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IN THE HOOGGEREGSHOF VAN SUID AFRIKA

(NOORD GAUTENG HOË HOF, PRETORIA)

Case Number: 10125/2008

In the matter between:

VICTOR NICOLAY ZELENYUK **APPLICANT**

vs

DAVID SAMEUL AVNIT **RESPONDENT**

JUDGMENT

Delivered on: 10 June 2009

POTTERILL AJ

1. In the applicant's amended notice the Court is requested to grant an order :

    1.1 *"Declaring that the Respondent was not entitled to make payment to the Applicant by utilizing the exchange rate of ABSA in order to convert his liability in USD to South African currency;*

    1.2 *An order declaring that when converting a judgment for payment sounding in a foreign currency to South African currency the amount shall, in the absence of any express stipulation to the contrary, be calculated according to the indicative rate of exchange of the South*

African Reserve Bank as published on the day the amount is paid, alternatively an order that the exchange rate of FNB as on 29 June 2007 be declared to be the exchange rate applicable to the conversion of the amount owning(sic) to the Applicant;

1.3 *Payment of R426 240.00, alternatively R206 880.00;*

1.4 *Interest on the amount of R11 354 240.00 from 1 July 2007 – 3 July 2007(i.e. 2 days) [this was amended orally at the hearing as reflected herein]*

1.5 *Interest on the amount of R426 240.00, alternatively R206 880.00 at the rate of 15,5% per annum a tempore morae from 30 June 2007 to date of payment;*

1.6 *Costs of suit on the scale including costs of two Councel [this was also amended orally at the hearing];*

1.7 *Further and/ or alternative relief."*

2 On the papers before me the following facts are common cause:

2.1 The applicant and respondent on 27 February 2007 concluded a settlement agreement with clauses 2.1 and 2.2 reading as follows:

"*Avnit shall pay to Zeeluyk on or before 30 June 2007*

US$1, 600,000.00(One million Six Hundred Thousand US Dollars).

The aforesaid amount shall be paid into the following bank account:

Danie Potgieter Attorneys.

FNB:261-556, Centurion Branch.

Account number:62006932439.

(Ref:Avnit/Zelenuyk)".

2.2 That 30 June 2007 was a Saturday.

2.3 The respondent on 29 June 2007 approached ABSA Bank Limited and obtained an exchange rate for conversion of the sum of USD1 600 000.00. The exchange rate quoted by ABSA was R6, 83.

2.4 The bank (ABSA) transferred the money in three instalments of R1 228 000.00 and R7 600 000.00 and R2 099 600.00 totalling R10 928 000.00 only to be received in the nominated bank account on 3 July 2007. The delay was due to the banking process.

2.5 The applicant accepted responsibility for the delayed payment and paid 2 days interest at 15,5% in the amount of R9 281.32.

3. From the papers the following is also not in dispute

3.1 The parties did not agree to any rate whatsoever.

3.2 The applicant had the option of paying the judgment debt in Rands.

3.3 South Africa has a floating exchange rate which implies that the foreign exchange value of the rand changes continuously according to supply and demand.

3.4 There is no official rate for the exchange of currency in South Africa and the Reserve Bank reflects on its website the average of the R/US$ exchange rate quoted by the four largest authorized dealers in foreign exchange at approximately 10h30 on normal trading days.

3.5 ABSA is one of the four largest authorized dealers in foreign exchange.

3.6 On 29 and 30 June 2007 ABSA Bank's Limited closing buying rate was R6.8763, the selling rate was R7.1672 and the indicative rate was R7.0218 to the US Dollar.

3.7 On 29 June 2007 FNB's selling rate was R7,1835 and the buying rate was R6,8971 to the US Dollar. At FNB no Forex data was available for 30 June 2007.

4. The applicant contends that the respondent's aver payment and that they have the onus to prove proper payment and they have not on the papers discharged this onus. The reason for this is that as a matter of law, alternatively upon proper interpretation of the agreement, alternatively in terms of an implied term of the agreement the Court must order the respondent to pay the Applicant the equivalent in Rands to US$ on a reasonable basis which would be the Reserve Bank's indicative rate, alternatively the buy-back rate of FNB. In argument a further alternative was added; the selling rate of FNB or ABSA because the respondent could not have shopped around for the cheapest rate and it is a practical solution.

