

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

27 May 2021
DATE

SIGNATURE

APPEAL NO: A 80/2019

CASE NO IN COURT A QUO: 24939/2015

In the matter between:

MACSTEEL SERVICE CENTRE SA (PTY) LTD

Appellant

(Plaintiff in court a quo)

and

HEAVY FEATHER TRADING 50 CC

Respondent

(Defendant in court a quo)

JUDGEMENT: APPEAL

(The judgement is delivered electronically in accordance with the Directives regarding special arrangements during the Nation State of Disaster. The judgement will be uploaded onto Case Lines to the electronic file of this matter and will be electronically submitted to the parties/their representatives by Email. The date of handing down is 27 May 2021).

BEFORE: HOLLAND-MUTER AJ, (MABUSE J & BAM AJ confirming).

[1] This is an appeal against the judgement of Khumalo J, sitting as the court of first instance on 9 March 2018. Khumalo J dismissed the appellant's claim against the respondent and the appellant's subsequent application for leave to appeal. The appellant, Macsteel Service Centre of South Africa ("MSC") petitioned and the Supreme Court of Appeal granted leave to appeal on 7 September 2018.

CONDONATION:

[2] MSC filed an application for condonation for the late prosecuting of the appeal and re-instatement of the appeal in terms of Rule 49(6) (b) of the Uniform Rules of Court. The reason for the application was inter alia caused by a delay to timeously obtain a copy of the transcription of the record from Digital Audio Recording Transcriptions.

[3] An incomplete record was received and despite several attempts to correct the situation, the record was filed a month late after receiving the complete record. Kari Van Rooyen, the attorney seized with the appeal, also stated that she was inexperienced in this regard and made a bona fide oversight when calculating the time frame within which the record should have been prepared and filed with the registrar's office.

[4] The lodging of the record one month late in the court's view does not warrant the appeal to be struck. The respondent did not oppose or object to the application and in view of no prejudice, condonation is granted.

CAUSE OF ACTION:

[5] MSC issued summons against the respondent (Heavy Feather Trading 50 CC referred to as "HF") in the court a quo claiming payment of an amount of R 432 788,11 (Four Thousand and Thirty-Two Thousand Seven Hundred and Eighty-Eight Rand and Eleven Cents), the alleged balance of an amount that a company called CC Trade 406 CC trading as Xtreme Profiling ("XP") owed to MSC and that HF agreed to pay the outstanding amount.

[6] MSC alleges that the HF was in breach of the agreement in that it failed to settle the balance on demand after agreeing to pay the XP debt towards MSC in full. HF denied being indebted to the MSC and pleaded that the agreement was subject to the condition that should HF not take over the business of XP, the amounts paid by HF towards MSC will be repaid by MSC (or to be set off against any debts owed by HF to the MSC)

[7] HF made several payments towards the MSC and that on its own calculation, taking into account the amounts it paid towards the MSC, owed the MSC the amount of R 166 439,89 (One Hundred and Sixty Six Thousand Four Hundred and Thirty Nine Rand and Eighty Eight Cents. This amount was paid and the MSC admitted receiving such payment.

THE FACTS IN THE COURT A QUO:

[8] In order not to repeat all the evidence presented in the court a quo, the following summary will suffice.

[9] MSC, or one of its divisions (Macsteel Trading), was a major supplier of steel in the Emalahleni/Middelburg area in Mpumalanga. XP was a long standing client of MSC and previously entered into a written credit agreement with MSC on 12 April 2010. MSC supplied XP with steel products on credit in terms of the credit application agreement between XP and MSC. XP fell into arrears towards MSC for steel received and was indebted to MSC in the amount of R 1 620 287,01 at the beginning of 2013.

[10] At that stage HF was a shelf company with no ties with either MSC or XP. Mr Kaplesh Dajee ("Dajee"), a businessman in the wholesale liquor business, for reasons not applicable on this matter, decided to leave the liquor trade and to enter into a business where the handling of cash was not a daily part of business. For obvious reasons the steel business in Middelburg seemed to be the answer. Dajee acquired HF with the purpose to use HF as the vehicle for the proposed venture into the steel trade.

