



IN THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE PROVINCIAL DIVISION, KIMBERLEY)

Case No: 141/2016

In the matter between:

KAROO WILDDIENSTE (PTY) LTD

Plaintiff

and

GRIQWALAND WEST COOPERATIVE LIMITED

Defendant

and

G.D. ANDRAG

1<sup>st</sup> Third Party

M. LOUW

2<sup>nd</sup> Third Party

Coram: Lever J

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JUDGMENT

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Lever J

1. This judgment deals with an application for absolution from the instance at the close of the plaintiff's case. For the sake of convenience and to avoid confusion the parties will be referred to as in the summons. The applicant for absolution, Griqwaland West Cooperative Limited, will be

referred to as the defendant or where appropriate GWK. The respondent, Karoo Wilddienste (Pty) Ltd, will be referred to as the plaintiff or Karoo Wilddienste.

2. The litigation arises out of an auction conducted by the defendant at the behest of the plaintiff on the plaintiff's property, on the 16 May 2015. The auction involved the sale of certain wild game. The wild game on auction were divided into two categories. The first being 'boma game', which were sold, paid for, and essentially delivered after the fall of the hammer. The second category being 'catalogue' game. The catalogue game was sold at the fall of the hammer, but a 25% deposit was payable on the day of the sale and delivery was to take place later in the year. There were other terms alleged in the pleadings and in the plaintiff's evidence, inter alia that an invoice was to be delivered to the purchaser of each respective lot of catalogue game within a week of the sale. These additional terms are in dispute.
3. The present litigation involves two different lots of catalogue game that the defendant sold on behalf of the plaintiff at the said auction. The first lot that forms the basis of the current dispute was sold to the second third party. This lot consisted of 5 bontebokke which were sold at auction to the second third party. In respect of this lot the second third party's winning bid was in the amount of R650,000.00 (six hundred and fifty thousand Rand). The second lot that also forms part of the current

dispute consisted of a female black impala that was advertised as being a certain age at the time of the sale and would be pregnant at the time of delivery. This lot was sold to the first third party for the amount of R450,000.00 (four hundred and fifty thousand Rand). Collectively, I shall refer to the first and second third parties as the purchasers.

4. For various reasons not fully known at this stage and which are also not material to the present application both third parties (the purchasers) either did not follow through or defaulted on their respective obligations arising from their respective winning bids at the said auction. The reason why the third parties' respective defaults are not relevant at this stage is because their liability is conditional upon the defendant being held liable to the plaintiff. In those circumstances, if there is no basis to hold the defendant liable to the plaintiff, there is also then no basis to hold the third parties liable.
5. Flowing from the purchasers not fulfilling their contractual obligations respectively incurred by them, the plaintiff sued GWK (the defendant) for 'specific performance' in respect of both lots of catalogue game referred to above. It is central in determining the present application for absolution from the instance to remember and not lose sight of the fact that the defendant was the auctioneer. In essence and in substance the plaintiff's agent. To the extent necessary, the nature of the contractual relationship between the various parties involved in the relevant auction will be considered below.

6. Having regard to the application by the defendant and the particular arguments raised in support thereof by Mr Gilliland, who appeared for the defendant, it is necessary to quote the material parts of the Particulars of Claim verbatim. The said particulars read:

