



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2777/2016

In the matter between:

NICOLAAS JOHANNES PETRUS VAN DER MEULEN 1ST Plaintiff

CAROLINA JOHANNA VAN DER MEULEN 2nd Plaintiff

(h/a SMALDEEL BOERDERY)

and

PIETER JOUBERT 1ST Respondent

PLATBERG LEWENDE HAWA BK 2nd Respondent

JUDGMENT BY: MHLAMBI J,

HEARD ON: 09, 10 and 12 OCTOBER 2018

DELIVERED ON: 18 OCTOBER 2018

MHLAMBI, J

- [1] The plaintiffs, trading in partnership as "*Smaldeel Boerdery*", sued the defendants for the payment of the amounts of R 1 026 000.00 and R 76 413.20. The claims were based on an alleged oral agreement entered into at Harrismith on 19 February 2016 between Johan Van Der Meulen, the plaintiff's representative and second defendant for the purchase, by the plaintiffs, of hundred cows and calves from the second defendant.
- [2] The defendants resisted the claims alleging that Johan Van Der Meulen instructed the second defendant (as represented by the first defendant) to act as an agent for the plaintiffs and to look for cows and calves for them to purchase and that such mandate was duly executed.
- [3] At the inception of the trial, an amendment of the particulars of claim was sought and granted in terms of which prayers 1 and 2 were amended to read R 639,000.00 and R 52 413.00 respectively. The plaintiffs' case relies on the testimony of three witnesses, namely the first plaintiff, Lieutenant Colonel Odendaal and the first plaintiff's brother and representative in the purchase transaction, Johan Van Der Meulen. The defendant closed its case without leading any evidence.
- [4] The identity of the defendants is undisputed and it is common cause that the plaintiffs paid to the second defendant the amount

of R 1,026,000.00 for the cows and calves on 19 February 2016 and were issued with a tax invoice by the second defendant as proof of payment. The cattle were delivered to the plaintiffs at Harrismith on 26 February 2016. On or about 18 March 2016, the South African police attached and removed the said cattle from the plaintiffs' farm as property alleged to have been stolen.

[5] The issues to be decided are:

4.1 Whether an oral agreement existed between the plaintiffs and the second defendant for the purchase of the cattle;

4.2 Whether the defendant(s) were the plaintiffs' agent.

[6] Mr Nicolaas Johannes Petrus Van Der Meulen testified that he was a farmer and in partnership with his wife, the second plaintiff, conducted a farming enterprise mostly in cattle known as "*Smaldeel Boerdery*" at Hoopstad. As the land at Hoopstad became dry, they leased a tract of land at Harrismith, which was later managed by the first plaintiff's brother, Johan Van Der Meulen, for farming purposes. The plaintiffs needed cattle on this farm. The first plaintiff's brother, Johan, arranged with Platberg Lewende Hawe for the purchase of hundred cows and calves for which the plaintiffs paid R 1,026,000.00. He did not know the owner of the cattle. The cattle bought were removed from the plaintiffs' possession by the police during March 2016 as it was alleged that they were stolen. The thief in that case was convicted and sentenced.

- [7] His testimony is to the effect that Johan Van Der Meulen suggested to him that Johan's friend, the first defendant, act as an agent for the plaintiffs and that, after 2013, they had done some transactions with the first defendant as agent. He confirmed under cross-examination the correctness of the information furnished by the plaintiffs in their further particulars dated 27 March 2017 that "*Eisers het Eerste verweerder gemagtig om honderd koeie en kalwers vir Eisers te kry om aan te koop*"¹. He, the first plaintiff, did not have discussions with the defendants as his brother had the mandate to do so. He was sent cellular phone photos of the cattle whereafter he authorized an electronic payment for the purchase price. He deposed to an affidavit to the South African police in relation to the impounded cattle. This affidavit was admitted in evidence as exhibit "B". In this affidavit to Lieutenant Colonel Odendaal, he referred to the first defendant on three occasions as "*veeagent*" or agent. On being confronted with this reference to the first defendant as an agent, he said that the police suggested the word. He had a difficult time during cross-examination to explain why he used the word in his statement. He conceded that he did mention the word to the police officer who took his statement. The plaintiffs received money and certain assets from the police in reduction or part compensation of the purchase price paid to the second defendant. The money and assets were attached from the thief who was arrested by the police.

