

A divorce, the settlement agreement, and a parcel of game

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Who knew that a divorce, the relevant settlement agreement, and a parcel of game could have provided for yet another case where the Supreme Court of Appeal (SCA) had to interpret a contract?



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In this case, A divorced from B and, to finalise the divorce proceedings, they entered into a settlement agreement in terms of which B would pay A R5,500,000 (Settlement Amount) in full and final settlement of the dispute, including any claim of maintenance that A might have had against B. However, the Settlement Amount was, in fact, payable as follows: C would have (i) purchased a parcel of game, for an amount equal to the Settlement Amount, and (ii) paid the purchase price (an amount equal to the Settlement Amount) to A (Payment Method). However, B and C could not come to an agreement on the purchase price in respect of the parcel of game and C resolved not to purchase the game.

A proceeded to claim the Settlement Amount from B and, after B refused to pay, instituted proceedings against B for payment of the Settlement Amount.

The SCA was called upon (based on an interpretation of the settlement agreement) to determine the following crisp question: was the coming into existence or continuation of the obligation to pay the Settlement Amount conditional upon compliance with the Payment Method. A argued that B's obligation to pay was not conditional upon compliance with the Payment Method (i.e., (i) purchase of the game by C and (ii) payment by C to A), whereas B argued the converse.

The SCA held that the interpretation of a contract entails giving meaning to the words used in the contract, within the *context* in which the words were used, which includes the *purpose* of the contract.

As to the *context*, A and B were married for 20 years under the accrual system and it was not disputed that A was entitled to be paid something under the accrual system. The *purpose* of the settlement agreement included the final determination of the *financial consequences* of the dissolution of the marriage. The agreement did not provide for payment of maintenance to A after the divorce and it was not disputed that A was entirely financially dependent on the payment of the Settlement Amount. In this *context*, the agreement contained a clear recognition of the family law rights of A to a financial award. Therefore, so the SCA held, it is highly improbable that the parties could have *intended* that A's right to payment would be entirely dependent on whether C would purchase the game or not.

One final nail in the proverbial coffin for B is the fact that the SCA held that, at best for B, the settlement agreement was ambiguous. However, this entitled the SCA to adopt an "*equitable construction*" of the settlement agreement.

The principle is that where an expression, term, or clause in a contract is capable of two constructions, and if there is nothing in the context, which points specially to one of them, it would be proper to apply the meaning that would *avoid a manifestly inequitable result*. Similarly, whilst a Court is not entitled to superimpose on the clearly expressed intention of the parties, its notion of fairness, the position is different when a contract is ambiguous. In such a case, the principle that all contracts are governed by *good faith* is applied and the *intention of the parties* is determined on the basis that they *negotiated* with one another *in good faith*.

If, upon an interpretation of the agreement, it is determined that the obligation to pay was conditional upon compliance with the Payment Method, A "*would simply have [had] to walk away with nothing*" and this would be, so the SCA held, a "*most inequitable result*".

This judgment is important for two reasons. First, context (which includes the purposes of a contract) colours the meaning of the express wording of a contract, since a Court must, when interpreting a contract, determine and give effect to the intention of the parties. Second, to the extent that the express wording of a contract, used within the specific context, is ambiguous, a Court may adopt an "*equitable construction*" that would avoid a manifestly inequitable result.

The second raises a most interesting consequence, which seems to have translated into an accepted principle in the South African law of contract (common law): Parties, so it seems, are free to agree to, and negotiate, a most inequitable result - provided that it is expressed in clear and unambiguous language.

Judgment discussed: L M and Others v. T M (343/2019) [2020] ZASCA 43 (21 April 2020). The facts referred to in the article are a simplified reproduction of the facts in this case.

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