- "4. Op 16 Mei 2015 en te Jakhalsdans, Loxton, en ingevolge 'n mondelinge ooreenkoms aangegaan tussen die Eiser, behoorlik verteenwoordig deur sy direkteur Nicola Burgerd van der Westhuizen, en die verweerder, behoorlik verteenwoordig deur sy afslaer, Deon Klopper, het die partye as volg ooreengekom:
- 4.1 Die Verweerder, deur sy afslaer, Deon Klopper, op die veiling verskeie wildsoorte namens Eiser te koop sal aanbied;
  - 4.2 Die Verweerder binne een week na die veiling verkoopsfakture sal uitmaak en lewer aan alle persone wat op die voormelde veiling wild gekoop het;
  - 4.3 Die koopprys aldus ingevorder deur die Verweerder, na tender van lewering van wild voormeld in paragrawe 6.1 en 6.2 hieronder, aan Eiser sal oorbetaal.
5. Die Eiser het al sy verpligtinge uit hoofde van die ooreenkoms tussen hom en die Verweerder nagekom.
6. Die Verweerder het versuim om sy verpligtinge uit hoofde van die vormelde ooreenkoms na te kom deurdat hy versuim het om binne 'n week na die vormelde veiling, welke veiling plaasgevind het op 16 Mei 2015 te die plaas Jakhalsdans, die verkoopsfakture te lewer aan die kopers van die volgende wild, welke op die veiling verkoop is vir die bedrae soos hieronder aangedui, en om die betaling van 25% van die koopsomme aldus verskuldig, in te vorder:
- 6.1 X5 bontebokke R650,000.00
  - 6.2 X1 swart rooibok R450,000.00
7. Strydig met die bepalinge van die ooreenkoms voormeld, het Verweerder nagelaat en of versuim om;
- 7.1 die depositos van 25% van die bedrae uiteengesit in paragrawe 6.1 en 6.2 hierbo verwys na, met afloop van die veiling in te vorder.

- 7.2 die verkoopsfakture voormeld aan die kopers van die wild verwys na in paragrawe 6.1 en 6.2 hierbo te lewer.
- 7.3 die balans van die koopprys van die wild verwys na in paragrawe 6.1 en 6.2 hierbo uiteengesit teen tender van lewering, in te vorder en aan die eiser oor te betaal.
8. In die vooropstelling is die Verweerder aanspreeklik teenoor die Eiser vir die betaaling van die bedrag van R1,100,000.00 (Een Miljoen Een Honderd Duisend Rand), maar nieteenstande aanmaning daartoe weier en/of versuim die Verweerder om daardie, of enige ander bedrag aan die Eiser te betaal.

WEESHALWE eis Eiser van Verweerder as volg:

1. Betaaling van die bedrag van R1,100,000.00;
2. Rente op bovermelde bedrag a tempore morae;
3. Teen betaaling van die bedrag plus rente voormeld, tender Eiser onmiddellik lewering van die wild verwys na 6.1 en 6.2 hierbo;
4. Koste van die geding;
5. Sodanige verdere en/of alternatiewe regshulp waarop Eiser geregtig is."

7. The above quotation represents the material parts of the plaintiff's Particulars of Claim after certain minor amendments were sought and granted at the commencement of the trial.

8. It is clear from the Particulars of Claim set out above that plaintiff does not seek contractual damages from the defendant. It is further clear that plaintiff does not sue defendant in order to seek defendant's assistance in suing the purchasers to fulfil their obligations arising from the auction. Plaintiff in the Particulars of Claim does not seek to compel defendant to sue the purchasers to perform their respective obligations in terms of the sale concluded at the auction concerned. Nor does plaintiff seek a

re-cession of the right to claim the purchase price that plaintiff may have ceded to the defendant, and which is reflected in the general conditions of sale. Plaintiff seeks specific performance from the defendant in respect of the obligations of the purchasers incurred at the relevant auction. The Particulars of Claim quoted above allow no other reasonable interpretation.

9. In the context of the present application for absolution from the instance and in the special circumstances of this case, two questions arise. Firstly, has a complete or proper cause of action been pleaded by the plaintiff in order to hold defendant liable for the obligations of the purchasers. Stated differently, is there in fact a case for defendant to answer on the pleadings in respect of it being liable to the plaintiff for the obligations of the purchasers. Secondly, if there is in fact a case for the defendant to answer on the pleadings, is the evidence led on behalf of the plaintiff, as it stands at the close of the plaintiff's case of such a nature that a court applying its mind reasonably to such evidence might find for the plaintiff.

10. Absolution from the instance at the close of the plaintiff's case is provided for by the provisions of Rule 39(6) of the Uniform Rules of Court (the Rule/s). The said rule reads as follows:

"39(6) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his

behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.”

