IN THE NORTH GAUTENG HIGH COURT, PRETORIA

( REPUBLIC OF SOUTH AFRICA )

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

12/11/2013 ....................

DATE SIGNATURE

13/11/2013

CASE NO : 26356/2011

In the matter between :

IVAN MOLLER Plaintiff

and

MOHAMMED BERA Defendant

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JUDGMENT

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MBONGWE AJ :

[1] The plaintiff commenced these proceedings by way of summons wherein he set out details of the two causes of action on which he grounds his claims. In claim 1 the plaintiff claims payment of the sum of R350 000-00 due to him consequent to a written settlement agreement between him and the defendant, while Claim 2 is founded on an oral agreement between the parties. The defendant denies that the document the plaintiff relies on has ever gone beyond the status of a settlement proposal the defendant had made, but was never accepted by the plaintiff. In defence of claim 2, the defendant alleges failure by the plaintiff to discharge his undertaking in terms of the oral agreement and, consequently, disputes the plaintiff's entitlement to receive the payment claimed.

[2] The association between the parties stems from an agreement between them in terms whereof the plaintiff was to manufacture machines called pressers for the defendant's cupboards manufacturing business called Melamine Industries. The resultant growth of the defendant's business soon directed to the need for bigger premises. That led to the parties agreeing to purchase bigger premises together. Suitable premises were found by the plaintiff who also raised the sum of R550 000-00 as his contribution towards the deposit. For his part, the defendant contributed the sum of R 940 000- 00 towards the same course. The premises, referred to by the parties as 10 Bradford Street, were then purchased in the name of an entity called FX Veneers for an amount just over R 5 million. The defendant was and remained the sole member of that entity. The plaintiff was neither involved in the operations nor did he have any financial interest in FX Veneer.

[3] Pursuant to the purchase of the new premises the parties entered into an oral agreement in at beginning of January 2008 in terms of which the plaintiff, who operated from and spent most of his time at these premises, would be responsible for the management and maintenance thereof. For this the plaintiff would be paid the sum of R50 000-00 monthly in arrears.

[4] The dispute between the parties began when the defendant failed to pay management and maintenance fees due in the month of November 2008. The parties held a meeting, at the instance of the plaintiff, early in December 2008 to resolve the issue. Also present at this meeting was one Johnson, an employee of the defendant responsible for the management of the defendant's business affairs. The discussions went awry, culminating in the parties agreeing to go their separate ways. The defendant had then undertaken to repay the plaintiff's contribution of R 550 000-00

before 1st February 2009 and ended communication between himself and the plaintiff, delegating all talks on the separation to Johnson whom he also instructed to draw up the relevant settlement agreement.

[5] The plaintiff told the court that subsequent to this meeting, Johnson had hand delivered to him a fax copy of a document titled : `` AGREEMENT ON THE SEPARATION OF THE TWO PARTIES CURRENTLY INVOLVED IN MELAMINE INDUSTRIES". The plaintiff has never seen the original of this document. For the importance this document in this case, I deem it necessary to quote its contents and remark on observations this court makes thereon. The document reads as follow:

`` (a) The two parties involved are Mr I. Moller and Mr Mohammed Bera.

(b) The building, 10 Bradford Street, is jointly owned by Mohammed Bera and Ivan Moller.

(c) The relative inputs were ; Ivan Moller R550 000-00 and Mohammed Bera R940 000-00.

(d) Ivan Moller states that he wishes to dissolve his partnership in Melamine Industries and requires the R550 000-00 of his input be returned to him.

(e) Before 1st February 2009 Mr Bera will pay Mr Moller R550 000-00.

(f) There would be no further requirements or interest in the company and all other buildings, equipment, current stock and debtors and creditors would then be in the ownership of Mohammed Bera.

(g) Once this document is signed then there would be no further claim upon the company, Melamine Industries or its associated companies under the control of Mohammed Bera."

(h) This agreement would be used if further claims were made against Mohammed Bera and would nullify such claims."

[6] This document bears the signatures of the defendant and, according to the defendant, also that of Johnson who signed as a witness. They both signed on the 18 December 2008. The document was signed by the plaintiff on 5 January 2009. There is a hand inserted isterik below paragraph (h) and another just below the signatures with the following handwritten notes: `` Excluding the amount of R50 000-00 further payable by M. Bera to I. Moller. The last said to use all means possible to recover the said amount." It appears at the bottom of this document that it was faxed on 18 December 2008 at 14h30 from FX Veneers, defendant's company, to 011 421 7371, a contact number that was, according to the defendant, provided by Johnson as the plaintiff's fax number. The plaintiff denied knowledge of this number and told the court that the written agreement was hand delivered to him by Johnson.

