

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
21/05/10 DATE	<i>[Signature]</i> SIGNATURE

Case No: A757/07

Date heard: 19/05/2010

Date of judgment: 24/5/2010

In the matter between:

Brugmans, Werner Alfred Johan
L'ecluse, Klass Jozoeff Romaan

FIRST APPELLANT
SECOND APPELLANT

and

Moutzouris, John Pandelis

FIRST RESPONDENT

JUDGMENT

DU PLESSIS J:

By way of an application launched in the Witwatersrand Local Division (as it then was) the respondent (as applicant) sought judgment against the appellants (as respondents) for payment of the sum of R770 511, 11 plus interest and costs. The application succeeded. With the leave of the Supreme Court of

Appeal¹ the appellants now appeal against the judgment and order of the court *a quo*. It is convenient to refer to the parties as they were in the court *a quo*.

For his entitlement to payment as set out above the applicant relies on a written agreement between him, on the one hand, and the respondents, on the other hand. (A further agreement is relevant. I shall refer to the agreement between the parties as "the agreement".) In terms of the agreement the respondents transferred to the applicant 410 shares in a company called Praysa Trade 1117 (Pty) Ltd ("Praysa"). The respondents also ceded to the applicant "portion of their credit loan accounts ... to the value of R750 000" in Praysa. The agreement further provides that "upon payment of the amount of R750 000"² and interest, the applicant would "return ownership of the shares and loan account" to the respondents. The essence of the applicant's case lies in clause 4.3 of the agreement that provides:

"Should the TRANSFERORS fail to make the payment ... within three ... months of signing hereof, the TRANSFEREE shall no longer be bound by the provisions of 4.1³ and shall be entitled to retain or sell the shares and loan account as he deems fit".

It is the applicant's case that the respondent made certain payments in reduction of the sum of R750 000 and interest, but that the balance owing, inclusive of interest until 26 January 2006, is the amount claimed.

¹ Leave was specifically granted to appeal to this court.

² The agreement contains no earlier reference to an obligation to pay the amount.

³ An undertaking not to encumber or sell the shares or the loan account.

In order better to understand the respondents' defences to the claim, a brief summary of facts that appear from the answering and replying affidavits is necessary.

A company called New Adventure Investment 84 (Pty) Ltd (New Adventure) owned a business called Hardhats. The applicant is the natural person behind New Adventure. In terms of a written agreement dated 26 January 2004 New Adventure sold the business (Hardhats) to a company called Express Model Trading 481 (Pty) Ltd. ("Express"). (In order to distinguish it from the agreement between the parties, I shall refer to this agreement as "the contract of sale".) The two respondents were the natural persons behind Express. The purchase price for the business was R2,5 million. It was payable by way of "an initial deposit" of R1 million. The contract of sale records that R250 000 of the deposit had been paid before the agreement was signed. The other R750 000 of the deposit was payable on 23 January 2004, prior to the agreement itself.

As to the balance of the purchase price after the deposit, R1,5 million, it was to be secured by a banker's guarantee issued on behalf of Business Partners Ltd and payable on fulfilment of all the conditions precedent contained in the contract.

The respondents allege that Express duly paid the deposit. It could, however, only get financing from Business Partners for R750 000. In the result, the respondents say, an amount of R750 000 remained owing to New Adventure

under the contract of sale. To secure the outstanding R750 000, the respondents further say, the agreement that the applicant now relies on for his claim was entered into. In other words, the shares and loan account in Praysa were to serve as security for the R750 000 that Express owed to New Adventure.

The first defence that the respondents raise is that "it was never the intention that we shall otherwise (than by pledging the shares and loan account) become personally liable for payment" of the R750 000. Inasmuch as clause 4.3⁴ of the agreement implies that the respondents are personally liable to pay the R750 000, it "is not in accordance with the common continuing intention of" the parties. "Through our common error" the respondents allege, the agreement reflects that they must make the payment while the intention was that only Express would be liable. The respondents contend that they are entitled to rectification of the agreement by substituting in clause 4.3 the word "TRANSFERORS" with "Express Model Trading 481 (Pty) Ltd. The respondents state that they were advised that the defence must be raised by way of a counterclaim. In view, however, of the dispute of fact that the defence was bound to engender, the respondents were also advised that the counterclaim for rectification must be pursued by way of action. On appeal before us Mr Nel for the respondents submitted that the application should in view of the disputes of fact have been referred to trial.

As the respondents foresaw, their defence of rectification created a dispute of fact. In his replying affidavit the applicant states that it was indeed the common continuing intention of the parties that the respondents would in terms

⁴ Quoted above.

of the agreement undertake personal liability for payment of the amount of R750 000. The applicant does not dispute, however, that the R750 000 referred to in the agreement was part of the purchase price that Express had to pay to New Adventure in terms of the contract of sale.

