



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 921/2012
Reportable

In the matter between:

FOURIER APPROACH (PTY) LTD

Appellant

and

LYNN MARGARET WEST

Respondent

Neutral citation: *Fourier Approach v West* (921/12) [2013] ZASCA 194
(2 December 2013)

Coram: Nugent, Shongwe, Leach and Willis JJA and Meyer AJA

Heard: 20 November 2013

Delivered: 02 December 2013

Summary: Interpretation of a contract — meaning of phrase ‘sales realised’ — not including interest on sale price. Tender of payment — not discharging obligation to pay.

O R D E R

On appeal from: North Gauteng High Court, Pretoria (Louw, Tolmay and Ranchod JJ sitting as court of appeal):

- 1 The appeal succeeds with costs.
- 2 The order of the Full Court is set aside and is replaced with the following:
 - ‘(a) The appeal succeeds with costs.
 - (b) The order of the court of first instance is set aside and is replaced with the following:
 - “(i) There will be judgment in favour of the plaintiff against the defendant in the sum of R267 000 together with interest thereon calculated at the legal rate from 1 March 2008 to date of payment.
 - (ii) The defendant is to pay the plaintiff’s costs.”

J U D G M E N T

LEACH JA (NUGENT, SHONGWE AND WILLIS JJA AND MEYER AJA CONCURRING)

[1] In February 2003 the appellant, a company that carries on business in the information technology sector, employed the respondent as a sales representative. The respondent’s contract of employment, the terms of which were reduced to writing, provided for her to be remunerated not only by way of a monthly salary but also by way of commission (the precise terms of the agreement as to commission will be dealt with more fully below). The respondent was thereafter the effective cause of the appellant selling a software system to a company referred to as ‘ACMB’ but, unfortunately, she and the appellant could not agree on the amount of commission she had become entitled to receive as a result.

[2] Eventually, the respondent instituted action in the North Gauteng High Court claiming payment of a substantial sum which she alleged was still due to her as commission on the sale. The merits of her claim fell to be determined by an interpretation of the provisions of the employment agreement relating to commission, and the parties agreed that this should be done by way of a set of agreed facts set out in a document headed 'Stated Case'.

[3] As appears from the agreed facts, the software sale agreement giving rise to the dispute was concluded in February 2004. It was, at the time, the appellant's standard practice to enter into written agreements with its clients in which provision was made for invoices to be paid within 30 days, after which interest would be payable at a rate of prime plus 2% on all amounts overdue. In the case of the sale to ACMB, however, the appellant for the first time agreed to the contract price (R13.3 million) being paid in instalments. These were set out in a schedule; it provided for payment of an initial sum of R2 660 000 followed by tranches of R2 953 141,18 on 31 January 2005, R3 278 587,53 on 31 January 2006 and R3 639 899,18 on 31 January 2007 and a final payment of R4 041 028,63 on 31 January 2008. Agreement was further reached on various amounts of interest to be paid monthly until the total indebtedness was discharged. Those monthly sums of interest, too, were set out in the schedule.

[4] As a result the total amount to be paid under the agreement was increased from R13.3 million to R16 572 656,52 of which R3 272 565,20 related to interest. The sale duly went ahead but, although various payments were made, they did not accord precisely with those set out in the schedule. At the end of the day, final payment was only made on 29 February 2008 with the total amount of interest paid by then having increased to R3 573 569,50.

[5] The dispute between the parties relates to how the respondent's commission is to be calculated in the light of these facts. In this regard each side placed a differing interpretation upon the provisions of clause 6.3 of the respondent's written employment contract which provided that (in addition to a monthly salary):

‘The (respondent) will also be entitled to be paid an amount of 5% on sales realised, payable in two payments namely 2.5% at the formalisation of the contract and the other 2.5% at the final payment on the contract.’

[6] It is common cause that the respondent became entitled to a first payment of 2.5% of the sale price of R13.3 million (ie R332 500) when the sale was formalised between the appellant and ACMB. It is also common cause not only that she was paid that sum but that she received a further sum of R65 500 in or about March 2004 which is to be set off against the further amount of commission she became entitled to receive on the sale. The dispute between the parties relates to the appellant’s contention that the respondent only became entitled to a second payment of R332 500 when final payment under the sale was made on 29 February 2008, whilst the respondent contends that she became entitled not only to that sum but, also, to 5% of the interest of R3 573 569,50 ACMB paid to the appellant.

[7] At first instance, the matter came before Polson AJ, who upheld the interpretation advanced by the respondent and found in her favour. The appellant appealed unsuccessfully to a Full Court of the North Gauteng High Court. While that court again upheld the respondent’s interpretation, it felt that the order of the court of first instance needed to be clarified. It therefore set aside the original order and replaced it with an order granting judgment in the respondent’s favour in the sum of R445 678,48 (being the sum it is common cause would have been due as commission should the respondent’s interpretation of the agreement be correct, less the payment of R65 500) together with interest and costs. It is against this order that the appellant appeals to this court with special leave.

[8] The issue of interpretation may be dealt with simply. The Full Court held that it could ‘only find that sales realised included everything received by the appellant until the date of final payment’ including interest. This appears to have been the same conclusion of the court of first instance. It is a conclusion which is, however, clearly wrong.