[7] The dispute between the parties with regard to this document turns on how the document reached the plaintiff and when the handwritten insertion thereon was made. The manner in which the document reached the plaintiff impacts on the effect a subsequent letter dated 23 December 2008 has on the settlement agreement dated 18 December 2008. This letter, which purports to alter the

terms of the agreement of settlement, is addressed to the plaintiff by the defendant who sent it to the same fax number appearing at the bottom of the settlement agreement. As stated above, the plaintiff denied knowledge of this fax number, stated that the agreement was delivered to him by Johnson in person. The plaintiff also denied ever receiving the letter dated 23 December 2008 and, therefore, being aware of the purportedly altered terms of settlement.

[8] The defendant testified that he participated in the drawing of the agreement and was present when Johnson faxed it to the plaintiff. He told the court that this document was merely a proposal of settlement which was not accepted by the plaintiff, prompting the defendant to send the letter dated 23 December 2008 with different terms of settlement to the same fax number. The defendant 's defence to claim 1 of the plaintiff is founded on the contents of this letter. In essence, the defendant is reneging in the letter from his undertaking to pay the plaintiff R550 000-00 in terms of the agreement of settlement and offers the plaintiff payment of the sum of R200 000-00 and one machine ( presser) in settlement.

[9] With regard to the handwritten insertion on the agreement, the plaintiff testified that on being handed the settlement agreement by Johnson, he had noticed that provision had not been made for payment of the outstanding R50 000-00 in respect of management fees owing. He discussed the omission with Johnson and inserted the relevant provision after Johnson had acknowledged the omission.

[10] The plaintiff did not sign the document immediately, but had decided to

take it with him to discuss it with his fiancée during the holiday which they were due to take.

[11]] On his return in January 2010 and, having agreed with his fiancée that he accepts the settlement, the plaintiff signed and returned the document to Johnson. The defendant denied that the document was ever returned or received by Johnson or him. Johnson was not called by either party as a witness. The defendant testified that he only saw the document again, with the handwritten insertion, when he received a letter, to which a copy was attached, from the plaintiff's attorneys demanding payment of the sum of R360 000-00, as being the balance due. It is to be pointed out at this stage that it was common course between the parties at trial that the defendant had paid to the plaintiff irregular instalments totalling R200 000-00 until July 2009 , ostensibly in terms of his letter dated 23 December 2008. The balance of R350 000-00, mistakenly stated as R360 000- 000 in the summons, to be covered by the machine offered in the letter.

[12] On the other hand the plaintiff's fiancée was called as a witness to clarify the miscalculation of the instalments the defendant had made until July 2010. The amount claimed in the plaintiff's claim 1 was duly amended to read R350 000-00 by agreement between the parties.

[13] The defendant ceased to make further payments after July 2010 thus paving the way for the plaintiff to commence these proceedings.

[14] The defendant maintained in court that the terms set out in the letter dated 23 December 2008 were the only settlement terms between the parties ; that the

settlement agreement had only been a proposal which the plaintiff did not accept and that, therefore, having paid the R200 000-00 to the plaintiff, he was no longer indebted to the plaintiff and that the plaintiff had not collected the machine. Asked whether the machine was still available, the defendant testified that he has since disposed of it.

[15 ] The issue this court is called upon to determine in respect of plaintiff's claim 1 is; which document , if any, between the parties records the final terms of settlement between them. In denying the receipt of the settlement agreement dated 18 December 2008 duly signed by the plaintiff, the defendant also necessarily contends that such agreement never came to being and that the plaintiff cannot, therefore, rely thereon for his claim.

[16] ] I now turn to consider the pertinent circumstances surrounding this agreement and to do so without putting on blinkers in respect of the letter dated 23 December 2008. The defendant's testimony was that he participated in the drafting of this agreement. He was obviously satisfied with the contents, hence he sanctioned its dispatch to the plaintiff. Consistent with the evidence of both parties that, except for his contribution of R550 000-00, the plaintiff had no other interest in the business of the defendant, the defendant protected his assets tightly in the agreement and, correctly so, undertook to pay back to the plaintiff the R550 000-00 by a specified date.

[17] There is no time limit in the agreement for the plaintiff to sign and return the written agreement, despite the defendant's testimony to the contrary. Barely a week after dispatching the agreement, the defendant dispatches a letter signed by him in which he refers to a telephone conversation he purportedly had with the

plaintiff in which payment to the plaintiff was restructured to consist of part cash payment of R200 000-00 and the bigger balance to be covered by the machine the defendant offers to the plaintiff. The defendant faxed this letter to the same fax number that the settlement agreement was sent to. Both parties told the court that they have never spoken to each other since the meeting of early December 2008. Thus the telephone conversation the defendant refers to in the letter is nothing more than a blatant fabrication. Similarly, the fax number he sent both documents to did obviously not belong to the plaintiff. He would not have written to the plaintiff and refer to a fictitious telephone conversation recording agreed altered terms.

