

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 720/2007

In the matter between:

MPUMELELO PROJECTS CONSTRUCTION CC Applicant

and

SASOL WAX (PTY) LTD Respondent

JUDGEMENT: RAMPAI J

HEARD ON: 17 MAY 2010

DELIVERED ON: 1 JULY 2010

[1] These proceedings are about an application for leave to appeal. The applicant is aggrieved by my judgment which was delivered on the 14th January 2010. In that judgment I granted the respondents application for absolution from the instance with costs. The application is opposed.

[2] On behalf of the applicant, Mr Bokaba argued that I misdirected myself in many respects. Among others, he contended that I made incorrect findings in connection with existence or otherwise of the supply agreement; the

representation the respondent allegedly made as to the quality of the liquid product; the nature of the agreement in terms of which the respondent supplied the liquid product; the crucial issue in the case; the defendant's general terms of sale; the insufficiency of the evidence as a whole tendered in support of the plaintiff's cause of action; the summary of the pleadings; the applicable caselaw; the grant of the order and many other aspects too numerous to mention. He submitted, therefore, that a reasonable prospect of success on appeal existed.

[3] On behalf of the respondent, Mr Leeuwner argued that save for the misdirection I committed in respect of the amount of the plaintiff's claim, the rest of the grounds of the appeal had no substance. He contended that my findings were correct in respect of all the matters now attacked by the applicant. His submission was that no other reasonable court would have come to a different conclusion.

[4] It is so that four of the five witnesses testified about the adverse effects they experienced when they burned the particular liquid product. However, the matter was not

properly investigated. No scientific tests were carried out to ascertain that the liquid product indeed had inferior qualities complained of. The witnesses, including the chemical expert, jumped to a conclusion which had not been properly investigated. In my view no evidence was tendered which conclusively established that the respondent's product had latent defects which made it unsuitable for the agreed purpose. This much the expert conceded during cross-examination.

- [5] The smoking and the bad odour which the consumers complained of could have been attributed to other factors other than the bad properties of the respondent's product for instance, the wick of an oil lamp. But the case was not decided on this point. In my judgment I did not consider the evidence in respect of the quality of the product because it was not a decisive issue. (judgment para [14].) Be that as it may, this is the conclusion I would have reached had it become necessary for me to consider the secondary issue.

[6] Whether the product was latently defective as the applicant contended was not the main issue. Let me assume in favour of the applicant, for the sake of this application that there was credible and reliable evidence to support the contention that the respondent had supplied a liquid product with inferior qualities to the plaintiff. But even if it was indeed so it would not have simply followed from such a finding that the applicant was therefore entitled to a judgment against the respondent. The respondent's plea, and this was the cornerstone of the respondent's argument, was that it made no representation to the applicant as to the qualities of the product, as the applicant alleged it did. It can therefore be seen that the quality of the product was not the crucial issue in the case. It was not dispositive of the entire dispute - hence I labelled it a secondary issue (judgment para [14]).

[7] The decisive issue, as I saw it, was whether or not the respondent represented to the applicant the alleged good qualities of its liquid product and warranted such qualities. The determination of this issue required consideration of the respondent's credit application form, signed by Dr

Chalera on behalf of the applicant, and any other document incorporated therein by reference. A document with the heading the general terms of sale applicable to the domestic sales was an integral part of the credit application form. Clause 7 thereof deals with liability and expressly excludes any warranties in respect of the respondent's product (judgment para [25] and [30]).

- [8] I found that the defendant's general terms of sale were expressly incorporated through reference into the credit facility application (judgment para [26]); that the plaintiff was bound by clause 7 thereof (judgment para [29]) and that the primary issue had to be decided in favour of the defendant (judgment para [30]) **BURGER v CENTRAL SOUTH AFRICAN RAILWAYS** 1903 TS 571 on 578. If I had found in favour of the applicant in respect of these very important issues then I would have proceeded to consider the evidence relative to the quality of the product as was placed before me by the applicant's four witnesses. I did not do so because the primary issue, in my view, was decisive.

[9] I was at pains to reconsider my judgment after I had had an opportunity of hearing and digesting the critique levelled against it as well as the support given for it. I am not persuaded that I committed any appealable misdirection as more fully set out in the notice of appeal and amplified during argument by counsel for the applicant.

[10] It follows from the foregoing that I am of the view that the matter has no single reasonable prospect of success on appeal. Therefore I am inclined to refuse the application.

[11] In **BURGER'S** case, *supra*, Innes CJ had this to say on p 577:

“Can a man who has signed a document in the form of the one now before the Court claim that he is not bound by it, simply because he did not read what he signed, and did not know what the document referred to? Had the regulations alluded to in the consignment note been annexed to it or printed upon it, there could surely have been no doubt as to the signatory being bound. And the fact that though referred to in the contract, they were not actually printed as part of it, cannot

alter the legal position of the consignor. The appellant could easily have acquainted himself with the regulations;”

On p 578:

“All that can be said is that the consignor did not choose to read what he was signing, and after he signed did not know the particulars of the regulations by which he had agreed to abide. For the Court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching consequences, and it would be a decision unsupported by any principle of our law.”

[12] Accordingly I make the following order:

12.1 The applicant is refused leave to appeal.

12.2 The applicant is directed to pay the costs hereof.

M. H. RAMPAL, J

On behalf of applicant: Adv. G. L. M Bokaba
Instructed by:
Naudes Attorneys
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On behalf of respondents: Adv. P. G. Leeuwner
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