



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

Case Number: A46/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 05 FEBRUARY 2021.

SIGNATURE: _____

In the matter between:

ABSA BANK LIMITED

Appellant

And

CENTURION BUS MANUFACTURERS (PTY) LTD

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] This appeal emanates from an order for absolution from the instance granted by Mbongwe AJ on 22 June 2016. For ease of reference, the parties will be referred to herein as cited in the court *a quo*.

Facts common cause

- [2] The plaintiff, ABSA Ltd ("ABSA"), is a public company and credit provider that trades *inter alia* as bankers and financiers.
- [3] The defendant, Centurion Bus Manufacturers (Pty) Ltd, ("CBM"), obtained credit from ABSA in terms of various credit agreements pertaining to certain equipment ("assets") purchased by it.
- [4] CBM did not honour its payment obligations in terms of the various agreements, which prompted ABSA to institute legal proceedings for the recovery of the assets and certain ancillary relief.
- [5] The account number in respect of each transaction and the case number under which the legal proceedings were instituted in respect of the various account numbers are crucial to the dispute between the parties. In the result it is necessary to deal with same in somewhat more detail.
- [6] Under case number 58965/2010, ABSA claimed in respect of the following account numbers:
- 6.1 73144146;
 - 6.2 74401142;
 - 6.3 78567029;
 - 6.4 73140361;
 - 6.5 73122711;

6.6 72403911;

6.7 70486232; and

6.8 72403822.

[7] Under case numbers 35992/2010 and 37218/2010 ABSA claimed in terms of accounts numbers 75473805 and 75477894.

[8] I pause to mention, that each account number refers to a specified asset. In other words, ABSA's claim under case number 58965/20105 was in respect of eight individual assets, which were described in detail in the notice of motion.

[9] In an endeavour to settle the various claims, CBM entered into settlement negotiations with ABSA. The negotiations were attended to by the respective legal representatives for ABSA and CBM.

[10] The negotiations were initiated by CBM in a letter from their attorneys dated 12 April 2012. The heading of the letter refers to an additional case, 38781/2010. It is not clear from the record in respect of which account number this application was issued.

[11] Be that as it may, the letter contained the following request: *"We request that you provide us with settlement amounts on all accounts pertaining to the matters that have been set down to be heard on 16 April 2012."*

[12] On 13 April 2012 the attorneys on behalf of ABSA, however, only provided settlement figures in respect of the following account numbers:

12.1 74580535 – R 284 541, 01;

12.2 75477894 – R 81 961.04;

12.3 75473805 – R 178 048.26;

12.4 73144146 – R 116 016.13; and

12.5 73122711 – R 64 764.16.

[13] It is evident from the account numbers *supra*, that only settlement figures in respect of two of the accounts under case number 58965/2010 were provided, namely, the accounts mentioned in subparagraphs 12.4 and 12.5.

[14] Negotiations proceeded and on 16 April 2012, CBM'S attorneys addressed a letter to ABSA's attorneys, which *inter alia* stated:

"We confirm we have noted your client's decline of our client's proposal. We confirm that as discussed we request that you take the following counteroffer to your client.

We confirm that our instructions are that our client will settle the amount of R 200 000, 00 that can be set off against account 75477894 and account number 73144146 which amount will be paid before close of business on Tuesday, 17 April 2012.

We furthermore, confirm that our client will thereafter pay R 100 000,00 per month, the first instalment due on 31 May 2012 on the balance of the amounts outstanding by settling the smallest balances first."

[15] The account numbers referred to are those that appear in subparagraphs 12.2 and 12.4 *supra*.

[16] In a letter dated 16 April 2012 ABSA accepted the proposal of R 200 000, 00 in respect of the abovementioned account numbers, but declined the remainder of the counteroffer.

[17] On 17 April 2012 CBM made proposals for the payment of the amounts owing on the remainder of the account numbers, i.e. the account numbers as reflected in subparagraphs 12.1, 12.3 and 12.5.

[18] In terms of a letter dated 17 April 2012, ABSA responded to the further proposal as follows:

"We confirm our clients will accept your client's proposals as referred to in your letter dated 17 April 2012.

Kindly find attached hereto settlement agreements for the above accounts which will be made an order of court."

