IN THE SUPREME COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A62/2004

In the appeal of:

KAMOHELO ISAAC MOROE Appellant

and

ABSA BANK LIMITED t/a BANKFIN Respondent

CORAM: MALHERBE JP *et* KRUGER J

JUDGMENT: KRUGER J

HEARD ON: 13 DECEMBER 2004

DELIVERED ON: 3 MARCH 2005

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[1] Appellant appeals against a judgment in the magistrate's court at Welkom cancelling the instalment sale agreement between the parties and ordering appellant to pay damages calculated in terms of the agreement. Appellant failed to comply with the rules relating to appeals and also lodged no heads of argument. In view of the fact that appellant is

acting in person, condonation should be granted.

[2] The respondent claimed cancellation of an instalment sale agreement concerning a motor vehicle and related relief in the magistrates' court, Welkom.

[3] In his plea the appellant stated:

"(a) that it was a term of the contract, implied by the law, that the plaintiff would only be entitled to the relief set out in the contract and the law if failure by the defendant to effect payment as agreed was wrongful and/or unlawful;

(b) that defendant's failure to effect payment was not as a result of any wrongful and/or unlawful conduct on his part but was solely as a result of wrongful and/or unlawful misrepresentation on the part of plaintiff's employee or employees who, at all material times, were acting in the course and within the scope of their employment with the plaintiff."

[4] In response to the allegation that he had failed to make payments in terms of the agreement, the appellant admitted non-payment, but alleged that his failure "was due to the fact that plaintiff rendered performance impossible for him".

[5] When asked for further particulars, as to the alleged misrepresentations, appellant stated:

"1.1 Plaintiff's employees, *inter alia*, advised defendant:

1.1.1 to resign from his stable job in order for his loan application lodged with the plaintiff to be approved;

1.1.2 that his employment, was the sole impediment to his application being approved;

1.1.3 that after his resignation, the loan application would be approved."

[6] In response to the question in what respect respondent rendered performance by appellant impossible, appellant stated:

"2. Plaintiff's employees:

2.1 made defendant to resign from his stable job which was his sole source of income;

2.2 The aforesaid resignation on the advice of

> plaintiff's employees resulted in defendant losing income and thus rendered it impossible for defendant to keep up with his obligation in terms of the contract and thus rendered performance impossible."

[7] At the trial, held on 29 January 2003, the appellant was legally represented by an attorney. Respondent's attorney at the outset made the submission that the appellant (defendant) should bear the duty to begin leading evidence. Appellant's attorney told the magistrate that he was "more than satisfied with that".

[8] Thereafter the appellant testified as well as Mr. Mokwena, a business consultant. The respondent closed its case without leading evidence.

[9] Appellant testified that he had worked for Sanlam for three years, the fourth year he resigned. He did not resign voluntarily. He was forced to resign by Louisa Venter and

Willie Oelofse from Absa. They told him to resign from Sanlam and to get a confirmation letter that he had indeed resigned.

[10] In January 2001 appellant saw an advertisement about a franchise for Legal Power Africa. He made enquiries and was told that Mr. Walter Mokwena was the representative in Bloemfontein whom he had to contact. Appellant and Walter Mokwena went to find Legal Power Africa. In Carletonville they found Jannel, who is the owner of Legal Power Africa. Jannel had another branch in Klerksdorp. The head office of the franchise was in Cape Town. Appellant decided he wanted to purchase the franchise and drew up a business plan. He asked Mr. Mokwena to help him.

[11] Appellant wanted to continue working for Sanlam, and stated this in his business plan. Appellant wanted the manager that he had taken with him to Cape Town for training to manage the business. Louisa Venter told him that they could not approve his loan whilst he was still employed. Mr.

Mokwena, who was chosen by the Banking Council of South Africa to help people who wanted to apply for loans from the major banks, helped appellant to prepare his business plan. Appellant called him his financial adviser. Mr. Mokwena advised appellant not to resign from his work and to employ a manager to manage his business until the business got on its feet.

[12] Appellant submitted the business plan to Absa, where Louisa Venter worked with this application for a loan. It took very long to process the application. Towards the end of February appellant took leave so that he could go to Cape Town with the person that had been hired to act as manager. Appellant went to Cape Town with this person for training while appellant was still employed at Sanlam.

