IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

31/10/13

CASE NO. A671/12

In the matter between:

FRANS SWART PRODUKSIES CC
t/a LEFRA PRODUKSIES **APPELLANT**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
31/10/2013
DATE SIGNATURE

And

CATHARINA ELIZABETH DE LANGE **RESPONDENT**

JUDGEMENT

MOLOPA-SETHOSA J

This is an appeal against the judgement and order granted by the learned magistrate SV Malinda in the Magistrate's Court for the District of Witbank held at Emalahleni, in which the claim of Frans Swart Produksie CC t/a Lefra Produksies ("the Appellant"), against Catharina Elizabeth De Lange ("the Respondent") was dismissed with costs.

The Appellant was the Plaintiff and the Respondent was the Defendant in the court *a quo*. The parties will be referred to as in the Appeal.

Background:

In or around June 2010 the Appellant issued summons against the Respondent for an order in the following terms:

"a). Betaling van die bedrag van R39 900;

b). Rente daarop teen 15,5% per jaar vanaf 15 Augustus 2008 tot datum van betaling;

c). Gedingskoste;

d). Alternatiewe regshulp."

The Appellant's claim is based on a written contract concluded between the Appellant and the Respondent, they being Plaintiff and Defendant respectively in the Court *a quo*, in terms whereof the Appellant sold two productions of the show "*Groet die Grotvrou*" ("The Show") to the Respondent, for the sum of R79 800. 00 (VAT included), for 22 and 23 August 2008.

In terms of the agreement entered into between the parties, the Respondent would pay the initial amount of R39 900.00 on signature of the agreement, and the balance of R39 900.00 a week before the show.

The Respondent only made payment of the initial sum of R39 900.00. The amount of R39 000. 00 claimed by the Appellant in the Summons is the balance outstanding in terms of the said written contract concluded between the parties.

On the pleadings the *locus standi* of the parties were common cause and the Respondent admitted the terms of the agreement concluded, save that it was subsequently orally agreed between the parties that the remaining balance of R39 900.00 would be paid after the final show. In addition the Respondent also admitted that the Appellant complied with all its obligations in terms of the agreement.

The Respondent's defence to the Appellant's claim was that the Appellant waived payment of 50% [fifty percent] of the agreed amount; i.e. the balance sum of R39 900.00.

In terms of the written agreement payment of the balance of R39 900.00 was payable a week prior to the show. As already set out above, the Respondent pleaded that it was agreed that the balance amount would only be payable subsequent to the show. This oral amendment of the date of payment of the balance of R39 900.00 does not seem to be of any consequence in this matter. It is not in dispute that the said balance of R39 900.00 was never paid to the Appellant by the Respondent, even after the show.

The gist of the Respondent's defence is that one Charl Senekal "(Senekal"), an employee of the Appellant, acting on behalf of the Appellant, waived payment of the sum of R39 900.00.

The Appellant in its replication denied that a waiver took place and further denied that Senekal had the necessary authority to have waived payment of the balance amount.

After the Appellant's replication denying such waiver as alleged by the Respondent, and/or Senekal's authority to waive payment of the R39 900.00 in issue herein, the Respondent amended its Plea and pleaded that **alternatively** the Appellant is estopped from denying that Senekal was authorized to act on behalf of the Appellant in waiving the right to the balance of R39 900.00.

It is trite that the party raising a waiver bears the onus to prove on a balance of probabilities that there was a waiver of rights by the other party. **Refer Kannemeyer v Gloriosa** 1953 (1) SA 580 (W) at 585C-D; **Ellis and Others v Laubscher** 1956 (4) SA 692 (A) at 702E-F; and **Road Accident Fund v Mothupi** 2000 (4) SA 38 (SCA) at 50 par.19.

The **onus** is thus on the Respondent to prove the waiver as well as the authority of the person who waives any right, Senekal in this case. This much was not in dispute, and in fact the Respondent was the first witness to begin leading evidence at trial at the court a quo.

In approaching the question of waiver, one has to have regard to the fact that it is a matter of intention. Whether or not Senekal had the intention to waive payment of fifty percent of the agreed amount, being the R39 000.00 in issue herein, has to be determined from objective facts. **Refer Mothupi** *supra* at p49 par.15 & 16

The Respondent's evidence was that Senekal, who attended the show, was there in order to do a count of how many persons were present. That he/Senekal had to ensure that no more than 700 tickets were sold. The importance of this is because the amount charged by the Appellant for the show, depends on the amount of tickets sold. The evidence further disclosed that Senekal was a production manager and that he had nothing to do with the financial aspects relating to the show.