[19] Be that as it may, on the strength of the agreement reached between the parties, Ms Prinsloo, a legal secretary employed by Hammond Pole Attorneys and who reported to Ms Slabbert, ABSA's attorney at the time, drafted three settlement agreements, one of which pertains to the dispute *in casu*.

[20] In the settlement agreement it is recorded that CBM will pay two amounts, namely R 116 016, 13 and R 64 764, 16. These two amounts accord with the amounts outstanding in subparagraphs 12.4 and 12.5 *supra* and consequently represent payment of two out of the eight assets claimed under case number 58965/2010.

- [21] Although only two accounts were settled in terms of the settlement agreement between the parties, the following is recorded in paragraph 6.1:

"This agreement represents the settlement entered into between the parties in respect of case number 58965/2010."

Issue in dispute

- [22] ABSA, upon realising its mistake, requested CBM to pay the remainder of the outstanding balances under case number 58965/2012. CBM refused and contended that, as recorded in paragraph 6.1 of the written settlement agreement, the matter was settled in its totality.

- [23] And thus a dispute is born.

ABSA's claim

- [24] ABSA instituted a claim for rectification of paragraph 6.1 of the settlement agreement to reflect the correct common intention of the parties. ABSA prays for the rectification of paragraph 6.1 to read as follows:

"6.1 This agreement represents the settlement entered into between the parties in respect of account numbers 73122711 and 73144146 only."

- [25] The elements underlying a claim for rectification, are:

- 25.1 an agreement between the parties that was reduced to writing;
- 25.2 that the written agreement did not reflect the common intention of the parties correctly;

- 25.3 an intention by both parties to reduce the agreement to writing;
- 25.4 a mistake in the drafting of the document, which must be as a result of:
 - 25.4.1 a *bona fide* mutual error; or
 - 25.4.2 an intentional act of the other party; and
- 25.5 the wording of the agreement as rectified,

[See: *Amler's Precedents of Pleadings*, Harms, 7th edition, 336]

Evidence

- [26] Two witnesses were called on behalf of ABSA, Ms Karien Slabbert, the attorney representing ABSA at the time and Ms Menesh van Eeden, a legal recovery specialist in the employment of ABSA at the time.
- [27] Ms Slabbert confirmed in her evidence that the parties, at all relevant times had the common intention to only settle the arrear amounts in respect of the account numbers reflected in the correspondence between the parties.
- [28] Ms Slabbert explained that she had a "*hectic*" time during the drafting of the various settlement agreements which led to the incorrect wording in paragraph 6.1 of the settlement agreement. She acknowledged that she had made a mistake.
- [29] During cross-examination, Ms Slabbert was confronted with the version of CBM, which version clearly indicated that it held a different view. CBM was adamant that, having regard to the correspondence preceding the agreement between the parties, the intention of CBM was to settle the matter in totality.

[30] The evidence of Ms van Eeden, save to confirm that ABSA, will not abandon amounts owing to it, did not really take the dispute any further.

[31] Upon closure of ABSA's case, CBM brought an application for absolution from the instance, which application, as stated *supra* was successful.

Judgment

[32] Having analysed the evidence and submissions on behalf of the parties, the court *a quo* made the following finding:

"[16] At the close of the plaintiff's case the defence applied for absolution from the instance. Counsel for the defendant argued that the plaintiff had not discharged the onus of proving the alleged common error which was core to the plaintiff's pleaded case. She further submitted that the witness' plea of an oversight on the part of the plaintiff's attorney resulting in the conclusion of the settlement agreement pointed to a unilateral error and was, consequently, at odds with the plaintiff's allegation of the existence of a common error between the parties. ...

[17] In opposition to the application for the defendant argued that the plaintiff had made out a prima facie case and submitted that it was incumbent on the defendant to testify in rebuttal. The applicable principle in this situation was aptly laid down in OOSTHUIZEN v STANDARD GENERAL VERSEKERINGS MAATSKAPPY BPK 1981 (A) at 1035H-36A (sic) as follows: 'If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution.' I find that the proposition by the plaintiff's counsel is clearly not supported by the evidence tendered and ought to be rejected.

In line with the principle in the Oosthuizen case, the defendant's application must succeed."