5. The respondent argues that the version of the respondent must be accepted in terms of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3)SA 623 (A). In view of the contention by the applicant that the parties contemplated to be paid in US$ there can be no implied term of the contract that the indicative rate or selling rate would be paid. On the papers there is also no basis set out as to what trade usage or custom is and this argument must be rejected.

   The correct legal position is to satisfy a judgment debt in a foreign currency by the payment of its equivalent in Rands when paid. The respondent did this and the application must be dismissed with costs.

6. If in motion applications there is a dispute of fact it is trite that the test in the Plascon-Evans Paint matter supra is to be applied. This is to be applied even if the onus is on the respondent. However, *in casu* there is no factual dispute. Payment is admitted, but the Court is requested to declare that the conversion method of the payment was incorrect and the submissions for this are based on arguments pertaining to the law, not on the facts.

7. The submission on the papers that the parties upon proper interpretation of the contract agreed to the indicative rate flies in the face of the common cause facts; the respondent had the right to make payment in rand and as there is no official rate in South Africa proper interpretation of the agreement can never lead to the conclusion that the parties would have paid the indicative rate. Neither can it be implied in the contract imposed by law from without; I am now only requested to declare what exchange rate is to be used when not agreed upon. There is also nothing on the papers before me setting out what the trade usage is. In address this argument was not raised, I think for obvious reasons, and I do not find it necessary to deal further with these arguments.

8. The contention of the applicant is that the conversion from US$ to Rand must be done on a reasonable basis and with regard to a prevailing conversion rate, i.e. the Reserve Bank's indicative rate, alternatively FNB's buy-back rate, alternatively the selling rate. Applicant's argument is thus that by law; flowing from the common law, the respondent should have paid the Reserve bank's indicative rate as an objective estimate or value prescribed by outside

authority or in accordance with trade usage. In the application the applicant refers only to the indicative rate as being the applicable rate. The reason for this being the applicable rate is set out as follows: "*I adopted the view that the applicable rate is the official rate for the Republic of South Africa determined by the Reserve Bank of South Africa, ….the rate obtained from the reserve Bank's official website for 29 June 2007 was R7.0964 to the dollar…..which conversion results in a further amount of R426 240.00 being payable..*
There is no reason why the Respondent had the right to appropriate the benefit of the cheaper rate to himself and if any bank's rate were to be used, the so-called "indicative rate" would have be used resulting in neither a benefit to the Respondent or to me;" {Paragraphs 20.4 and 20.3 of the answering affidavit}.

9. The question that needs to be answered is did the respondent perform in terms of the agreement, i.e. did he pay the amount of US$ 1 600 000.00 into the allocated account? On the papers before me the respondent avers he did. Nowhere on the papers did the applicant aver that the amount paid into the allocated account is not the amount of US$ 1 600 000.00. His only contention is that the respondent was not entitled to use the exchange rate he used to his benefit. This is however not the issue, the issue is did the applicant get what he bargained for? He did not state that he did not get what he bargained for because the Rands paid into the allocated account did not total US$ 1 600 000.00.

10. The applicant feels aggrieved that the respondent used ABSA bank's conversion rate to fulfil the agreement. The correct rate would have been the indicative rate of the Reserve bank. This is however not the official rate of South Africa and I am not inclined to declare it as such. The reserve bank is not a commercial bank. The indicative rate is only a reflection, not prescriptive, of the average R/US$ exchange rate quoted by the four largest authorized dealers. One can only exchange currency in South Africa through an authorized dealer, not the reserve bank. ABSA is one of the four largest authorized dealers. The rate to convert dollars into rand was used as on 29 June 2007. This rate was used because 30 June 2007 was a Saturday. The applicant in his replying affidavit [paragraph 27.2] denies that the rand equivalent as on 29 June 2007 should have been paid, but the rand equivalent of 30 June 2007 should have been paid. ABSA rates for 29 and 30 June 2007 are identical (Annexures VZ1 & VZ3). On Annexures VZ4 and VZ5 no data for Forex 30 June 2007 can be reflected for Standard bank and FNB. The rate of exchange must be used on the date payment is made, as there was no exchange rate for 30 June 2007 the respondent acted *bona fide* and reasonable in utilizing the exchange rate as on 29 June 2007. On the above facts I can not declare that respondent was not entitled to make payment by utilizing the exchange rate of ABSA. The rate used is an accepted public rate. I can not find there was improper payment.