[13] From Cape Town appellant phoned the Welkom branch of Absa, and spoke to Louisa Venter. She asked appellant to come to their offices when he returned from Cape Town. They made an appointment to see each other two days later.

When appellant arrived two days later, they took the appellant's business plan and called Willie Oelofse from Bloemfontein. While he was talking on the telephone, he told the appellant that his loan had been approved and asked him if he could resign any time sooner if he was still working. Appellant asked Louisa Venter how long it was going to take to access the money after resigning. She told him not longer than a week.

[14] Appellant went to speak to his manager at Sanlam, and told him that he wanted to resign, that he had found finance, but Absa could not finance him as yet because he was still employed. His manager said he should write his letter of resignation himself. The appellant wrote the letter and his manager acknowledged that he had indeed resigned.

[15] The letter of resignation was forwarded to Bloemfontein, and on that day appellant was told that his loan application with Absa had been approved and that his business Bank account would be opened.

[16] In the event, appellant did not receive the loan from Absa. He was told the loan had been turned down. He could not go back to his previous work at Sanlam because the three days grace he had been given had elapsed.

[17] After appellant had resigned, his car was still in his possession. He could only afford to pay one instalment after he had resigned. He went to Louisa Venter and explained his problem to her, and she told him not to worry. She contacted one Ian Meintjies at Bankfin. Appellant was told that Meintjies was the manager. Appellant's car was repossessed in February 2002, a couple of months later.

[18] Louisa Venter told appellant that one Moses at the Johannesburg Head Office was responsible for refusing the loan. Appellant requested Mr. Mokwena to speak to Moses. They spent about 45 minutes on the telephone. Moses told Mr. Mokwena that the loan was not going to be approved, apparently also because appellant did not have any assets.

[19] Appellant phoned the Absa Hotline to lodge his complaint. The manager was very interested to help but when he heard about the bank adjudicator (Mr. Mokwena), he was no longer interested and told appellant that he should go back to Louisa Venter as she was the one who had told him to resign from his work, not Absa Bank.

[20] In cross-examination appellant said that he did not sign any application form for a loan. It was put to the appellant that neither Louisa Venter nor Oelofse were employed by Absa Bank. He could not dispute that, but said that at the time they were employed by Absa.

[21] Appellant called Mr. Mokwena as a witness. He is a business consultant for FDC, a parastatal development corporation which helps people who want to start small businesses by financing and advising them. Mr. Mokwena assisted appellant with his business plan to start his own business. Appellant took the business plan to Absa. It was

submitted to Louisa Venter. When the loan was turned down, Louisa Venter called Mr. Mokwena to her office because it was not clear to her why the loan was turned down. Mr. Mokwena said the problem was that the official at Absa did not understand the cash flow. The answer was negative. They now cited appellant's credit record as reason for turning the loan application down.

[22] Mr. Mokwena testified that paragraph 6.1 of the business plan he had completed with the appellant stated that appellant should keep his employment with Sanlam until the business got viable. Mokwena testified that he spoke to a number of officials from Absa, who told him that in order for applicant to get a loan, he had to resign from his employment. The impression they created was that the loan was granted, but for appellant to get the money he had to resign. When appellant resigned, Absa came up with excuses not to grant the loan. This shocked Mr. Mokwena and Ms. Venter.

[23] In cross-examination Mr. Mokwena said that appellant did complete an application form for the loan.

[24] The appellant's case was closed by Mr. Siyo after the evidence of Mr. Mokwena. The respondent (plaintiff) closed its case without leading any evidence.

[25] In her judgment the magistrate found that there was no concrete evidence that Ms. Venter & Mr. Oelofse were employees of Absa. She found that the evidence that they were employees of Absa, was contested by respondent.

[26] On the issue of vicarious liability, the magistrate found that the appellant had failed to present proof that Oelofse and Venter were employees of the respondent. On the second issue, the impossibility of performance, the magistrate found:

> "Daar is geen *nexus* tussen die Eiser se eis en die Verweerder se verweer nie. Die een kan nie teenoor die ander afgespeel word nie. Daar bestaan nie eers sekerheid of die Verweerder sal slaag met so 'n eis nie. Daar is nie so beding in die ooreenkoms opgeneem dat indien Absa nie 'n lening sou toestaan aan die Verweerder, die Verweerder betalings ingevolge die kontrak mag staak nie, ……."