[9] The matter turns on the interpretation to be placed on the meaning of the phrase 'on sales realised' in the clause in question. It is trite that those words should be afforded their ordinary and grammatical meaning unless it would lead to an absurdity, repugnancy or inconsistency with the rest of the contract.

[10] The word 'realised' is the past tense of the verb 'realise' which, in the context of a sale, bears the ordinary meaning of 'sell for' or 'convert (an asset) into cash'.¹ In ordinary parlance, an asset is therefore realised when it is sold and paid for. This is clearly what was envisaged by clause 6.3 which provided for a percentage of the sales realised to be paid as commission 'at the formalisation of the contract' and the balance of such commission to be paid 'at the final payment on the contract'.

[11] On the other hand, interest connotes the 'money paid for the use of money lent or for delaying the repayment of a debt'² or 'money paid for the use of credit or borrowed money'.³ In the context of a sale interest therefore connotes what is paid by the purchaser for the benefit of being extended credit in respect of the purchase price

[12] Bearing these concepts in mind, interest cannot be regarded as being part of a 'sale realised'. In the present case, the sale realised the price of R13.3 million. It did not realise interest. The interest the appellant received from ACMB was a consideration for not insisting upon payment on conclusion of the sale and extending credit.

[13] Accordingly, the finding of both the court of first instance and the Full Court cannot stand. As the respondent thus failed to prove the interpretation which she placed upon clause 6.3 of the employment agreement, she failed to prove that she was entitled to receive a second tranche of commission greater than R332 500. And as she had already received the amount of R65 500 paid in March 2004, when ACMB made its final payment on 29 February 2008, the appellant became liable to pay her the difference between those two sums (ie R267 000) as commission.

¹ See The Concise Oxford English Dictionary (12 ed).

² Concise Oxford Dictionary *op cit*.

³ Collins Dictionary of the English Language (2010).

[14] Counsel for the appellant suggested in his heads of argument that in the event of this court reaching that conclusion, the order of the court a quo should be set aside and substituted with an order allowing the appeal from the court of first instance and substituting an order dismissing the respondent's claim with costs. This was based on it being common cause that when an amended plea to the respondent's claim was filed in the high court on 3 April 2009, the appellant had not only admitted being liable for commission in the sum of R266 000 but had gone on to plead:

'The (appellant) hereby formerly tenders payment to the (respondent) in the amount of R266 000 in accordance with a formal tender in terms of the provisions of Rule 34 which shall be filed simultaneously herewith.'

[15] Presumably this tender was an attempt to shield the appellant from further costs, although whether it would have done so might be a matter of some debate given the provisions of Rule 36(10) of the Uniform rules of court (this is an issue unnecessary to discuss any further). However the fact that an offer to settle was made did not discharge the debt itself and, indeed, so we were informed by counsel, no further payment in respect of commission has ever been made. That being so, the amount of commission that was due on 1 March 2008 remains unpaid and, despite the appellant's tender, was still due when the matter came before the court of first instance. Judgment in respect of that amount ought to have been entered in the respondent's favour.

[16] Moreover, the amount tendered (R266 000) was of course R1000 less than the amount in fact due. This was the result of the appellant having made an arithmetic error by deducting a sum of R66 500 in respect of the payment of March 2004 whereas it had in fact been R65 500. In addition, counsel were agreed, correctly, that interest on the amount of R267 000 became due on 1 March 2008 after ACMB's final payment, and the amount tendered made no allowance for the interest that had accrued. There is thus no reason for the respondent not to have been awarded both interest and costs when the court of first instance gave judgment.

[17] There is no reason why costs should not follow the event, and the appellant is entitled to its costs both in the court a quo and on appeal.

[18] In these circumstances, the appeal must succeed, the order of the court a quo set aside, and the order of the court of first instance altered to that which ought to have been made by the Full Court on appeal.

[19] The following order will issue:

- 1 The appeal succeeds with costs.
- 2 The order of the Full Court is set aside and is replaced with the following:
 - ‘(a) The appeal succeeds with costs.
 - (b) The order of the court of first instance is set aside and is replaced with the following:
 - “(i) There will be judgment in favour of the plaintiff against the defendant in the sum of R267 000 together with interest thereon calculated at the legal rate from 1 March 2008 to date of payment.
 - (ii) The defendant is to pay the plaintiff’s costs.”

L E Leach
Judge of Appeal

APPEARANCES:

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THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
Date: 2 December 2013
Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

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The appellant is the former employer of the respondent. Under the respondent's contract of employment, the appellant was obliged to pay her commission at an agreed rate 'on sales realised' payable in two instalments: the first on formalisation of a contract of sale and the second on final payment on a sale.

The respondent acted on the appellant's behalf in concluding a sale at a price of R13.3 million. A dispute arose between them how the payment of her second tranche of commission was to be calculated in terms of her employment contract. The respondent contended that the amount was to be calculated with reference to the interest that had been payable by the purchaser on the contract price; the appellant contended that regard was to be had solely to the sale price and not to any interest.

The respondent's contention was accepted both by a High Court and by a Full Court of the High Court, on appeal. However the Supreme Court of Appeal today held that the meaning of the phrase 'on sales realised' clearly did not include interest. The appeal therefore succeeded and the appellant was ordered to pay outstanding commission calculated without reference to the interest that it had been paid under the sale to a third party.

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