11. The test to be applied in an application for absolution from the instance at the close of the plaintiff’s case has been set out by Harms JA in the matter of **GORDON LLOYD PAGE & ASSOCIATES v RIVIERA AND ANOTHER**<sup>1</sup> as follows:

“[2] The test for absolution to be applied by a trial court at the end of the plaintiff’s case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

‘...(W)hen absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to the evidence, could or might (not should or ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).)’

This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine and Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4<sup>th</sup> ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one not the only reasonable one *Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is ‘evidence upon which a reasonable man might find for the plaintiff’ (*Gascoyne (loc cit)*) – a test which had its origin in jury trials when the ‘reasonable man’ was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The Court ought not to be concerned with what someone else might

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<sup>1</sup> 2001 (1) SA 88 (SCA) at 92E to 93A.

think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice."

12. The approach to the test for absolution set out above was specifically reaffirmed by the Supreme Court of Appeal (SCA) in the matter of **DE KLERK v ABSA BANK LIMITED AND OTHERS**<sup>2</sup>.

13. In the context of an application for absolution from the instance at the close of the plaintiff's case, the plaintiff must establish a *prima facie* case in the sense that it must adduce evidence on all of the elements of its claim. This is set out by Harms JA in the **GORDON LLOYD PAGE**<sup>3</sup> judgment. The relevant passage is included in the quote set out above and in the judgment itself is to be found at page 92G-H of that judgment.

14. A *prima facie* case in the sense set out above, is to be distinguished from the manner in which the phrase 'a *prima facie* case' is more commonly used. In this latter case the phrase means if the party upon whom the onus rested adduces evidence which calls for an answer from the opposing party, such party has established a *prima facie* case. If that evidence is not answered by the opposing party, then the *prima facie* case becomes conclusive proof and the party upon whom the onus

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<sup>2</sup> 2003 (4) SA 315 (SCA) at 323C-G.

<sup>3</sup> Above.

rested has discharged such onus and is entitled to judgment in its favour on the basis of such unchallenged evidence.<sup>4</sup>

15. The respondent opposing an application for absolution does not have to establish a *prima facie* case in this latter sense. Such respondent, in order to avoid absolution only has to adduce evidence on every element of its case. Unless such evidence is inherently unacceptable, it should be accepted as true in an application for absolution at the close of the plaintiff's case.<sup>5</sup>

16. Mr Gilliland on behalf of the defendant argued that absolution should be granted for the following reasons:

16.1. That ordinarily when a seller engages an auctioneer to conduct an auction, different contractual relationships come into being between three different parties resulting in three distinct contracts at different stages of the auctioneer in fact conducting the contemplated auction. In making this submission Mr Gilliland relied on the authority of **SPRINGFIELD OMNIBUS SERVICE DURBAN v PETER MASKELL AUCTION CC and ANOTHER**<sup>6</sup>.

16.2. The first agreement arises from the appointment by the seller of the auctioneer. In terms of this contract the auctioneer acts as the seller's agent.

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<sup>4</sup> HURLEY AND ANOTHER v MINISTER OF LAW AND ORDER 1985 (4) SA 709 (A) at 725H.

<sup>5</sup> ATLANTIC CONTINENTAL ASSURANCE Co. v VERMAAK 1973 (2) SA 525 (ECD) at 527C-D.

<sup>6</sup> 2006 (4) SA 188 (NPD) at 191I to 192C.

16.3. The second contract arises between the auctioneer and the prospective buyer. This contract usually comes into existence when a person registers as a buyer for the relevant auction and sometimes when a potential buyer makes a bid at the relevant auction. This contract is sometimes referred to as the 'rules of the game'. Essentially, the rules under which the auction would be conducted which the prospective buyers agree to in one of the ways referred to above.