¹ Plaintiffs reply to the defendants' request for further particulars, para 1.4

[8] Lieutenant Colonel Odendaal testified that he was attached to the stock theft unit at Vrede. He was involved in a criminal investigation that established that the cattle found in the plaintiff's possession were the property of a certain doctor Schutte of the farm Saaihoek. He attached 99 cows and 99 calves. A certain Liebetrau was arrested in connection with the theft of these cattle at a Newcastle butchery where he had bought shares in the business. An amount of R 182,800.00, a Nissan Navarra vehicle and furniture, bought by the said Liebetrau, were confiscated by the police and later handed over by them to the plaintiffs. The total value handed over to the plaintiffs as a result of the confiscation was the amount of R 370,000.00. He, the colonel, was appointed a curator in the matter. During cross-examination he confirmed that Liebetrau was already sentenced and one Gyser, a co-perpetrator, stood arraigned on the same charges and the matter was as yet not finalized. He confirmed that he wrote in his handwriting the first plaintiff's statement which was admitted in evidence as exhibit "B", being the first plaintiff's statement dated 18 March 2016 and which formed part of exhibit "A" on pages 7 to 9.

[9] A brief summary of Johan Van Der Meulen's evidence was that the first defendant was his neighbour in a townhouse complex when the said defendant worked at Vleissentraal at Harrismith during 2009. They did business together and speculated in calves and communicated frequently. He phoned the first defendant and inquired whether he did not have cattle immediately available for purchase. The first defendant informed him a day later that cattle

were available at Newcastle and forwarded him photos of cows and calves available. A price was negotiated and the witness expressed his surprise that such a quantity could be obtained from one person. The reason advanced by the first defendant was that the lease agreement of the supplier of the cattle had expired. He confirmed that the first defendant acted as an agent. During cross-examination he confirmed that he regarded the first defendant as his friend and that he did not know whether he had any cattle at that stage. He did not ask him whether he had cattle on the farm. The first defendant informed him that he would go look for cattle and speak to the sellers. He was himself the first plaintiff's agent and conceded that the first defendant acted as the plaintiffs' agent. He knew that the cattle that were bought were not first defendant's; he could therefore not buy them from him. He conceded that the tax invoice, which was marked annexure "A" to the summons and issued to Smaldeel Boerdery by Platberg Lewende Hawe, was but proof of payment. He conceded that most of the time the identity of the sellers was not known to the buyers as the agents chose not to disclose the identity of the suppliers of cattle in order to protect the agents' business.

- [10] It was submitted on behalf of the plaintiffs that the main question which was to be decided was whether the second defendant should be held liable for the plaintiffs' loss on the basis as set out in the plaintiffs' particulars of claim. Counsel conceded in his oral submissions that initially the agreement between the parties was that of agency and that the second defendant could only be held liable when it was found that it was the seller. However, it was