The Respondent's evidence was that out of the blue, Senekal said to her that evening of 23 August 2008 that ***"hy sien die vertoning is nie genoeg steun nie en dat hulle ons een vertoning gratis sal gee".***

The Respondent's evidence was that it was this statement that constituted the waiver on which she relies. Counsel for the Appellant submitted that the above statement in itself does not constitute a waiver. That "*hulle*" is not identified, that reference is made of something in the future ["*hulle sal*..."], and that nothing is said about the obligation to pay in terms of the written agreement and the terms of the said contract/agreement.

The Respondent also called her daughter, Natalien Marcel de Lange ("the daughter"), who was present at the show on the night of 23 August 2008 with the Respondent and Senekal when Senekal allegedly waived payment of the balance of R39 900.00, to give evidence about this aspect.

From the facts it appears that this show was actually for a project arranged by the Respondent's daughter as a fundraising effort on her part.

She was raising as much money as possible in a competition that was run for CANSA.

The daughter's evidence was that Senekal would have said to her and the Respondent **"ons kan die laaste ene verniet kry of een van die vertonings verniet kry om ons te help met ons fondsinsameling"**. This differs with what the Respondent said, set out above.

According to the daughter the intention was that the Appellant was making a donation towards the good cause for which the shows were intended for. This was denied by the Swart and Senekal [Appellant's witnesses]. Swart stated that the Appellant has a policy relating to charity and charitable organizations that it supports.

In her cross-examination the daughter changed her evidence by saying that ***"Ek het verstaan dat hy gese het dit is reg hy sal dit vir ons doen"***, implying that Senekal was requested to make a donation and Senekal agreed.

Against the background of this evidence was the evidence of Frans Swart ("Swart"), who gave evidence that financial meetings are held and prices are discussed. That no one in the employ of the Appellant, except himself/Swart, has any authority to make an arrangement relating to payment and/or to fix prices.

From the evidence on record as testified by Swart, he/ Swart is the sole member of the Appellant; Senekal, on the other hand was a production manager. This evidence was not disputed by the Respondent.

Swart testified that Senekal did not have authority to waive any payment, and this evidence was similarly not placed in issue by the Respondent. The Respondent's answer, to the question of authority and right to waive was simply that she accepted that Senekal had authority because they knew him to be a *"manager"* at Appellant's. The Respondent on her own version is a business woman and knew that she was dealing with a close corporation. Surely it cannot be said that the fact that a person is a manager does not give the person the right, to waive compliance with a contract which he did not sign. The agreement was signed by the only member namely Swart.

In the learned magistrate's reasons, she finds support for the waiver on the basis that ***"The Court finds no fault in Defendant believing that the said Charl had the necessary authority as much as correspondence about payment was also directed to Charl".***

This factual finding by the Magistrate is clearly incorrect and is not supported by the documentation and exhibits.

Looking at the correspondence subsequent to the show, nothing in the correspondence indicates that the Respondent at any stage raised the question of waiver. This is particularly noticeable in the letters written on behalf of the Respondent by her attorney, after demand for payment of the balance aforesaid was made. One would have expected that the fact of the waiver would immediately have been raised by the defendant. I deal with this aspect fully below.

Senekal denied the evidence of the Respondent that he waived payment of the balance of R39 900.00. He testified that he had no authority to do that, and that he would therefore never have agreed to any waiver and/or discount without first discussing such with Swart; further that this is what he would have told the Respondent had there been any talk of a waiver and/or discount of the balance owed by the Respondent to the Appellant. It was not his duty to attend the venue to collect money or to deal with any contractual aspect, he was merely a production manager and dealt with issues pertaining to artists and performance of shows.

Senekal was adamant that he would not prejudice his employment by negotiating fees and/or discounts without first running these past Swart, who was the chief of Appellant. That he knew exactly what the financial arrangements were and what procedures were to be followed with the Appellant.

He testified that in fact if the waiver was an aspect that indeed arose, he would have expected the Respondent to have referred to it in an e-mail or a fax. This she did not do; there is no shred of paper/correspondence from the Respondent to the Appellant and/or Senekal mentioning this alleged waiver. The Respondent was said to be an astute business woman by her own legal representative; she herself referred to herself as a business woman. One would have expected her to have immediately communicated this waiver of the R39 900.00 by way of e-mail or fax to Swart on behalf of Appellant or Senekal who she alleges waived payment of the said amount.