[27] As to vicarious liability appellant's witness, Mr. Mokwena,

testified:

> "According to the best of your knowledge for whom was Louisa Venter working? -- Absa.
>
> According to the best of your knowledge and belief for whom was Mr Willie Oelofse or Oelofse working? -- Absa."

[28] This established *prima facie* proof and no contrary evidence was produced and cross-examination left this evidence intact:

> "Mr. Mokwena, why did you say that Ms Louisa Venter was an official of Absa? -- Because I know she was employed by Absa or working at Absa.
>
> What is the source of your knowledge? -- I was able to get that knowledge while I was dealing with Absa. It was not the first time that I was dealing with Absa."

and:

> "MR MOSTERT: My instructions are that Ms Louisa Venter was at the time when the defendant applied for a loan in the employ of New Business Enterprises Bank. -- The statement is not correct because at that time she was wearing the badge which has her name on and it

> was also from Absa, Absa logo on."

In respect of Mr. Oelofse, Mokwena testified:

> "You also made reference to a certain Mr Oelofse. Where was he employed at the time? -- Regional office Bloemfontein, Absa's regional office in Bloemfontein."

[29] The appellant's allegation that respondent made performance impossible for him, flows from the refusal of an application for a loan to commence a business which the appellant made to the respondent. This meant that appellant had no income to continue payments on the instalment sale agreement.

[30] According to the summons, the instalment sale agreement was entered into on 22 December 2000 at Klerksdorp. The instalment sale agreement was made with Agenbach Motors and ceded to the respondent. These allegations are admitted in the plea. Respondent thus acts herein as a cessionary.

[31] Mr. Mokwena testified that Absa created the impression that appellant must resign from his current employment before the loan could be paid out.

[32] From the evidence the inference can probably be drawn that the respondent had brought appellant under the impression that he had to resign and that his loan had in fact been approved and that the loan would be paid out as soon as he had resigned. However, after he resigned the loan was turned down. The question is whether this situation created an impossibility of performance as alleged by the appellant for him to comply with his obligations under the instalment sale agreement.

[33] The magistrate found that the defence raised by the defendant was not of any legal force because it fell outside of the contract. She found that a possible claim of appellant which might flow from the loan application was unrelated to the present action. She also said there was not even any certainty that appellant would succeed in such claim.

[34] The magistrate granted judgment in favour of plaintiff (respondent).

[35] The appellant's Notice of Appeal signed by his attorney, who represented him at the trial, reads as follows:

> "1. The Honourable Magistrate erred both in law and on the facts when she found that no concrete evidence was adduced to show that Mrs. Venter and Mr. Oelofse were employed by the respondent.
>
> 2. The Honourable Magistrate erred in law when she found that it was necessary for the appellant to call the said Venter and Oelofse as witnesses.
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> 3. The Honourable Magistrate misdirected herself when she found that the appellant was of the view that it was not his obligation to prove vicarious liability on the part of the respondent.
>
> 4. The Honourable Magistrate erred in law when she

accepted the *ipse dixit* of the respondent's legal representative as sufficient to refute the evidence tendered by and on behalf of the appellant with regard to the relationship between the respondent on the one hand and Venter and Oelofse on the other hand.

5. The Honourable Magistrate, further, misdirected herself both in law and on the facts when she found that the respondent disputed the existence of employment relationship between itself and the said Venter and Oelofse when, at no stage in its pleadings, did the respondent place that issue in dispute.

6. The Honourable Magistrate erred in law and on the facts when she found that there existed no *nexus* between the respondent's claim and the appellant's defence.

7. The Honourable Magistrate's judgment goes against the weight of the evidence properly before her."

[36] No Heads of Argument were filed by appellant, who appeared in person at the hearing of the appeal.