16.4. The third contract is between the seller and the buyer. This contract comes into existence when a bidder at the respective auction has a sale awarded to her/him/it at the fall of the hammer. In other words, the auctioneer, as the seller's agent, on the fall of the hammer has awarded the relevant sale to the particular buyer who has made the highest acceptable bid, which results in a contract between the seller and the buyer.

16.5. It is not normal or customary for the auctioneer, being the seller's agent, to take on the obligations of the buyer to the seller unless there is a special provision to that effect in the agency agreement. It would be necessary to plead such special contractual provision if it existed in the agency agreement between the seller and the auctioneer. This is so because it would form the factual and legal basis for a claim of specific performance against the auctioneer for performance of the obligations of the buyer to the seller.

- 16.6. In the present case, the plaintiff has pleaded no such contractual basis for its claim of specific performance for the defendant to perform the obligations of the respective buyers relevant to plaintiff's claim.
- 16.7. In other words, there is no factual or contractual basis set out in plaintiff's Particulars of Claim that could form the factual and legal basis of plaintiff's claim that the defendant should perform the obligations of the respective buyers to the plaintiff.
- 16.8. It is submitted that in these circumstances it is not possible to say that the court reasonably assessing the evidence at the close of the plaintiff's case might or could find for the plaintiff.
- 16.9. Mr Van den Bergh the first witness for the plaintiff testified that the defendant's own auctioneer, Mr Klopper, said on a number of occasions that the defendant ought to pay the plaintiff.
- 16.10. Mr Van der Westhuizen the second witness for the plaintiff testified that he understood that the failure of defendant to collect the 25% deposit on the day of the sale and the failure to deliver the relevant invoices to the said buyers within one week of the sale meant that plaintiff was entitled to claim that the defendant fulfil the obligations of the respective purchasers. Mr Van der Westhuizen also testified that on occasions Mr Klopper also told him that the defendant should pay the plaintiff.

16.11. Mr Gilliland submitted that this was the high watermark of the plaintiff's evidence in support of its claim against the defendant. That this fell short of being evidence of plaintiff's claim.

16.12. Mr Gilliland further submitted that this is not a case where, as a result of its plea or for any other reason the onus on any aspect of the case rested on the defendant. In his submission, the onus rests on and remains that of the plaintiff.

16.13. Mr Gilliland also spent a great deal of time and effort in dealing with the ownership clauses and their legal effect in both the conditions of sale agreement and the liaison agreement. The defendant had pleaded that these two agreements formed part of the agency agreement it had entered into with the plaintiff. However, having regard to Mr Gagiano's express disavowal on behalf of the plaintiff, of any reliance on the ownership status of the game concerned after the auction, and Mr Gagiano's assertion that the plaintiff's claim is for specific performance, pure and simple, it is not necessary to consider the submissions on the effect of the ownership clauses in the said agreements.

16.14. Mr Gilliland submitted that the defendant was only obliged to pay the plaintiff if it collected the relevant amounts from the prospective purchasers. This, he submits, is what the plaintiff actually claimed in paragraph 4.3 of its Particulars of Claim. The said paragraph of plaintiff's Particulars of Claim has been quoted verbatim above. By extension, Mr Gilliland submitted that as the defendant

had not collected any money from the respective purchasers, it was not obliged to pay the plaintiff as claimed or at all. Mr Gilliland also submitted that clause 4.3 of the Particulars of Claim cannot be interpreted to mean that it was a claim for defendant to collect the balance of the purchase price or that there was an obligation on the defendant to stand good for the purchase price of the respective lots sold on auction.

17. Mr Gagiano on behalf of the plaintiff argued that absolution should be refused for the following reasons:

17.1. The provisions of the 'Conditions of Sale', an agreement in the form of a standard form agreement defendant uses for auctions and the 'liaison agreement' pleaded by defendant as part of its 'agency' agreement with plaintiff, supports the plaintiff's case. Defendant pleaded that the said 'agency' agreement was partly written and partly oral.

17.2. Mr Gagiano submitted that the defendant pleaded these agreements and their terms, and that plaintiff had accepted that as a correct reflection of the agreement that existed between them.