[18] I interpose to discern the most probable scenario in this case : The plaintiff's testimony is that he has no knowledge of the fax number and that he received the settlement agreement in the form of a fax copy from Johnson, clearly suggests that the defendant was dispatching these documents to himself or to someone known to him other than the plaintiff. The defendant, in his creativity, certainly had never intended for the plaintiff to have sight of these documents ; he had a calculated intention not to pay the plaintiff and to stop at nothing to achieve that goal.

[19] In my view, the fax of the 18 December 2008 was discovered by Johnson who handed a copy thereof to the plaintiff. It is also possible that Johnson had initially been part of the defendant's creativity, but had later decided to spill the beans by handing a copy of the fax to the plaintiff. Armed with this document the plaintiff who capitalised on it to recover his common course debt from the defendant. Talk of beating a party at his own game. This explains why neither party could call Johnson as a witness. It further explains the defendant's allegation that after dispatching the settlement on 18 December 2008, he only saw it again as an attachment to the letter of demand he received from the plaintiff's attorneys.

Reality was that the defendant had not expected the plaintiff to be in possession of this document. To add to the defendant's self – created woes, he could not disavow the document ; not with the information pointing at him and his companies contained therein.

[20] Whatever the circumstances, the court has to reach a decision on the facts placed before it.

[21] The defendant continues in the letter to state that the revised mode of payment is in lieu of the total cash payment agreed upon in the settlement agreement. It is extremely absurd that the defendant unashamedly and wilfully gave conflicting evidence of his perceptions of the settlement agreement, amongst others; the document was not an agreement, but a proposal which was never accepted; in the letter and the settlement document itself, he refers to the document as an agreement. In the circumstances this court rejects the defendant's versions to the extent that such versions dispute the settlement agreement as the agreement between the parties. I find the letter dated 23 December 2008 to be a display of a desperate attempt by the defendant to create a justification for reneging on the terms of settlement, specifically to escape payment of the full amount due to the plaintiff. This letter is consequently rejected as proof of the final settlement terms between the parties.

[22] The next question to be determined is whether the plaintiff communicated his acceptance of the settlement terms to the defendant. While I am of the view that there was no need for a formal acceptance in the light of the defendant's undertaking to pay before a specified date, I cannot find reason not to accept

the plaintiff's version that he returned the duly signed settlement to Johnson who was the authorised representative of the defendant. The defendant failed to call him as a witness despite stating that he was financially able to bring Johnson from abroad where he now lives. I find that the defendant's alleged non receipt of the signed settlement agreement, even if true, cannot justifiably affect the plaintiff adversely. I consequently find that the plaintiff has successfully discharged the onus on him to prove his claim.

[23] In respect of the plaintiff's claim 2, being for the payment of management fees due, the defendant alleged that the plaintiff had failed to perform in terms of the oral agreement and was, consequently, not entitled to payment. The plaintiff denied this stating that he performed and had initiated the meeting between him and the defendant to discuss the non-payment. The credibility of the defendant is so wrecked that it is impossible for this court not to view his uncorroborated evidence in defence of this claim as yet another ploy to escape settling his debt to the plaintiff. The balance of probabilities, in the circumstances, must favour the plaintiff. The defendant's defence is, therefore, rejected.

[24] In the result, I find that the plaintiff has successfully discharged the onus on him to prove both of his claims against the defendant.

[25] The following orders are, therefore, given;

1. The defendant is ordered to pay to the plaintiff the sum of R350 000-00 in respect of claim 1;

2. The defendant is ordered to pay to the plaintiff the sum of R50 000-00 in respect of claim 2;

3. The defendant is ordered to pay interest on the amounts stated in 1 and 2 at the rate of 15.5% per annum calculated from the 1st February 2009, but, in respect of the amount in 1, the R200 000 – 00 paid and the period in which it was paid must be factored in in calculating the interest.

4. The defendant is ordered to pay the costs.

**MBONGWE AJ**

ACTING JUDGE OF THE GAUTENG HIGH COURTS

Date of hearing : 22 October 2013

Date of judgment : 13 November 2013

REPRESENTATIVES

1. For the plaintiff : Adv. R. F. De Villiers

   Instructed by : Van Adel - Brink Attorneys, Pretoria

2. For the defendant : Adv. J. C. Erasmus

   Instructed by : Zaakir Ally Attorneys, Pretoria