[11] XP was indebted to MSC at that stage in the amount of R 1 332 788, 11 for steel products sold and delivered in terms of the existing credit agreement between XP and MSC. It was known that XP was in a financial struggle. Dajee heard about XP's predicament in his quest to enter the steel business and entered into negotiations with the members of XP, inter alia at first to purchase three machines from XP and to consider a possible takeover of the XP business at a later stage if viable.

[12] XP needed a cash injection of about R 1 million resulting in Dajee (via HF) purchasing three machines from XP for the amount of R 1 million during August 2013. XP had two other machines subject to lease agreements with Nedbank which Dajee did not purchase.

[13] Dajee (HF) ventured into the steel business and started trading for own account from the same building premises from which XP was operating its own business. HF initially bought steel from suppliers (including MSC) for cash and HF was operating its business apart from XP's business for own account.

[14] Dajee approached MSC and negotiated with Hoffman representing MSC for HF to purchase steel from MSC. MSC at first supplied HF with steel for cash but Dajee later approached Hoffman (MSC) for credit facilities and they entered into a credit facility agreement on 12 September 2013.

[15] Dajee and Hoffman differ from one another on the terms of the oral agreement between the parties. Hoffman testified that they agreed that HF will

unconditionally pay all outstanding debts (R 1 602 000, 00) owed by XP to MSC in exchange for a credit facility. Dajee's version is that he (HF) agreed to make monthly payments towards MSC in respect of XP's outstanding debts **on condition** that should HF ultimately take over the business of XP as a running concern, the payments made (the initial post-dated cheques for R 50 000 per month) will be set off against the outstanding XP debts, but should HF not take over the business of XP, MSC will repay those payments made to HF (or set off will apply if HF owed MSC any monies for steel received from MSC).

[16] Hoffman further contended in the court a quo that should the court accept Dajee's version of the contract, the court should in the alternative find that HF ultimately took over the business of XP and that the condition was fulfilled. Dajee denied that the takeover occurred. According to Dajee the reason why HF was interested in taking over XP was because of its client base and to *springboard* it into the steel industry. This did not materialize because of the massive existing debts of XP amounting to more than R 9 million and disagreement with the members of XP regarding the building as an asset and that XP was too deep in debt.

[17] There were other different nuances between the versions of Hoffman and Dajee as to the number of meetings held between the parties, Hoffman's interpretation of HF's proposed takeover of XP shares by HF and whether the actions of HF indeed amounted to the takeover of XP's business. Dajee was clear that HF did not take over the business of XP for reasons set out above. Dajee's uncontested evidence was that when HF started operating from the same building where XP was, XP had no stock to trade. It later became clear to Dajee

that it was not financially viable to take over XP with its existing debts and nothing came about the possible purchase of XP shares by HF. There were also other reasons why Dajee decided against a takeover regarding the members of XP and the building from where XP operated.

[18] The following aspects were also raised in the Court a quo:

(a) The identity of the plaintiff (appellant):

There was some confusion as to the identity of the appellant. The issue was whether the appellant was MSC or Macsteel Trading ("MT"). It seems that there was/is a group of entities generally known as the Macsteel Group operating in such close collaboration that even Mr Hoffman (who was the main witness on behalf of MSC) did not know exactly how it was structured and whether the one entity, Macsteel Trading, was deregistered. He was called a director but was never reflected as a director on the Cipro documents. This point was not taken further. It seemed that all transactions by MT were purportedly ascribed to MSC. The trial court obiter found that because this was not part of the discourse before the court, the matter could not escape scrutiny. There were unsatisfactory explanations that previous registered entities were dormant and/or became divisions of MSC. This confusion does not have any bearing on the dispute between the parties but reflected on the credibility of Hoffman.

(b) The terms of the agreement:

The appellant made much of the origin of a letter dated 8 April 2014 but the trial court ruled in favour of the respondent as to the origin and the value thereof. The court a quo ruled that MSC did not prove on a balance of probabilities that the email originated from Dajee. The finding of the trial court took much of the sting out of MSC's argument. The court will deal below with the credibility finding of the court a quo and when a court of higher instance will intervene with a credibility finding.