17.3. Mr Gagiano submitted that the plaintiff relied on these terms and specifically clause 5 of the 'Conditions of Sale' agreement assists plaintiff's case. The said clause 5 reads as follows:

"5. All goods and livestock (hereinafter referred to as the "assets") are sold by the Auctioneer as agent on behalf of the seller, who authorises the auctioneer to collect the purchase price from the

buyer and the seller hereby cedes to the auctioneer all the seller's rights, title and interest in and to its claim for payment of the purchase price against the purchaser which session (sic) the Auctioneer hereby accepts."

17.4. Mr Gagiano maintains that because of the cession contained in clause 5 of the conditions of sale agreement, the plaintiff has no other remedy but to sue the defendant for specific performance.

17.5. Mr Gagiano submits that the evidence of Mr Van den Bergh and Mr Van der Westhuizen in relation to both Mr Kloppers alleged point of view vis-a-vie the liability of the defendant to the plaintiff and the evidence of Mr Van der Westhuizen's understanding of the effect of the terms relating to the 25% deposit and the provision of the invoice within one week of the auction put in place a factual case that the defendant must answer. That in such circumstances absolution must be refused.

17.6. On behalf of the plaintiff, Mr Gagiano submitted that, plaintiff's case is for specific performance, defendant had the obligation to make payment to the plaintiff in September 2015. Defendant failed to make good on that obligation. Accordingly, he submitted the plaintiff was entitled to specific performance against the defendant.

17.7. Mr Gagiano submitted that plaintiff did not have to plead its remedies. He submitted that if there is a breach of the agreement the remedies follow as a matter of law. He submitted that the plaintiff's Particulars of Claim have laid a sufficient basis for its claim of specific performance.

17.8. Mr Gagiano referred the court to a request for Particulars for Trial lodged by the first third party and more particularly at paragraphs 3.7 to 3.11 of such request. In such request the first third party asked where, by whom on behalf of plaintiff/defendant, to whom on behalf of the first third party, and subject to what terms and conditions, was delivery offered but refused by the first third party. He then referred the court to the defendant's response thereto contained in paragraphs 10.1 to 10.3 of such response. In the said response the defendant informs the first third party that a Mr H Bosman on behalf of defendant tried to contact the first third party to arrange such delivery. That first third party deflected and stated he would contact plaintiff himself to arrange delivery. That this occurred during or about September 2015. That the terms of delivery were that 25% was to have been paid on the day of the auction and that the remainder of the purchase price was to be paid on delivery. In interrogating the defendant's response, Mr Gagiano asked if the defendant denies its obligation to effect delivery or make payment of the purchase price why would Mr Bosman go to the trouble of trying to facilitate delivery of the game concerned.

17.9. Mr Gagiano then referred to a passage in the transcript of the evidence where Mr Gilliland was cross-examining Mr Van der Westhuizen and Mr Gilliland put to Mr Van der Westhuizen:

"Mr Bosman will testify that after four or so attempts to arrange delivery or capture and delivery, he told you to sort it out with Mr

Andrag and Mr Louw and to let him know when delivery can take place so that the transaction can be finalised.”

Mr Gagiano argued that this position put to Mr Van der Westhuizen by Mr Gilliland contrasts and conflicts with the submission by Mr Gilliland that the defendant was merely the agent.

18. It is relevant to note at this stage that the evidence adduced by the plaintiff differed from what was pleaded. However, for the purposes of the absolution application and the view I take of such application, it is not necessary for me to consider and deal with these differences.

19. It is convenient to deal with the plaintiff's contentions opposing absolution first. The first submission to be considered is set out in paragraphs 17.1 to 17.4 above. In short that the cession in the 'Conditions of Sale' contract effectively meant that the plaintiff had no other remedy but to sue the defendant for specific performance.

