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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

43579/13

25/1/2018

In the matter between

LIBERTY GROUP LIMITED trading as LIBERTY LIFE PLAINTIFF

(REGISTRATION NUMBER [...])

And

HENRY PHULANE MAKGOTLA

FIRST DEFENDANT

(IDENTITY NUMBER [...])

SEMPOPI JOYCE MAKGOTLA

SECOND DEFENDANT

(IDENTITY NUMBER [...])

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The plaintiff instituted action against the defendants for the recovery of an

amount of R211 763.96 being Agent's Commission which was overpaid and was now being clawed back. The matter did *not* proceed against the second defendant who has passed away. The claim against the first defendant is based on a suretyship he concluded with the plaintiff on 15 August 2003 as a member and on behalf of a Closed Corporation, African Skies. There was an alternative claim in terms of section 2e (5) of the Closed Corporation 69 of 1984 holding the defendant personally liable for the debts of the close corporation as at date of deregistration. Africa Skies was, deregistered as reflected in a certificate by the Registrar of Companies Issued on 17 May 2013. The plaintiff was not aware that the Closed Corporation was deregistered, Summons commencing this action was issued on 17 July 2013.

BACKGROUND

[2] It was common cause that the closed corporation represented by the defendants concluded a 'Broking Agreement' on 14 October 2003 where it was appointed as 'independent intermediary' as defined in the Long Term Insurance Act and In the Broking Agreement the closed corporation is referred to as 'brokerage', In terms of the Suretyship the first defendant bound himself jointly and severally as surety for and Co-Principal Debtor *in solidum* with the Close Corporation for payment on demand to the plaintiff of any indebtedness in terms of the Agreement. It was also agreed that the suretyship shall remain in place as long as the Close Corporation remained indebted to the, plaintiff, and furthermore that all legal costs of the plaintiff would be paid on an attorney and client scale,

[3] Some of the material terms relied upon were pleaded as follows;

"7.6 The Commissions referred to in sub-clause 8.1 of the Agreement shall be paid in accordance with the Schedule of Commissions

7.7 Should a contract issued pursuant to the proposal ,submitted by the Close Corporation lapse, and not be reinstated within three months from the date of lapse, no commission shall be paid ...unless such reinstatement was the result of the sole efforts of the Close Corporation..

7.8

7.9 If a contract on the life of any person, which is issued by the Plaintiff, or any associated company of the plaintiff, is surrendered ,cancelled, made

paid up or lapsed or the sum assured or premium , reduced or an automatic premium loan Is taken on the policy or a loan taken within a period of six months a before or after the date of any application to the plaintiff for a new contract on such person's life, total commission on the new contract shall be determined by the plaintiff and the Brokerage shall refund any excess commission ;

7.13

7,14

7.16

7.16 On termination of the Agreement, payment of any commission to the Close Corporation shall be subject to:

(a) The liquidation or set off of all indebtedness to the plaintiff; and

(b) Compliance by the Close Corporation with clause 8.3 of the Agreement;

7.17

7.18 Any advances made to the Close Corporation at any time against commission to be earned.... Shall constituted debts of the Close Corporation to the Plaintiff, which the Plaintiff may call upon to be paid at any time. Should any debts remain outstanding in excess of 30 days, they shall attract interest at a rate determined from time to time by the Executive Director of Financial Services Operation, which rate shall not exceed the maximum rate permitted in terms of the Usury Act. A certificate setting out the indebtedness of the Close Corporation to the Plaintiff signed by the Director or General Manager of the Plaintiff shall be prima facie evidence of such indebtedness.....”

[4] The closed corporation was paid commissions on contracts introduced and accepted by the plaintiff. The commission was payable in advance. The contracts consisted of insurance policies and investment policies where premiums were paid on a monthly basis. The plaintiff was entitled to reclaim payment of commissions paid in advance where the contracts were subsequently surrendered, cancelled, made paid up or had lapsed. This is referred to as clawing back of commission overpaid. During the duration of the contract it was

possible that where the brokerage submitted new business which was accepted, that set off was applied and the negative amounts of commission be deducted from commission due.