Her conduct makes it highly improbable that the Appellant waived payment of the balance amount of R39 900.00. From the facts on record it is highly improbable that the Appellant would have waived 50% [fifty percent] of the agreed fee, when it had expenses that it had to pay in connection with the show, as testified by Swart. It is not in dispute that the Appellant had expenses which had to be paid.

From the evidence on record it is clearly shown that the Defendant made profit out of the show [R40 876.00]. On the totality of the facts on record there is no probability which favor the Respondent's version.

The documentation and in particular letters written on the Respondent's behalf do not support a submission that a waiver had occurred.

On a proper scrutiny of the correspondence between the parties, subsequent to the demand to the Respondent to pay up the balance aforesaid, after the event/show had taken place, can it be said that there was a waiver of the right of the claim to the balance of R39 900 as alleged by the Respondent?

From the documentation filed on record it appears that, the first demand by the Appellant was by way of a letter dated 13 March 2009 ("the 1st letter") in which letter the Appellant's bookkeepers, Financial Services, on behalf of the Appellant demanded payment of the balance of R39 900.00 in issue herein plus interest from the Respondent.

The first letter does not seem to have received any response from the Respondent. Nor was there an indication forthcoming from the Respondent that payment of that balance had been waived by Senekal.

One would have expected the Respondent to immediately deal with this issue in writing on receiving the 1st letter of demand.

On 21 May 2009 the Appellant wrote a letter dated 21 May 2009 ("the second letter") to the Respondent, in which letter Swart confirms a telephone conversation between himself/Swart (the sole member of the Appellant) and the Respondent, wherein amongst others, the balance owing by Respondent aforesaid [R39 900.00 plus interest], was confirmed and further demand made to the Respondent to settle the balance. The second letter also does not seem to have received any response from the Respondent.

The Appellant again wrote another letter to the Respondent dated 15 June 2009 ("the 3rd letter") in which letter the final demand is made for the payment of R39 900.00 plus interest (total of R44 554.76 demanded). Again the third letter does not seem to have received any response from the Respondent.

On 18 February 2010 Appellant' Attorneys of record wrote yet another letter of demand to the Respondent ("the 4th letter") pertaining to the R39 900.00 still owed plus interest. Again this letter does not seem to have received any immediate response from the Respondent.

On 31 March 2010 the Appellant yet again wrote a letter of demand to the Respondent. From the record it appears that this is the only letter which received reaction from the Respondent by way of a letter from her Attorneys of record dated 31 March 2010; in which letter it is stated on behalf of the Respondent that she denies any liability whatsoever for the amount claimed by the Appellant. The Appellant attorney's letter of 18 February was also responded by letter dated 31 March 2010, and the Attorney was referred to the response/letter to the Appellant dated 31 March 2010.

I may just state that nowhere in the letters aforesaid [the one to the Appellant's Attorneys and/or the one to the Appellant himself], is any mention made of a waiver of payment of the balance of R39 900.00 by the Appellant and/or any of the Appellant's representative/Senekal.

Seeing from the correspondence alluded to above that there has been demand for the payment of the balance of R39 900.00 plus interest since 13 March 2009, followed by several letters from the Appellant demanding payment, without any response whatsoever by the Respondent, one would have expected that if indeed there was a waiver by the Appellant as alleged by the Respondent, this would have been mentioned in correspondence by the Respondent herself, and/or her Attorneys. Nowhere in any of the letters from the Respondent's Attorneys is any mention made of a waiver. This defence of a waiver was only raised for the first time in the plea

From the documentation/correspondence set out above the learned Magistrate a quo cannot have been correct in stating that **"the documentation supports the version of the Defendant"** [Respondent]; the contrary seems more probable; in fact the documentation/correspondence does not support the version of the Respondent at all.

On the totality of the evidence on record, it is clear that Senekal had no authority to have waived payment of the R39 900.00 balance, if he indeed did so. Swart's evidence in this regard was not disputed and the probabilities militate against the fact that Senekal could have had authority, either express or implicit.

Further, from the totality of the evidence, viewed objectively as a whole, it cannot even be said that Senekal actually waived payment of the balance aforesaid. The Respondent thus did not discharge the onus to show that Senekal had authority and/or that a waiver had taken place.

The Respondent, in the alternative, pleaded estoppel; i.e. that the Appellant is estopped from denying that Senekal had no authority to waive payment of the R39 900.00 balance. Before this [estoppel] can even come into play the Respondent must prove that there was a waiver by Senekal. I have already stated above that on the facts and on the totality of the evidence on record there was no waiver of payment of the balance of R39 900.00 by Senekal.