20. In reply, Mr Gilliland dealt with the argument based on the cession on the following basis: Firstly, the plaintiff could not rely on the cession agreement because the agreement pleaded was between the auctioneer and the buyer.; The cession was not pleaded by the plaintiff.; There was no evidence that a cession had taken place. In support of this submission Mr Gilliland submitted that when he asked Mr Van der Westhuizen if the scenario of a buyer walking away from the sale agreement had been

specifically discussed, this would have been the time for Mr Van der Westhuizen to have raised the cession. Instead, Mr Van der Westhuizen simply answered that such scenario was not discussed.

21. At first blush, I was tempted to simply dismiss Mr Gilliland's submission on the cession out of hand. However, a cession does not require any formalities and the person entitled to those rights must clearly intend to cede them and must also do everything necessary to give effect to that intention.<sup>7</sup> There is no evidence to that effect from either of the plaintiff's witnesses.

22. Mr Gilliland's submissions on the cession might come into play at the close of the defendant's case. In my view in considering the application for absolution at the close of the plaintiff's case and in the special circumstances of this case, it would be more appropriate to assume to the benefit of the plaintiff that such cession had in fact taken place and to deal with the application for absolution on that basis.

23. Accordingly, for present purposes, the cession contemplated in terms of clause 5 of the Conditions of Sale will be assumed. It is clear from the terms of clause 5 quoted above that the plaintiff would have ceded its right to pursue the individual purchasers for their obligations to pay the purchase price.

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<sup>7</sup> Luttig v Jacobs 1951 (4) SA 563 (O) at 568A-D.

24. Such cession would deprive the plaintiff of the right to sue the said purchasers. Mr Gagiano is wrong when he submits that as a consequence of the cession the plaintiff has no remedy. The plaintiff has at least 3 ready remedies.
25. Firstly, it could sue defendant for contractual damages that might have flowed from its default in collecting the 25% deposit on the day of the sale and its default of not delivering to the respective purchasers the relevant invoice within 1 week of the sale. In fact, at one point the plaintiff had amended its claim to one of contractual damages then inexplicably changed it back to a claim for specific performance against the defendant for the performance of the obligations of the respective buyers to the seller without any contractual or legal basis for such claim.
26. Secondly, it could sue defendant for a *mandamus* compelling defendant to assist plaintiff to sue the respective purchasers to fulfil their obligations.
27. Thirdly, plaintiff could sue the defendant to re-cede the relevant right to pursue the purchasers for the purchase price back to the plaintiff.
28. More significantly, the fact that plaintiff may have ceded the right to claim payment from the respective purchasers to the defendant, this does not, in and of itself and on the basis of the terms of the said clause 5 set out above, create a right to claim such payment from the defendant

on the basis of 'specific performance'. Without more, no such right exists.

29. The next argument relied upon by Mr Gagiano is set out in paragraph 17.5 above, being that Mr Van den Bergh and Mr Van der Westhuizen's evidence of the alleged statements of Mr Klopper, the defendant's auctioneer. The short answer to this is that without an underlying contractual basis being pleaded for a claim for specific performance by the defendant on an obligation that rests on the respective purchasers, the allegations of what Mr Klopper may or may not have said amount to nothing more than an opinion without any discernible basis in fact or in law to hold such opinion. In short, such assertions cannot be evidence of anything in the context of the claim as pleaded read with the evidence at the close of the plaintiff's case. Without a factual or legal basis being established in either the particulars of claim or the evidence, such alleged opinion is simply untenable and inherently unacceptable as evidence, even at the close of plaintiff's case.

30. What Mr Klopper is alleged to have said can only be relevant if a factual or legal basis was pleaded for the defendant to stand in for the obligations of the purchasers, as was the case in **MARCUS v STAMPER and ZOUTENDIJK**<sup>8</sup>, where the auctioneer warranted the performance

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<sup>8</sup> 1910 AD 58.

of the purchaser. The probable reason why such warranty is not the normal practice in auctions is apparent from the facts of MARCUS' case.