Discussion

[33] The test for absolution from the instance at the end of the plaintiff's case was first formulated in *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173. In essence the test is not whether the evidence established what would finally be required to establish, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff.

[34] The test has been confirmed in a long line of authorities and in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A), the end result of applying the test was explained as follows at 409G–H:

"This implies that a plaintiff has to make out a prima facie case-in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no Court could find for the plaintiff." (own emphasis)

[35] ABSA contends that, although the *dicta* in the *Oosthuizen* matter relied upon by the court *a quo* in the judgment is in line with the principle set out in *Claude Neon Lights*, *supra* the court *a quo* applied the test incorrectly. Having regard to the test in *Claude Neon Lights*, *supra* the point of departure is to have regard to the elements of rectification and to determine whether evidence was led in respect thereof.

- [36] The elements have been set out *supra*. The next step is to have regard to the evidence presented by ABSA in respect of each element. It is important to note that the evidence presented by the plaintiff must only establish a *prima facie* case on which a court "*could or might*" find for the plaintiff.

An agreement between the parties which was reduced to writing.

- [37] It is common cause between the parties that the settlement agreement was reduced to writing.

That the written document did not reflect the common intention of the parties.

- [38] In this regard Harms in *Amler's Precedent of Pleadings, supra*, remarks as follows:

"The common continuing intention of the parties, as it existed when the agreement was reduced to writing, must be established. It may be deducted from an antecedent agreement, for instance."

- [39] The correspondence between the parties in respect of the settlement figures for specific account numbers evidence at least *prima facie* that it was the common intention of the parties to settle only the amounts in respect of the mentioned case numbers.

An intention by both parties to reduce the agreement to writing.

- [40] This element is common cause between the parties.

A mistake in drafting the document, which must be a result of either a *bona fide* mutual error or an intentional act of the other party.

[41] ABSA relies on a *bona fide* mutual error and the evidence of Ms Siabbert considered in conjunction with the correspondence between the parties establishes at least *prima facie* that the mistake is due to a common error between the parties.

[42] The mere denial by CBM at this stage that the mistake was not due to a common error between the parties still needs to be tested. It is a well-known principle in litigation that the skilful art of cross-examination should never be underestimated. It is one thing to merely deny a fact, but a total different scenario presents itself if such denial is scrutinised during *viva voce* evidence.

[43] *Erasmus Superior Court Practice*, Van Loggerenberg, Vol 2, 2nd edition, D1-531, explains this principle with reference to *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (4) SA 90 (RA) as follows:

"In case of doubt as to what a reasonable court 'might' do, the court should lean on the side of allowing the case to proceed, for the plaintiff should not lightly be deprived of his remedy without the evidence of the defendant being heard. A defendant who might be afraid to go into the witness-box should not be permitted to shelter behind the procedure of absolution from the instance."

The wording of the agreement as rectified.

[44] ABSA has alleged what the wording of paragraph 6.1 of the Settlement Agreement should, once rectified, read, to wit

"This agreement represents the settlement entered into between the parties in respect of account numbers 73122711 and 73144146 only."

[45] It is apposite to remember that, as stated in *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 E, for purposes of absolution the evidence of the plaintiff's witnesses should ordinarily be assumed to be true.

[46] In the result I am of the view that the appeal should be upheld.

ORDER

[47] In the premises, I propose the following order:

The appeal is upheld with costs.

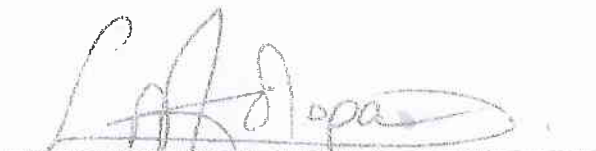
The order of the court *a quo* is set aside and substituted with the following order:

"The application for absolution from the instance is dismissed with costs."



N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.



L.M. MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree



E.M. KUBUSHI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

21st of October 2020.

(TEAMS HEARING)

DATE DELIVERED PER COVID19 DIRECTIVES:

5 February 2021

APPEARANCES

Counsel for the Appellant:

Advocate F.H. Terblanche SC

Instructed by:

Hammond Pole Majola Inc.

Counsel for the Respondent

Advocate C.A. Kriel

Instructed by:

Machobane Inc