submitted that the plaintiff's case was based on a warranty against eviction as the cattle were taken away from the plaintiffs. This argument appears to be faulty as correctly conceded by the plaintiffs' counsel during the oral submission; as such an argument presupposed a valid agreement between the parties. In order to prove such an agreement, counsel, in both written and oral submissions, argued that "*the agreement of sale*"² relied upon by the plaintiffs in paragraph 3.1 of the particulars of claim, came into existence at that stage when the decision to purchase the cattle was conveyed to the first defendant, after the receipt of the photographs by the plaintiffs showing the cattle. In my view, this argument neither serves nor take the plaintiffs case any further. The mere fact that the purchase price of the cattle was made by the plaintiffs on 19 February 2016 to the second defendant, as represented by the first defendant, does not justify the conclusion that the plaintiffs only had knowledge of one seller, namely Platberg Lewende Hawe and no other. This submission is not supported by the evidence on record. The counsel's submission that the only inference that could be drawn from the facts was that "*it was the second defendant who wished to dispose of the property whilst it was the plaintiffs who wished to obtain ownership of the cattle, was the only sale agreement before the court*"³, is without substance. So also is the submission that the second defendant was the seller.

- [11] The arguments advanced by the plaintiffs cannot hold water as they fail to address the defence raised by the defendants; do not take into consideration the evidence by both the Van Der Meulen

² Plaintiffs' heads of argument, para 3.1.3.4

³ Plaintiff's heads of argument, para 3.1.8

brothers and Colonel Odendaal to the effect that first defendant was nothing else but a “*veeagent*” or agent; and that the cattle were not supplied by the second defendant but by an independent third party. It follows therefore, that the basis and reliance by the plaintiffs on a cause of action based on a warranty against eviction as against the second defendant is misplaced.

- [12] The defendants’ counsel submitted that the case that the defendants had to meet was the verbal contract pleaded by the plaintiffs in paragraph 3 of the particulars of claim. The onus rested on the plaintiffs to prove the terms relied upon; which involved also the proof of a negative and that the parties did not agree on any additional terms as alleged by the defendant⁴. On a reasonable interpretation of the evidence, it could never be found that paragraph 3 of the particulars of claim was proven. On the contrary, what was proven was the defendants’ case as Johan Van Der Meulen confirmed under cross-examination that the first defendant was merely an agent and no purchase agreement came into existence between the plaintiffs and any of the defendants. He confirmed that the tax invoice, Annexure “A” to the plaintiffs’ particulars of claim, was issued for the sole purpose of claiming value added tax.

- [13] It is clear from the evidence that:

⁴ Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk 1976 (3) SA 470 (A)

13.1 Both plaintiffs never had any communication with the defendants (save for the communication between the plaintiffs' representative and the first defendant);

13.2 No agreement was reached between the defendants and the plaintiffs' representative to the effect that the second defendant would sell cattle to the plaintiffs for the stated amount;

13.3 The second defendant acted as the plaintiffs' agent;

13.4 The plaintiffs failed to prove the oral agreement between them and the second defendant as alleged.

[14] A tax invoice is not an essentialia of a sale agreement⁵. It is something that is needed for tax and accounting purposes. Oral agreements can be proved by evidence of the conversations between the parties, but such evidence must be very clear and reliable; otherwise the court is bound to find that the contract was not constituted, for the onus is on the person who alleges a contract to prove its existence⁶. An agent on the other hand is simply and solely the representative of the principal on whose behalf the agent transacts with third parties. The agent acts merely as a conduit to bring about a legal relationship between a principal and the third party⁷.

⁵ C.A. Bothma v Chalmar Beef (Pty) Ltd (2145/2017)[2018] ZAFSHC 132 (14 September 2018) para 23

⁶ Francois du Bois: General Editor: Wille's Principles of South African Law, 9th Ed 2007, Juta & Co at pages 755 and 756; See also Topaz Kitchens supra

⁷ Francois du Bois, supra on page 986; C.A. Bothma supra para 17

[15] In the circumstances, I find that there was no need for the defendants to be put on their defence as the plaintiffs failed to prove the existence of an agreement between the plaintiffs and the second defendant. The first defendant was a mere conduit between the plaintiffs and a third party. The plaintiffs have therefore failed to prove their claims against the defendants and these claims stand to be dismissed.

[16] In the result, the costs should follow the event.

[18] I therefore make the following order:

The action is dismissed with costs.

MHLAMBI, J

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