(c) The series of cheques:

The Parties initially agreed that HF would give MSC a series of 12 post-dated cheques in the amount of R 50 000 per cheque. The cheques amounted to R 600 000 and is less than 50 % of XP's outstanding debt. If it was a term of the agreement that the cheques were given as future payment of XP's debt like Hoffman avers, one would expect that the total of the amounts of the cheques would be equal to the outstanding debt of XP. When the cheques were later returned and exchanged for cheques of R 25 000 each, these amounts of the cheques still did not equate to the full outstanding debt. This supports the version by Dajee's that these payments were to be set off against the debt of XP after MSC granted HF credit on account for steel products and not as an unconditional payment of XP's debts.

(d) The version of the agreement:

Hoffman testified that the agreement was unconditional, and that HF would receive credit facility from MSC in return for the payment of XP's debt. Dajee's version was that the monthly payments were made on

behalf of XP towards MSC **on condition** that should HF take over XP's business, the payments will be credited to HF's account. Should it not realize, MSC will refund HF the balance after clearing HF's account with MSC. The later replacement of the cheques with new post-dated cheques in the amount of R 25 000 did not alter the terms of the agreement according to Dajee. The court a quo held that if it was that the cheques were for HF to pay the full debt of XP the appellant would have required HF to furnish post-dated cheques for the full outstanding amount. The first series of cheques covered only half of the outstanding debt. The dispute with regard to the condition remained unresolved between the parties. The trial court held that this confirmed Dajee's version that the payments were conditional. The Court a quo held that because the suspensive condition was not fulfilled, HF was entitled to repayment of the payments made. See **Barenblatt v Son & Dixon 1917 CPD 319** and **Rhooide v De Kock [2013] 2 All SA 389**.

- (e) HF's claim to set off of the payments made against the credit it received from MSC was not replied to by the appellant resulting in it being uncontested. HF claimed that in terms of the credit facility HF ceded all of its rights, title and interest in the debt MT owed to HF in the amount of R 575 000 to MSC, being the amount paid by HF to MT in anticipation of the possible takeover of XP by HF. The takeover did not materialized and after the set off, HF was indebted to MSC on the credit facility in the amount of R 166 439,89. This amount was paid on

21 April 2015 and HF was no longer in debt to MSC.

- (f) The court a quo made a credibility finding in regard of Hoffman, Schoeman and Dajee and found that the version of Dajee was consistent, probable and logic when compared with that of Hoffman and Schoeman. Their versions were rejected.
- (g) The court a quo accepted Dajee's version that HF did not take over the business of XP but merely purchased the three machines from XP. The question of whether HF needed the vendor number of XP to enter and continue in the steel market was denied by Dajee and it is not contested that HF obtained its own vendor number and proceeded with trading in the steel business. XP remained in possession of two other machines and remained on the premises to continue with business. HF did not take over the business of XP but started its own business from the premises.

ON APPEAL:

[19] The thrust of argument on behalf of the appellant by Mr Rossouw in his heads of argument were the following:

- (a) The trial Judge ignored the methodology to be followed as summarised in ***Stellenbosch Farmers' Winery Group Ltd v Martel & Cie 2003(1) SA***;
- (b) The version of the respondent was inherent absurd in that once it has received and utilized the credit of R 1 million it can simply say it is no longer taking over XP's business;
- (c) That HF undertook to pay the full outstanding amount owed by XP to MSC as "*counter performance*" for a credit facility of R 1 million to allow HF to enter the steel industry and to conduct business from the same premises as XP; and
- (d) The court erred in finding that Dajee's version was more probable despite displaying a questionable relationship with the truth;

[20] Mr Wesley argued that the court a quo was correct in finding in favour of HF and that HF did not take over the business of XP but purchased three machines from XP to enter the trade.

EVALUATION:

[21] The technique generally used by the courts when confronted with two or more irreconcilable versions is well known as set out in the **Stellenbosch case supra par 5**. To come to a conclusion, a court will find on (i) the credibility of various factual witnesses; (ii) their reliability and (iii) the probabilities.