[5] Ms Muldoon, employed by the plaintiff for 16 years testified that she was responsible for preparing the commission statements which statement, were discovered. She did not know why the , Broking Agreement was terminated or whether it was at the instance of the plaintiff or the defendants. The statements were compiled from information sourced from the systems of the plaintiff, which though different in format are, the same. It was a requirement that in respect of policies, and investments that businesses remain active in the books of the plaintiff for a period of 2 years (policies) and 5 years (Investments) respectively. Commission was earned in respect of business introduced and accepted and this was reflected at payment of first year commission, and commission on annual premium increases on the statements,

[6] She took us through some of the statements to illustrate commission earned and those reflecting negative amounts are the commission which has to be reclaimed or clawed back by plaintiff. The Commission payable to the brokerage is the same as reflected on the commission statements. These were usually sent to the brokerage and they were also made available to the brokerage online, so that the brokerage would have at all times information regarding the commission statements. She testified that according to information available the commission was paid to African Skies.

[7] Examples were given of a commission statement and the commission movement statement. As shown on page 85 of the bundle the commencement date is recorded, which is the same date in respect of all the statements; followed by African Skies mentioned as the intermediary; then the statement date and the amount due to the intermediary of R13 242, 12. On page, 75 of the bundle being the schedule on commission movements is shown that the latter amount had been paid to the intermediary. On page 90 of the bundle is shown that an amount of R18 926.56 was payable as commission, that there was a negative balance of- R10662.90 (commission over paid in respect of lapsed policies); the balance of R9265.66 is reflected on the commission movement schedule, page 78, as being

paid to the intermediary.

The defendant did not object to the statements as presented.

[8] Although the agreement was terminated on 19 May 2008 the commission statements annexed to the particulars of claim as annexure 'O' indicate now the negative amounts (overpaid commission) accumulated as a result to lapsed policies. A schedule annexed to annexure 'D' shows which kind of policies were affected, the policy numbers and names of the client. On 7 May 2009 the negative amount ,that is the amount of commission to be clawed back stood at R211 763.96 and this was the amount claimed from the first defendant. The certificate of balance as provided for in the • agreement was not signed as provided in the agreement.

[9] The first defendant raised prescription. In a special plea, he stated that the plaintiff's claim had prescribed on May 2008, 'the debt having been transferred to the legal department of the collection on 2 June 2009 and that upon termination of the contract the plaintiff had all facts which gave rise to the claim and the identity of the debtor.' On the merits it was denied in his plea that the Closed Corporation had been deregistered. The defendant denied that he had knowledge of the commission statements and of his indebtedness in the amount claimed by the plaintiff.

[10] The first defendant testified that he had experience of fifteen years in the Insurance business when he joined the plaintiff in 2003, and that at the same time he also did business for other insurance companies. According; to the him and in terms of the rules of the plaintiff he was obliged to pay back commission on lapsed policies within 12 months and he denied that business had to be on the books for 2 years and 5 years as mentioned by Ms Muldoon. He denied that he wrote all that business which resulted in the amount claimed. He last wrote business for the plaintiff during 2006. He denied ever receiving any commission after 2008 after the agreement had been terminated or that he wrote business for the plaintiff during this time. He had lodged a complaint that there were fraudulent applications made in the name of the Close Corporation and that the commission

claimed back related to these policies. The first defendant alluded to hearing before ASISA that he had requested a DVD of the hearing which was never availed to him. He contended that the plaintiff had knowledge of this hearing.

[11] It is apposite to mention that during the testimony of Ms Muldon, Mr Matemane who represented the first defendant objected to the use of the trial bundle during the leading of evidence. He informed the court that they were not in possession of the trial bundle, he had been instructed a few days before the hearing. Mr Roux for the plaintiff indicated that the defendant had been though four attorney, who had withdrawn and the trial bundle had been discovered as confirmed in the Pre-trial minute. I ruled that the trial proceed because on a reading of the minute, of the third pre-trial minute, held on 28 October 2018, the defendant seem to have been aware of the content of the documents discovered. Furthermore, Mr Matemane should have enquired that he was in possession of all the necessary information especially that he had agreed to represent the first defendant at the trial which he knew was proceeding.

THE LAW

[12] Mr Roux argued that the first defendant had failed to put up a version in cross-examination by disputing the evidence of the plaintiff. An opportunity had to be given to the plaintiff to respond to the version of the defendant which was also pleaded. Consequently, failure to put up a version to illustrate which aspect of the plaintiff's evidence is disputed, would entitle the plaintiff to assume that the defendant had admitted and accepted as correct the version of the plaintiff; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at paragraph 51, this rule was also affirmed in *S v. Bassak* 2000 ZACSA paragraph 26;

"[61] As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the point by questions put in cross examination, . showing that an imputation is intended to be made and to afford the witness opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character"

[13] The cross-examination of Ms Muldoon concentrated mainly on the issue of prescription. No version for the first defendant was put up to dispute the fact that commission was paid to the Closed Corporation in advance, and that there was commission which had to be clawed back, this despite his contention that the policies recorded were fraudulent. In my view no evidence was offered to prove that the commission was not paid to the Closed Corporation. The first defendant has not disputed the fact that the commission statements were availed to the Closed Corporation by post and also online.