31. The next argument raised on behalf of the plaintiff is set out in paragraph 17.6 above. This is to the effect that plaintiff's claim is for specific performance. That defendant was to pay in September 2015. Defendant failed to do so and therefore plaintiff can claim specific performance from defendant. Firstly, Mr Gagiano misstates the facts when he says defendant was obliged to pay in September 2015. On plaintiff's own version and paragraph 4.3, as read with paragraph 7.1 and 7.3 of its Particulars of Claim, defendant was obliged to facilitate collection of the relevant monies and delivery of the game concerned to the purchasers and in circumstances where delivery and payment were assured, make payment to the plaintiff.

32. Plaintiff not only misstates the facts but also conflates the three different contracts that come into existence when an auctioneer is appointed to run an auction on behalf of the seller. In short, plaintiff has not pleaded or established a claim for the defendant to perform the obligations of the respective purchasers.

33. The next argument to be dealt with is set out in paragraph 17.7 above. Here Mr Gagiano argues that plaintiff's particulars of claim set out a sufficient basis for its claim. That plaintiff does not have to plead

its remedies. That plaintiff need only plead the breach and the remedies follow as a matter of law.

34. Again, plaintiff conflates the 3 agreements that come into being when an auctioneer is appointed to and runs an auction. Plaintiff has to plead a contractual basis for the defendant to be held liable to stand good for the obligations of the respective purchasers, this the plaintiff has failed to do. Accordingly, the plaintiff's argument on this issue has no substance.

35. The plaintiff's arguments set out in paragraphs 17.8 and 17.9 above run together. The relevant statements attributed to Mr Bosman are not evidence that the relationship was something more than just an agreement of agency. Mr Bosman's alleged statements have to be assessed in the context that his efforts were consistent with an agent trying to deliver the pre-requisite circumstances in which it would be entitled to its commission, nothing more.

36. Turning now to the arguments raised by Mr Gilliland on behalf of the defendant.

37. The first argument set out by the defendant appears from paragraphs 16.1 to 16.8 above. In brief this argument relates to the 3 contracts that come into being when an auctioneer is appointed to run an auction. The significance of those separate and distinct contracts. The fact that

ordinarily the auctioneer does not take on the obligations of the purchaser in the absence of a special agreement to that effect.

38. No such agreement has been pleaded. In effect such an agreement, if it existed, would amount to a warranty by the auctioneer that the purchaser will perform in respect of its/his/her obligations. There is no evidence at all of such a term being part of the agreement of agency between the plaintiff and the defendant relating to the conduct of such auction. Nor is there any evidence of any other term to the same effect being agreed to by the plaintiff and the defendant.

39. The issues raised in paragraphs 16.9 and 16.11 run together. The evidence of what Mr Klopper is alleged to have said has already been dealt with. It does not assist the plaintiff in avoiding absolution from the instance in the circumstances of this case. In the circumstances of this case even if Mr Klopper did make the statement he is alleged to have made, there is simply no plausible or credible basis to consider the alleged statements as evidence in support of a claim that plaintiff has failed to allege or establish in both the pleadings and the evidence.

40. The issue of the failure to collect the 25% deposit on the day of the auction and the failure to deliver the relevant invoices within one week from the sale and more specifically the fact that Mr Van der Westhuizen claims that he understood from those two terms that the defendant has an obligation to stand good for the contractual obligations of the

purchasers, is just so far fetched and unreasonable in all of the circumstances of this case that it can simply be treated as unreasonable, untenable and inherently unacceptable. It cannot form the basis for successfully opposing an application for absolution from the instance at the close of the plaintiff's case.

41. In my view Mr Gilliland is correct, there is an essential averment missing from its claim as pleaded in the plaintiff's Particulars of Claim that would establish a factual or legal basis for holding the defendant liable for the obligations of the respective purchasers. There has also been no acceptable evidence that would establish a basis for holding the defendant liable in such circumstances.