11. The alternative argument is that FNB's exchange rate, the rand buy-rate (the applicable rate for purchasing rands with dollars) be utilized. Once again the applicant had not made out a case that the agreement was not fulfilled

because he did not in fact receive US$ 1 600 000.00. There is on the papers no basis to suggest that the monies paid in at FNB is not the amount of US$ 1 600 000.00. There is nothing on the papers to suggest why FNB's rates should be the preferred rate. I was referred to a letter, Annexure C, by the respondent's attorneys wherein the respondent's attorney refers to ABSA's "buy-rate." This referral is not a basis for applying FNB's rate. The allocated account was with FNB, but there is nothing on the papers to suggest that therefore FNB rates should apply or that FNB rates would result in payment of the amount as agreed.

12. As its main solution to this application the applicant is relying on the judgment of Stegmann J in **Barclays Bank of Swaziland Ltd v Mnyeketi** 1992(3) WLD 425 on 435D-E:

> *"It is perhaps relevant to mention the general rule of the common law that (subject to any contractual term to the contrary) the debtor was free to choose the currency in which to pay his debt. Groenewegen De Legibus Abrogatis 46.3.99 (Beinart's translation vol 2 at 295) puts it thus: "… (A)ccording to the general practice and custom of the whole world, not only the person who owes money in general, but also the person who has promised money of a particular kind, is permitted in all cases to pay in other coinage, even of inferior designations or metal, as long as the amount he pays corresponds to the value of the money promised, in accordance with the accepted public rates or with an objective value or estimate prescribed by outside authority. And this is without doubt the*

rule which applies, except in the case where it clearly appears that the contracting parties have agreed otherwise….."

And further on p436 D-F:

"…*I consider that I must enter provisional sentence for payment of the debt in the foreign currency in which the foreign judgment quantified the debt. At the same time, I must leave the defendant free to make payment in the currency which is legal tender in this jurisdiction, viz South African rands. In that way the foreign creditor will receive from the defendant either the amount of the judgment in the relevant foreign currency (if the defendant is in a position to acquire it and deliver it) or else a sufficient sum in South African rands to enable the creditor, at the time of payment, immediately to acquire the amount of the relevant foreign currency (if he is in a position to do so). This result seems to me to satisfy the principle of nominalism restated and emphasised by the Appellate Division in the SA Eagle Insurance case supra.*"

It is argued that in terms of this case the selling rate is to be applied where no agreement between the parties was reached. The selling rate is the amount of rand necessary to purchase US$ dollars at the time of performance. On the papers there simply was not a single averment that with the amount of rand paid into the nominated account he could not acquire US$ 1 600 000.00. The only averment pertains to the indicative rate. In the amended notice FNB's rate is requested and orally it is amplified as being the "buy-back rate." There is no prayer in terms of the selling rate and it is not the Court's task to make calculations and bargain on behalf of the parties. Judge Stegmann in the case supra on p437, A-B, finds the following:

"*It is in my view, the function of this Court to determine the rate of exchange on which the Sheriff is to rely when executing this Court's judgment. However, for practical purposes, I think it can safely be left to the plaintiff, provided that the defendant is given an opportunity to challenge the rate claimed by the plaintiff and to have it replaced by such rate as the Court may hold to have been proved."* He does not find that the selling rate must be applied, but leaves it open to be proved! The respondent has thus proved payment.

13. I accordingly dismiss the application with costs.

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S Potterill Acting Judge of the High Court

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