Even if there was a waiver, [which has not been proved], the Respondent has also not discharged her onus in proving estoppel. The Respondent, to succeed on estoppel, must have shown that the Appellant and/or Senekal made some representations, whether negligently or intentionally, and that she acted to her detriment as a result of such representation resulting in some prejudice on her. On the facts and looking at the totality of the evidence on record this cannot be so. The Respondent has not shown that she suffered any prejudice and/or that she acted to her detriment. It cannot be said, on the facts, that the Appellant made some representation, and that the Respondent acted to her prejudice by virtue of the alleged representation.

Surely the Appellant's business is to employ an artist to present a show. The Appellant only produces the show and incurs expenses. It surely cannot be a matter where the Appellant would not require payment. The Appellant would surely require payment in order to pay expenses. In this regard the dicta of Roper J in the **Kannemeyer** judgement *supra* at pp585H & 586A would be appropriate; where the following was said:

> "*...The Court must take into account the unlikelihood, the strong improbability, that a man will lightly waive a right conferred upon him by law.*"

Fagan JA, in the **Laubscher judgement** *supra at p702*E reinforced this statement by saying:

> "*'n Afstand van regte word nie vermoed nie, maar moet streng bewys word...*"

The Respondent's Attorney submitted that the note on the proof of payment [for the deposit/initial amount of R39 900.00] to 'Charl'/ Senekal, written by the Respondent, to urgently send " plakkaarte" [Posters]-**P170 of record,** is an indication and/or creates the impression that Senekal had authority to amend the contract.

How a pack a pack of cards/posters impacts on the authority to waive payment escapes me.

From the document itself/proof of payment, it cannot be said that correspondence about proof of payment was directed to Charl/Senekal, as alluded to by the learned Magistrate at page 198 line 30 of her judgement. Nowhere does the document even state 'for attention Charl Senekal'.

All that is on the proof of payment document is a note from the Respondent to 'Charl' to urgently send a pack of cards/posters to an address provided therein. This document cannot be said to be proof that Senekal had any authority whatsoever to waive payment of the Balance R39 900.00 as alleged by the Respondent. Surely the minute the first letter of demand by the Appellant was sent to the Respondent, she would have immediately reacted thereto and stated that the Appellant had waived payment of the balance of R30 900.00. This defence seems to be an afterthought; it is not supported by the facts and correspondence.

In fact the only persons mentioned by the Respondent regarding payment of monies, as appears on Page 171 of the record are Frans Swart, the sole member of the Appellant; and Cecile Kleyn the administrative manager of the Appellant then [at email address- Cecile@lefra.co.za]; **not** Charl/Senekal as the Respondent's legal representatives seeks to portray

Clause 11 of the agreement, signed by the Respondent clearly stipulates that the person signing the agreement on behalf of the party warrants that they are duly authorized to bind their respective principals. On behalf of the Appellant the agreement was signed by Frans Swart [not Charl Senekal]. Nowhere in the agreement is Senekal given any authority to bind the Appellant in any way.

On facts and on the totality of the evidence on record, in my considered view, it cannot be said that the Respondent discharged the onus of proving on a balance of probabilities that the Appellant waived its right to the payment of the balance of R39 900.00 owed to it by the Respondent, nor can it be said that the Respondent proved estoppel against the Appellant. The probabilities are just not in favor of the version put forward by the Respondent.

As already stated above it is trite that the party raising a waiver bears the onus to prove on a balance of probabilities that there was a waiver of rights by the other party.

Respondent did not discharge its onus to prove on a balance of probabilities that the Appellant waived its right to the payment of the balance of R39 900.00;] nor did the Respondent succeed on the facts/evidence in showing that the Appellant should be estopped from denying that Senenkal had any authority to waive Appellant's rights to the payment of R39 900.00.

The learned Magistrate in the Court a quo should have thus upheld the Appellant's claim and should therefore have granted judgement in the Appellant's favor in terms of prayers (a), (b) and (c) of the particulars of claim.

In the result the Appeal is upheld with costs and the order of the court *a quo* dismissing the Plaintiff's action is set aside and replaced with the following order:

"The Plaintiff's claim is upheld and the Defendant is ordered to pay to the Plaintiff:

(a) An amount of R39 900.00;

(b) interest at the rate of 15.5% p.a. from 15 August 2008 to date of payment;

(c) Costs of suite

L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree

PP LEDWABA DJP o.b.o. MAKGOBA J.

E M MAKGOBA
JUDGE OF THE HIGH COURT

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