[37] In his argument before the magistrate, Mr. Siyo, applicant's attorney referred to four cases. He said it is a fundamental principle of our law that where one of the parties to a contract is responsible for the impossibility of performance it does not give a right to the party who creates the situation of impossibility to claim relief on the basis of the contract, with reference to **WIREOHMS S.A. (PTY) LTD v GREENBLATT AND ANOTHER** 1959 (3) SA 909 (C) at 912. He also referred to **S.A. CRUSHERS (PTY) LTD v RAMDASS** 1951 (2) SA 543 (N) where the court says that a party cannot rely on impossibility of performance where such impossibility has been created by an act of his own (at 547 B-C). In **CAVE t/a THE ENTERTAINERS AND THE RECORD BOX v SANTAM INSURANCE CO. LTD** 1984 (3) SA 735 (W) the defendant prevented the fulfilment of the procedural requirement by not complying with its duties. Therefore the

defendant could not raise non-compliance by the plaintiff in order to avoid defendant's obligation to indemnify plaintiff (at 747 F – H.)

Lastly, Mr Siyo referred to **NATIONAL UNION OF TEXTILE WORKERS AND OTHERS v JAGUAR SHOES (PTY) LTD** 1987 (1) SA 39 (N) at 46 A where the court said that where performance by the employee becomes impossible due to the fault of the employer, the latter would remain liable.

[38] In his heads of argument, Mr. Human for respondent, submitted that at best for appellant, he showed that it would be difficult for him to perform, which subjective impossibility does not release him from liability, with reference to **UNIBANK SAVINGS AND LOANS LTD (formerly COMMUNITY BANK) v ABSA BANK LTD** 2000 (4) SA 191 (W) par. [9.2] especially at 198 B - C where the court says that a contract is only terminated by objective impossibility, not subjective impossibility. Mr. Human pointed out that the appellant, correctly, never suggested that it would be

impossible to ever earn an income again. (**WORLD LEISURE HOLIDAYS (PTY) LTD v GEORGES** 2002 (5) SA 531 (W) at 533 F – 534 G.)

[39] In considering impossibility of performance, one looks at the obligation created by the agreement, not the reasons for entering into the agreement. (**ROSEBANK MALL (PTY) LTD AND ANOTHER v CRADOCK HEIGHTS (PTY) LTD** 2004 (2) SA 353 (W) par. [64] at 383 F – G). In the present case the appellant says that the reason why he resigned was to secure a loan. That decision of his, taken for whatever reason, is unrelated to his obligations created under the instalment sale agreement. There is no issue of *vis major* in this case – the appellant took the decision to resign (on *vis major* and foreseeability of impossibility, see **NUCLEAR FUELS CORPORATION OF SA (PTY) LTD v ORDA AG** 1996 (4) SA 1190 (A) at 1205 I – 1207 I.) Appellant is seeking to escape liability, and has to show that there was no fault on his part **GROBBELAAR N.O. v BOSCH** 1964 (3) SA 687 (ECD) at 691 D – E. The appellant decided to resign

from Sanlam. No-one forced him to do so. He did so because he believed that such resignation would secure a loan for his proposed business venture.

[40] The negotiations relating to obtaining a loan for appellant's proposed business venture were unrelated to the instalment sale agreement. Even if one were to accept that Venter and Oelofse were employees of respondent, acting in the course and scope their employment with respondent, appellant has failed to show objective impossibility to perform, and the negotiations and the loan for the business venture were unrelated to the appellant's obligations under the instalment sale agreement, which is the subject of the present litigation.

[41] The appellant's inability to pay the instalments is temporary – it cannot be said that it is impossible for him to find employment in future. Temporary impossibility of performance does not of itself bring a contract to an immediate end – **WORLD LEISURE HOLIDAY (PTY) LTD v GEORGES** **(supra)** paragraph [8].

[42] The question whether the appellant was mislead in respect of his application for a business loan, is unrelated to his obligations under the instalment sale agreement, which he concluded with Agenbach Motors, which was ceded to the respondent. There is no evidence that in the consideration of the business loan the instalment sale agreement featured at all. As the magistrate says in her judgment, there is no *nexus* between respondent's claim and appellant's defence. They are unrelated. There is no merit in the appeal.

[43] The magistrate came to the correct conclusion.

[44] The appeal is dismissed with costs.

A. KRUGER, J

I concur.

J.P. MALHERBE, JP

On behalf of appellant	:	In person No attorneys
On behalf of respondent	:	Adv. C.A. Human Instructed by: Neumann Van Rooyen Inc BLOEMFONTEIN

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