



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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES

(2) OF INTEREST TO OTHER JUDGES: ☒ YES

(3) REVISED. ☒ YES

5/10/2010 *Bam*

DATE SIGNATURE

CASE NO: A357/2009

DATE: 19/10/2010

IN THE MATTER BETWEEN

GLOBUL ROADS

APPELLANT

AND

E H BARNARD t/a

E H BARNARD BOERDERY & VERVOER

RESPONDENT

JUDGMENT

BAM, AJ

- [1] The appellant and the respondent were contracting parties. In accordance with the agreement entered into between the parties the appellant hired certain heavy equipment and machinery from the defendant for certain periods of time, including the period October 2007.

[2] It was common cause that the appellant was obliged to pay the defendant the amount of R23 712,00 for the said period.

[3] The appellant did not pay the amount timeously and the respondent subsequently, in April 2008, issued summons against the appellant for payment of the said amount. In the particulars of claim the respondent referred to the agreement between the parties and attached a document, which on the face of it is a "tax invoice" with the number 8 and dated 9 November 2007. In paragraph 3 of the particulars of claim the respondent described the said document as follows:

"n Afskrif van die geskrywe (*sic*) gedeelte van die ooreenkoms word hierby aangeheg as aanhangsel A."

[4] The respondent then applied for summary judgment alleging that the appellant had no *bona fide* defence against the claim.

[5] In opposing the summary judgment the appellant replied under oath, with reference to the aforesaid tax invoice as follows:

"3.1 Tax invoice 8 dated 9/11/07 in the amount of R23 712,00 (twenty three thousand seven hundred and twelve rand) was paid by the defendant via electronic transfer into plaintiff's bank account on 18 February 2008;

3.2 I attach proof of the payment transaction hereto as annexure A."

- [11] Despite objection by the appellant's attorney that any other transaction or invoice regarding business between the parties would have been irrelevant and inadmissible on the basis that it referred to another cause of action, the learned magistrate nonetheless allowed the cross-examination of Mr Oosthuizen in this regard.
- [12] What is clear is that the issue pertaining to any prior business and/or amounts owed to respondent by the appellant was not ventilated in the pleadings in this matter. In this regard Mr Vermeulen, appearing for the appellant, submitted that the respondent was in the circumstances obliged to file a reply to the appellant's averments in his plea, introducing the facts upon which the respondent later on endeavoured to rely upon, to entitle the respondent to address the said issue. In the event where the respondent did not file a replication in terms of the Rules of the Magistrate Court, Mr Vermeulen submitted that in terms of rule 21 of the said rules the defendant "shall be taken to have denied all the allegations of fact contained in the plea". This includes a denial by the respondent that the appellant caused payment of the amount in question on 18 February 2008.
- [13] To my mind it appears from the papers that at all relevant times it was in the contemplation of the parties that the issue turned about payment of the amount reflected in invoice no 8 and nothing else.

[14] Mr Geyser for the respondent argued that the respondent was entitled to refer to the previous transaction between the parties on the basis that that evidence was used by the respondent to rebut the evidence of the appellant for what purpose the said payment was indeed effected.

[15] I do not agree with the contention of Mr Geyser, to my mind the respondent was bound to what is contained in the pleadings. In view of the contents of the pleadings, where the parties were *ad idem* that the issue between the parties turned upon the payment of the amount reflected in invoice no 8, there was no scope for the respondent to introduce new evidence.

[16] It is trite that the *onus* to prove payment lies heavily on the party who avers payment, *in casu* the appellant, see *Pillay v Krishna* 1946 AD 946 at 955. Mr Geyser for the respondent further contended that the appellant was obliged to prove that the specific debt in question had been paid. In this regard we were also referred to the authority *Nedperm Bank Ltd v P Lavarach & Others* 1996 4 SA 30 (AD) at 47B. The principles re *onus* are trite.

[17] From the evidence it is clear that the respondent was not in doubt who the party was who made the payment and also not in doubt that it turned about a certain transaction between the parties; and where both parties at all relevant times focused upon the debt reflected in invoice no 8, there could, on the probabilities,

have been no doubt from the defendant's point of view that the payment could have been for anything else.

[18] Accordingly I am of the view that the appellant succeeded in proving that the payment made by the appellant to the respondent was a payment in connection with the issue referred to in the respondent's particulars of claim, as envisaged in *Pillay v Krishna (supra)* and the *Nedperm Bank* case (*supra*).

I would therefore suggest that the following order should be made.

1. The appeal of the appellant is upheld.
2. The magistrate's order in the court *a quo* is substituted by the following:
"Die eiser se eis word van die hand gewys met koste."
3. Respondent is ordered to pay the appellant's costs of the appeal.


A J BAM

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

I concur and the order is made accordingly.


Ms L M MOLOPA

JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON:

FOR THE APPELLANT: ADV P J VERMEULEN

INSTRUCTED BY: VENEZIANO INC, PRETORIA

FOR THE RESPONDENT: ADV W W GEYSER

INSTRUCTED BY: WEAVIND & WEAVIND, PRETORIA