[14] He has conceded that where there were lapses then commission paid in advance, which constituted , overpayment had to be repaid and that such payment would be effected by setting off from commission earned. After the contract was terminated on 19 May 2008 then on the evidence of Ms Muldoon the commission earned would come from commission as a result of annual premium increment in respect of those policies which remained on the books of the plaintiff. In his evidence mention was made of an enquiry before a body known as ASISA. It does not appear from the pleadings, that that issue was pleaded. Therefore, this is not relevant to the issue of his indebtedness to the plaintiff. Furthermore, the first defendant has not disputed why he should not be held liable for the liabilities of the Close Corporation in terms of section 26(5) of the Closed Corporation Act. He seems to put the blame for deregistration on the plaintiff without living a basis for such conclusion. It does not seem to me that he studies the commission statements and schedules properly because they do not show that Close Corporations did business for the plaintiff after the contract was terminated. My understanding is that figures were drawn from first year commission earned and that in respect of the policies which had lapsed, set off applied to the Closed Corporation's indebtedness.

[15] Mr Roux was asked to address the fact that the certificate of balance annexed to the summon, was not signed by a director as provided in the agreement. He correctly submitted that failure to do so did not prejudice the defendants, as the purpose of the certificate was to establish a *prima facie* case thereby shifting the onus to the defendant. Ms Muldoon testified a, how the

amount of indebtedness was calculated.

[16] The last issue to determine iii whether the first defendant's plea on prescription should succeed or not. It was trite that the Prescription Act 68 of 1969 provided for the circumstances in which debt is extinguished and that In this instance section 11(d) providing for extinction of the debt after three years. Also applicable is section 12 (1) which provides that (a) *'prescription shall commence to run as soon as the debt is due'* and 12 (3) *'A debt shall not be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor ,hall be deemed to have such knowledge if he could have acquired It by exercising reasonable care.*

[17] Mr Matemane argued that the plaintiff had acquired complete knowledge of the facts leading to the indebtedness claimed on 7 May 2009 and that prescription commenced to run from that time, Mr Roux argued that it was impossible for the plaintiff to have acquired full knowledge of the indebtedness because the figure continued to change every month as such indebtedness was set either increased as a result of the policies that were lapsing or decreased as commission earned was set off, and that this continued to be the case even after the determination of the amount claimed of R211, 763.96 on 7 May 2009. Another factor was that the plaintiff had no knowledge after conducting a Cipro search as appears in annexure B on 17 May 2013 which confirmed that the deregistration of African Skies. Action was instituted on 17 July 2013.

[18] In terms of the Agreement the indebtedness to the plaintiff did not disappear as a result of the cancellation, of the agreement. According to Ms Muldoon there would not be any prescription because there was continued movement on the balances. It is my view that there would always be movement on the balances for a long time after the termination of the contract, even after twenty years e.g. a retirement annuity policy or a lapse of policy being made paid up long after the period of risk on the books of the plaintiff. On a study of Policy Movements, Commission Movements and Commission Statements relied upon the Indebtedness of the defendant was not reducing.

It is my view that the plaintiff by drawing the line on the indebtedness of the defendants at R211 763.96 on 7 May 2009 made an election to recover commission overpaid up to that amount. If there was my intention to adjust the figure it would have been pleaded or the particulars of claim would have been amended to cater for additional amounts occasioned by the indefinite movement of the balances.

[19] In *Truter and Another v Deyssel* 2008 (4) SA 168 (SCA) states:

"[15]For the purposes of the Act, the term 'debt due' means debt which is owing and payable. A debt is due in the sense that the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against that debtor is in place, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."

"[18] Cause of action for the purpose, of prescription thus means-

...,every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

In my view all the facts necessary to institute action in terms of the surety agreement were readily available to the plaintiff and in as far as the deregistration was concerned could have been readily available on 7 May 2009 when the election to sue was made. It is for this reason that the special plea of prescription should be upheld.

[20] In the result the following order is given:

1. The special plea of prescription is upheld and the plaintiff's action is dismissed with Costs.

TLHAPI W

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON : 16 AUGUST 2017

JUDGMENT RESERVED ON : 17 AUGUST 2017

ATTORNEY FOR THE PLAINTIFF : RC CHRISTIE INCORPORATED.

ATTORNEYS FOR THE DEFENDANT : RAMANTSI ATTORNEYS.