[21] The argument that the trial court ignored the methodology to be followed as set out in the **Stellenbosch case supra** is without merit. A court does not have

to mention a reported case to indicate the application thereof. It is clear from the discussion by Khumalo J that she applied the test when confronted by two irreconcilable versions. The court is satisfied that the court a quo indeed evaluated the evidence as required. Khumalo made credibility findings with regard to the witnesses and the probabilities after evaluating the evidence in its totality. The court disagrees with Mr Rossouw on this aspect.

[22] A similar approach is to be found in **Dreyer v Axzs Industries 2006 (5) SA 548 SCA** and in **National Employers' General Co Insurance v Jagers 1984 (4) SA 437 E at 440D**. The court a quo did weigh and compare the different versions before coming to the conclusion that the version of Dajee is more probable than that of Hoffman. The court a quo had the opportunity to observe the witnesses also with regard to demeanour before ruling in favour of the defendant (HF). The trial court also made an adverse credibility finding in respect of the appellant's witness Schoeman. This court did not have that opportunity to observe the witnesses and will only intervene when it is very clear that the trial court erred in this regard.

[23] It is trite that a court of appeal is very reluctant to reverse the decision of the court of first instance and to upset the findings of the trial court. The trial court had the opportunity to hear the witnesses, to observe their demeanour and comparing all the witnesses' performances when evaluating the evidence as a whole. Although a litigant is entitled to a rehearing, it is limited to the principles as summarized in **R v Hlatswayo & Another 1948 2) SA 677 A at 705-6** and **Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa 4th ED p 916-918**.

[24]The version by Hoffman that HF would not be able to trade without XP's vendor number was denied by Dajee. He testified that HF did not need XP's vendor number but that HF obtained its own vendor number. There was no evidence that HF was indeed struggling without a vendor number and that MSC refused HF sales without XP's vendor number.

[25]The issue of the shares of XP was raised by Schoeman on behalf of MSC and Dajee did not make much thereof but stated that after investigation of the financial position of XP, it made no business sense to purchase the shares. The court a quo held that Dajee's version with regard to the shares was the more probable version.

[26] A further aspect in favour of HF's version to deliver the post-dated cheques to MSC is that if it was as stated by Hofmann, all that HF would receive for payment of R 1 million to MSC is a credit facility. This makes no business sense at all for HF.

[27] It is highly unlikely that the reasonable business person would enter into such an agreement where his business has to pay R 1 million only to receive a credit facility in return thereof. On Hofmann's version HF would pay R 1 million for a credit facility alone **but** will still have to pay for all other purchases made on account. The opposite is more probable in that payments made will be returned to HF should HF's taking over of XP did not materialise or that the payments would be set off.

[28] The alleged ***inherent absurdity*** as referred to by Mr Rossouw in his heads of arguments (par 10) is not persuasive at all. There is no merit in arguing that HF would after utilising the credit facility to turn around and say: *“Thank you for the credit but I am not taking over XP’s business”*. MSC would by way of ordinary contractual principles be entitled to recover the full purchase price from HF for any steel sold and delivered on credit irrespective of any other payments made or not made.

[29] It ought to be remembered that MSC was in the process of winding up XP but withdrew its application for some undisclosed reason. Without speculating, it is a reasonable inference that MSC by receiving “payment” from HF for XP would receive full payment from HF for XP preferring it above other creditors and thereby avoid the consequences of the Insolvency Act of probably receiving a small dividend or be obliged to contribute to the liquidation process.

[30] If Hoffman’s version is accepted, MSC would benefit by receiving full payment on behalf of XP and full payment by HF for any sales made while HF will be worse off by more than R 1 million for a mere credit facility. Such a proposition is highly improbable and makes no business sense and on this alone the version of Hofmann cannot stand. Hoffmann’s version is most unlikely and improbable if compared with the version of Dajee. This version by Hoffman makes no financial sense.

[31] This court finds no misdirection by the trial court in any way and the appeal can therefore not succeed.

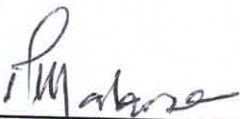
We therefore make the following order:

The appeal is dismissed with costs.



J HOLLAND-MUTER

Acting Judge of the Pretoria High Court



P MABUSE

Judge of the Pretoria High Court.



N BAM

Acting Judge of the Pretoria High Court

(Appeal heard on 28 April 2021.

Judgement on CaseLines on May 2021)

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