As a preface to a summary of the applicant's allegations, I point out that the contract of sale and the agreement were entered into on 26 January 2004. It is clear from the parties' evidence and the contract of sale itself that, while the latter was signed on 26 January 2004, it had been concluded, orally I assume, before that date. I have earlier pointed out that the deposit was in terms of the contract of sale payable before it had been signed. Already on 14 January 2004 Praysa wrote a letter for the applicant's attention⁵ wherein the respondents, who signed the letter, stated that they were seeking to raise "a further R700 000 in order to pay our outstanding amount to purchase Hardhats ...". The letter further reads: "Our proposal is to make a contract with you to guarantee the cash amount still due to you in order to save the R1 500 000 made available by Business Partners which will be available by (*sic*) you shortly. Since our agreement with Business Partners stipulates that we need a written confirmation ... that the R1 000 000 is paid by the Purchaser in order to release the R1 500 000 to the seller. The agreement to make between you and us is to transfer pro rata shares from us to you in Praysa ... to assure you of your money. The shares will be transferred back to us once the amount is paid in full."

With reference to the letter of 14 January 2004 and to further correspondence, the applicant seeks to demonstrate that Express did not pay the

⁵ It is unclear to whom the letter was addressed.

deposit as contended for by the respondents. Based on the correspondence the applicant further seeks to demonstrate that Business Partners paid the full R1,5 million. In short, the applicant avers that the respondents are lying when they allege that the agreement was made to secure R750 000 that Business Partners did not pay. According to the applicant the agreement was made "to secure the payment of the moneys from Business Partners Ltd". As I understand this, it means that Business Partners were not going to pay the R1,5 million if the deposit had not been paid or secured.

The applicant further alleges, with reference to documents, that the respondents were fully aware that they were undertaking personal liability to pay to him R750 000.

The applicant's evidence as to the defence of rectification is contained only in the replying affidavit. In the nature of things, the respondents had no opportunity to deal therewith. I shall nevertheless assume, but I advisedly do not find, in the applicant's favour that he has by way of the correspondence demonstrated that the agreement was entered into to secure part of the deposit and not part of the balance of R1,5 million. That is not the real issue, however. The real issue is whether the parties intention was that the respondents would undertake personal liability to pay part of the purchase price or whether the agreement was entered into as a means to give security for Express's liability to pay the purchase price. As to that issue there is a dispute of fact that the correspondence does not resolve.

In Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3)

SA 623 (AD) at p. 634H and further Corbett JA (as he then was) formulated the general rule applicable to disputes of fact in motion proceedings as follows: Where "disputes of fact have arisen on the affidavits, a final order ... may be granted if those facts averred by the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order." The learned judge of appeal then pointed out that, "in certain circumstances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact." That does not apply here as the applicant's averments are all contained in the replying affidavit to which the respondents did not have an opportunity to respond. On p. 635B Corbett JA further stated that there may be exceptions to the general rule "as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers".

The question now is whether in this case the respondents' averments as to rectification are so far fetched or clearly untenable as to justify the court to reject them without the benefit of oral evidence and its concomitant, cross examination. I have already pointed out that the correspondence does not demonstrate the respondents' contentions to be untrue. In argument before us Mr Ohannessian for the applicant submitted that there are several contradictions in the respondents' evidence that, so he argued, demonstrate untruthfulness. In my view the contradictions, if such they are, do not support a conclusion that this case is exceptional to the extent that the respondents' evidence can be rejected

out of hand. In view thereof, another court will have to deal with the facts and it is inappropriate and unnecessary for this court fully to deal with each contended contradiction. There is in my view a genuine dispute of fact as to whether the parties intended to render the respondents liable for part of the purchase price.

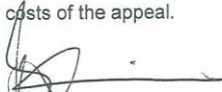
The learned judge *a quo* reasoned that the respondents did not, on their own averments, make out a case for rectification. With that I cannot, with respect, agree. In order to succeed with a defence of rectification, the respondents will have to prove that the agreement does not reflect the common intention of the parties. They will also have to prove what the parties' common continuing intention was and that such a common continuing intention is by mutual mistake not part of the agreement. Finally, the respondents will have to prove what the correct wording of the agreement should be (See **Harms: Amler's Precedents of Pleadings** (6th ed. p.336).)

I conclude that the defence of rectification was properly raised and that in respect thereof there is a dispute of fact that cannot be resolved on the papers. The conclusion renders it unnecessary to deal with further defences that the respondents raised on the papers.

Mr Ohannessian submitted that if it is held that the factual dispute cannot be resolved on the papers, that the matter should have been referred to trial. With that submission, at least, Mr Nel agreed.

In the result the following order is made:

1. The appeal is allowed.
2. The order of the court *a quo* is set aside and the following order is made in its stead: "The application is referred to trial. The notice of motion shall stand as a simple summons. Within 15 days of the applicant receiving notice of this order, he must file a declaration. Thereafter the Rules of the Court shall apply to the exchange of pleadings and the conduct of the trial. The costs of the application shall be costs in the cause."
3. The respondent is ordered to pay the appellants' costs of the appeal.



B.R. du Plessis

Judge of the High Court

I agree,



J.R. Murphy

Judge of the High Court

I agree,



J. Hiemstra

Acting Judge of the High Court

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