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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 28/04/2009
CASE NO: 33002/2004

UNREPORTABLE

In the matter between:

SAMPSONS BUILDING (PTY) LTD PLAINTIFF

And

STANLIB WEALTH MANAGEMENT LTD 1ST DEFENDANT

WESVAAL MAKELAARS INC
ALTERNATIVELY WESVAAL MAKELAARS 2ND DEFENDANT

JUDGMENT

SERITI, J

Introduction

This matter came to court by way of an action.

1. In the particulars of claim, the plaintiff *inter alia*, alleges that on or about 13 December 2001 the plaintiff and the first defendant entered into an agreement in terms of which the

first defendant undertook to invest, on behalf of the plaintiff an amount of R5 000 000.00. Plaintiff further alleges that :

“Die relevante wesenlike uitdruklike alternatiewelik, geimpliseerde, alternatiewelik, stilswyende terme van die beleggingsooreenkom was:

5.1 dat die eiser sou toesien dat ‘n bedrag van R5 000 000.00 aan die eerste verweerder betaal word om deur die eerste verweerder belê te word in die sogenaamde Multivest Corporate Investment Trust van Liberty Groep se geldmarkfond; ...

Op of ongeveer 13 Desember 2001 het die eiser sy verpligtinge in terme van die beleggingsooreenkoms nagekom deurdat ‘n bedrag van R5 000 000.00 deur Dezzo Trading 85 (Edms) Beperk ten behoeve van die eiser gedeponeer in die bankrekening van Multivest Corporate Investment Trust.”

2. Plaintiff further alleges that on or about 17 December 2001 the first defendant, with its own funds, in favour of the plaintiff, invested an amount of R5 000 000.00 in a policy, and on the said date, plaintiff became lawful owner of the said policy or investment. On 18 December 2001 first defendant issued to the plaintiff an investment certificate.
3. Plaintiff further alleges that on or about 18 December 2001, without plaintiff's knowledge Dezzo Trading 85 (Edms) Beperk instructed its bankers not to honour the cheque of R5 000 000.00 mentioned above.

During February/March 2002, plaintiff demanded that the first defendant should pay it the R5 000 000.00 invested on behalf of the plaintiff, and the first defendant refused to refund the said invested amount.

4. In its plea, the first defendant denied that it concluded investment agreement with the plaintiff on or about 13 December 2001. It alleged that the first defendant processed the online application of the plaintiff on or about

17 December 2001, whereafter an agreement between plaintiff and first defendant came into existence.

5. The first defendant further alleges that:

“On a proper construction of the agreement aforesaid the plaintiff would only acquire rights as an investor *vis-à-vis* the First Defendant on receipt by the First Defendant of funds to be invested in terms of the agreement, alternatively

4.9.2 the agreement tacitly provided that the plaintiff would only acquire rights as an investor *vis-à-vis* the First Defendant in terms of the agreement on receipt by the First Defendant of funds to be invested in accordance with the agreement.”

The first defendant further alleges that the R5 million cheque drawn by Dezzo Trading (Proprietary) Limited was dishonoured, and that means that no payment was received by the first defendant on behalf of the plaintiff and no investment was made on behalf of the plaintiff.

6. During the pre-trial meeting, the following was noted:

“A. The parties agree that the following issues are in dispute:

1. The meaning and interpretation of the client application authority and mandate referred to by the parties in paragraph 4 of the Particulars of Claim, read with Annexures ‘A’ and ‘B’, and paragraph 4 of the plea read with Annexures ‘X’ and ‘Y’ respectively;

2. Whether the plaintiff is entitled to payment from First Defendant in the amount of R4 989 000.00 in the light of the following:

2.1 A cheque drawn by Dezzo Trading 85 (Pty) Ltd for R5 000 000.00 (FIVE MILLION RAND) was deposited into the account of the Trustees of the

Liberty Specialised Investments on
13 December 2001;

2.2 The plaintiff's on-line application was
processed by First Defendant on
18 December 2001;

2.3 Payment of the cheque was stopped
by Dezzo Trading (Pty) Ltd on
17 December 2001;

2.4 First Defendant reversed investment
MV 1006761 on 12 February 2002
after it had learned that payment of
the cheque had been stopped.

2.5 Plaintiff maintains that an investment
was made in its name and that it is
entitled to the proceeds thereof ...”

Findings

7. One of the documents which forms part of the agreement is “Blue Print Pro Forma Data Capture Form”. Clause 10 thereof reads partly as follows:

“B. General Risk Warning

The duties of Liberty Specialised Investments as a Linked Investment Service Provider (‘LISP’) are to duly process a client’s investment instruction, which shall mean:

- To receive the client’s investment amount into its trust accounts;
- To invest such amounts timeously in accordance with the client/retirement fund/preservation fund mandate: ...”

According to the particulars of claim the agreement between the parties, entailed, *inter alia*, that there would be a payment to the first defendant, of the sum of R5 million. Plaintiff alleges that on 13 December 2001, in order to

comply with its obligations in terms of the investment agreement, caused a payment of R5 million to be made by Dezzo Trading 85 (Pty) Ltd.

It is common cause that the cheque drawn by Dezzo Trading 85 (Pty) Ltd was not honoured.

In *Eriksen Motors Ltd v Protea Motors and Another* 1973 3 SA 685 at 693G-H HOLMES JA said:

“1. In general, payment by cheque is *prima facie* regarded as immediate payment subject to a condition. The condition is that the cheque be honoured on presentation. When the cheque is so honoured, the date of payment of the debt is the date of the giving of the cheque. Conversely, if the cheque is dishonoured there has been no payment.”

8. On the papers, plaintiff alleged that it complied with its obligations and made a payment of R5 million by cheque. Payment by cheque is regarded as immediate payment

subject to the condition that the cheque is honoured. It is common cause that the cheque was not honoured and consequently the plaintiff's allegation that it complied with its obligation to make payment is false.

9. In this case each party had an obligation to perform. The obligation of the plaintiff was to make funds available and the obligation of the first defendant was to invest, on behalf of the plaintiff the said funds.

The first defendant's counsel submitted, correctly so in my view that the obligation of the first defendant was consecutive to the obligation of the plaintiff to make payment to the first defendant.

Since the plaintiff has failed to perform its part of the obligation, it is not entitled to sue on the basis of the contract.

10. My view is that the plaintiff has failed to prove its case and its action should fail.

I therefore, make the following order:

10.1 The plaintiff's claim is dismissed.

10.2 The plaintiff is to pay the costs of the first defendant
and the said costs will include costs consequent upon
the employment of two counsel.

W L SERITI
JUDGE OF THE NORTH GAUTENG HIGH COURT

33002/2004

<u>Heard on:</u>	21 April 2009
<u>For the Plaintiff:</u>	Adv M H Wessels SC and J P Daffue
<u>Instructed by:</u>	Van Heerdens Inc, Pretoria
<u>For the Defendants:</u>	Adv J G Wasserman SC and P T Rood
<u>Instructed by:</u>	Messrs Cliffe Dekker Hofmeyr Inc, Pretoria
<u>Date of Judgment:</u>	28 April 2009