42. In short plaintiff has not adduced evidence on all aspects of its claim. It has not pleaded a factual or legal basis for the requisite special term being part of its agency agreement with the defendant. Plaintiff has adduced no evidence to that effect. Accordingly, I cannot find that there is evidence in respect of which I might find for the plaintiff. In these circumstances, it is appropriate that I uphold the defendant's application for absolution from the instance at the close of the plaintiff's case.

43. In regard to the costs of the application for absolution from the instance, including the costs of the action not already determined, I considered, due to the failure of plaintiff to appropriately plead its case to award costs as on exception. Such approach was not considered by

either party when the matter was argued before me. I then had regard to the manner in which Mr Gilliland comprehensively dealt with the question on the issue of change of ownership as provided for in the written parts of the agreement. It occurred to me that in all probability Mr Gilliland on behalf of the defendant was being cautious as a result of his concerns relating to the deemed change of ownership and so avoided taking the exception. That taken together with the attitude of Mr Gagliano on behalf of the plaintiff that whichever way the application for absolution went the costs should follow the event, I decided that the most equitable approach in the circumstances was to award the costs of the absolution application, including the costs of the application not already disposed of by way of a prior court order, to the defendant.

44. The last question to consider are the costs of the postponement on the 26 and 27 October 2020. In respect of the costs related to this postponement affidavits have been filed on behalf of both the plaintiff and the defendant.

45. The plaintiff in its affidavit takes the position that the second third party was aware of the matter proceeding on the 26 and 27 October 2020 and had failed to take steps to ensure that he had legal representation after the withdrawal of his previous attorney. Consequently, the plaintiff's position, as set out in the affidavits referred to is that the second third party should pay the costs related to the postponement of the matter on the 26 and 27 October 2020.

46. The defendant's position on the other hand was that the plaintiff and the second third party should be jointly and severally liable for the costs occasioned by postponing the matter on the 26 and 27 October 2020. The basis for this submission is that after being joined as a third party, the second third party was to be served with all documents and be given notice as a party under the provisions of Rule 13(5). As *dominus litus*, plaintiff served the relevant notice of set down on the second third parties erstwhile attorney's local correspondent. This defendant submitted was done in circumstances where plaintiff ought to have known that this was no longer effective service on the second third party.

47. The defendant submitted that the second third party should be jointly and severally liable to pay the costs occasioned by postponing the hearing on the 26 and 27 October 2020, because he did not provide an address contemplated in Rule 16(4)(b).

48. Further, defendant set out in the affidavit filed on its behalf on this issue of the costs related to the postponement on 26 and 27 October 2020, that the second third party had averred that he had given instructions to Blair Attorneys in Bloemfontein before the 26 October 2020.

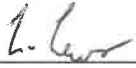
49. Plaintiff's evidence that second third party was aware of the matter proceeding on the 26 and 27 October 2020 has not been challenged. In

fact, to some extent, it is supported by the defendant's assertion that the second third party had instructed attorneys before the 26 October 2020.

50. Unfortunately, the second third party has not adduced evidence but it is clear that the postponement of the matter on the 26 and 27 October 2020 was at his instance. There is no direct evidence on record from him to show that second third party needed such postponement due to the fact that he did not have timeous notice of the proceedings on those dates. There is no basis upon which I can ignore the evidence of the plaintiff that second third party was aware that the matter would proceed on the said dates. In the circumstances I believe second third party should bear the costs of the postponement of the matter on the 26 and 27 October 2020.

In the circumstances the following order is made:

- 1) The defendant is granted absolution from the instance.
- 2) The plaintiff is to pay the costs of such application, such costs to include the costs of the action that are not as yet disposed of by any existing Court Order in this matter.
- 3) The second third party is to pay the costs of the postponement of the matter on the 26 and 27 October 2020.



Lawrence Lever  
Judge - Northern Cape Division, Kimberley

**Representation:**

Plaintiff: Adv GJ Gagliano oio Engelsman Magabane Inc.

Defendant: Adv JG Gilliland oio Van De Wall Inc.

Date of Hearing: 19 August 2021

Date of Judgment: 17 September 2021