

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A259/2014

In the appeal between:-

DIRK SAMUEL BOTHA

Appellant

and

IVECO SOUTH AFRICA (PTY) LTD

Respondent

CORAM: KRUGER, EBRAHIM JJ *et* OPPERMAN, AJ

HEARD ON: 12 OCTOBER 2015

JUDGMENT BY: OPPERMAN, AJ (*Minority Judgment*)

DELIVERED ON: 22 OCTOBER 2015

- [1] I concur with the findings of Kruger J but for the costs order. It is crucial to lay emphasis on the compass of law that directs the key aspects namely the indemnity clause, the quantum and the order for costs. Parallel to the law is the thread of vexatious conduct of the appellant that weaves through the relevant events. Due to the plethora of litigation that has taken place and to avoid confusion I will refer to the parties as Iveco and Botha.

- [2] The case that has an epic history commencing in 2001 and hopefully concluding in 2015, is a tension between commercial certainty and the constitutional right of access to the courts. Commercial certainty is the right of Iveco to unfettered use of the assets that were accrued from Botha and guaranteed in the contract with the indemnity clause. It is grounded not only in law but also in morality.

In **Basson v Chilwan and Others** 1993 (3) SA 742 (A)¹ at 762H Eksteen JA referred to:

“The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible ...”

Further,

“If there is one thing that is more than public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this para-mount public policy to consider - that you are not lightly to interfere with this freedom of contract.”

Justice Ackermann in **Ferreira v Levin NO; Vryenhoek v Powell NO** 1996 (1) SA 984 (CC) paragraph 26 described it as ‘a central consideration in a constitutional state’. These statements aim for reasonable certainty, so that parties can go about their business

¹ **Basson v Chilwan and Others** (332/1991) [1993] ZASCA 61; 1993 (3) SA 742 (AD); [1993] 2 All SA 373 (A) (17 May 1993)

knowing the rules of the game; constitutional economic integrity is vital.

- [3] Botha, apparently, relied on his right of access to the courts in terms of the Constitution throughout. The use of courts to settle disputes must be in good faith and is not absolute. Access to courts in section 34 of the Constitution of South Africa, 1996 is termed:

“Everybody has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

The crux is that the dispute did not have to be resolved by the application of law in a court if Botha honoured his contractual undertaking.

Firstly the facts proven showed that Botha caused the disputes with his obstinate conduct towards Iveco. If he did not succeed in his *extra curial* conduct he would carry on in the courts under the guise of his right to access to court with facts that did not need to be resolved by the application of law by the courts but by the sacredness and morality of contract between parties. The chronology of events depicted in the judgment of Kruger J paragraphs 12 to 16 echoes the above.

- [4] It is apposite to acknowledge the contrast in the case by referring to the diligence with which Iveco honoured the agreement and endeavour to limit damages due to the conduct of Botha. Iveco

complied with the contract, informed Botha of the claim of the municipality timeously and after patient deliberations with the municipality and Botha and out of desperate protection of their business interest, paid the monies. Ultimately, after the court *a quo* decided on the facts they are now financially strangled in the costs of this appeal.

- [5] Moseneke J (as he then was) pointed out in his dissent in **Barkhuizen v Napier** 2007 (5) SA 323 (CC) paragraph 98 that:

“Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties.”

The right of access to court could never have been meant to serve conduct such as Botha's.

- [6] At the heart of the last sentence above is the basic premise that commercial transactions, freely and honestly entered into, and not vitiated by fraud, misrepresentation, duress or public policy, should be respected and enforced. Botha's case and defence was throughout meritless and dishonest. I deem it necessary to highlight some of the actions of Botha to corroborate this. They are as follows:
- a) Botha was the sole shareholder of a company whose sole assets was an immoveable property. Throughout the time that he held the shares the company did not pay amounts levied in respect of rates and taxes at all. This is the first sign that Botha

deemed himself above the law; he will not pay rates and taxes like ordinary citizens. He admitted the neglect to pay and then made representations to the municipality claiming the accounts were sent to the wrong address whilst he supplied the same address to the municipality.

- b) Botha did not disclose the existence of the municipal liabilities during the sale of the shares and falsely warranted that he disclosed all material information to the purchaser.
- c) He delayed the matter with the municipality and with that did not offer security to litigate to Iveco. This all whilst Iveco's business interest suffered as a result.
- d) He further affected the right to commercial certainty of Iveco by claiming prescription in the High Court and the Supreme Court of Appeal that were rejected in both instances. The issue of prescription was caused by the conduct of Botha; it caused more litigation and delay.
- e) Notwithstanding the finding of the Supreme Court of Appeal that the indemnity clause was applicable, activated by the conduct of Botha, that Botha was liable to pay Iveco the amount which Iveco had paid; Botha went to trial disputing the same finding.
- f) The court *a quo* ruled against him. As was pointed out by the Supreme Court of Appeal, the court *a quo* and Kruger J with whom I concur, the indemnity clause is clear and

straightforward. The reasoning of Mr. Zietsman on behalf of the appellant is desperate and a game of semantics to shirk liability; liability that Botha agreed upon in the contract and later in communications.

- g) Further and tersely put, the quantum that had to be established in terms of the indemnity clause, obviously so, was situated between Iveco and Botha and not between Botha and the municipality or Iveco and the municipality. Extensive litigation on the issue followed and after Iveco did its utmost best to comply with a burden of proof that was not theirs in the first place, Botha simply declined to lead any evidence on an issue that he started and claimed. He clearly, from the start, did not have a case to rebut the evidence put up by Iveco and on which to support his own stance. He just litigated for the sake of litigation and vexatiously so.
- h) Twelve judges have dealt with the matter just to confirm the obvious over and over.

ORDER

I would rule that the appeal be dismissed and the orders of the court *a quo* be confirmed.

M. OPPERMAN, AJ

On behalf of appellant:

Adv P Zietsman SC

Instructed by:

McIntyre & Van Der Post

BLOEMFONTEIN

On behalf of respondent:

Adv D Vetten

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