In the present case the agreement prescribes what further steps should be followed in the event of a deadlock between the parties. The engagement between the parties can therefore be analysed as requiring not merely an attempt at good faith negotiations but also the participation of the parties in a dispute resolution process that they have specifically agreed upon.'

Put simply, if the appellant wished to derive the benefits of the process he was obliged to participate in it in accordance with the agreed terms.

[18] Since it was at the end of the day common cause that the applicant had not afforded the respondents any opportunity to achieve consensus on the identity of the accountant who would resolve the dispute concerning the value of Ms Pennel's interest, the application was premature and had to fail.

[19] The appeal is accordingly dismissed with costs.

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J A HEHER
JUDGE OF APPEAL

MTHIYANE JA)Concur
VAN HEERDEN JA)