



REPORTABLE:	YES/NO
CIRCULATE TO JUDGES	YES/NO
CIRCULATE TO MAGISTRATES	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case no: CA&R 36/2022

HEARD ON: 17-07-2023

DELIVERED: 14-06-2024

In the matter between:

Karoo Wilddienste (PTY) LTD

Appellant

and

Griekwaland-Wes Korporatief Beperk

Respondent

and

G.D Andrag

First Third Party

M Louw

Second Third Party

CORAM: PHATSHOANE DJP et WILLIAMS, STANTON JJ

J U D G M E N T

WILLIAMS J:

1. This is an appeal, with leave of the Supreme Court of Appeal, against the judgment and order of Lever J dated 27 September

2021, in which he granted absolution from the instance, with costs in favour of the respondent.

2. The appellant is a company which conducts business capturing and relocating game and owns game on the farm Jakhalsdans in the Loxton area. Since 2012 the respondent, Griekwalandwes Korporatief Beperk (GWK), has been conducting auctions of the game for sale on the farm Jakhalsdans, which over the years, as the appellant's game inventory increased, involved mainly the appellant's own game.

The pleadings

3. In its Particulars of Claim the appellant pleads that on 16 May 2015 it, duly represented by its director, Mr Nikola Van der Westhuizen, entered into a verbal agreement with GWK, duly represented by its auctioneer, Mr Deon Kloppe, in terms of which the parties agreed that:
 - 3.1 GWK, through its auctioneer Kloppe would sell the appellant's game at a public auction on behalf of the appellant.
 - 3.2 GWK would within one week of the auction issue and deliver invoices to those persons who purchased game at the auction.
 - 3.3 The purchase price of the game achieved at the auction would be collected by GWK and delivered to the appellant upon the appellant tendering to deliver the game.

4. The appellant alleged that it had fulfilled its obligations in terms of the agreement but that GWK had failed to comply with its obligations in that it had:
 - 4.1 Failed to issue and deliver invoices to the purchasers of five bontebok in an amount of R650, 000, 00 and one black impala in an amount of R450,000,00;
 - 4.2 Failed to collect 25% of the purchase price of the game mentioned in 4.1 above after the auction;
 - 4.3 Failed to collect and pay to appellant the balance of the purchase price of the game mentioned above after appellant had tendered delivery of the game so purchased.
5. As a result, the appellant claimed from GWK the amount of R1.1 million.
6. GWK in its plea, pleaded that Van der Westhuizen and Klopper, both duly authorized by the appellant and GWK respectively, had entered into an agency agreement sometime during January 2015 to February 2015.
7. The agency agreement was partly verbal and partly in writing. The written portion of the agency agreement consisted of the General Conditions of Sale and GWK's Liaison Service Agreement.

8. The Liaison Service Agreement is additional to the General Conditions of Sale and is applicable to the auctioning of catalogue game such as the two lots of game (that is the five bontebok and the black impala sold to the first and second third parties at the auction) which form the subject matter of the appellant's claim.
9. Catalogue game comprise of those animal too young to be delivered to the successful bidder on the day of the auction or immediately thereafter. It was agreed between all parties concerned that these animals would be ready for delivery sometime during September 2015.
10. The express, alternatively tacit, and further alternatively implied terms of the Liaison Service Agreement were as follows:
 - 10.1 The purchaser of catalogue game and the appellant as seller are required to enter into the written Liaison Service Agreement with GWK immediately after acceptance of the bid.

The sale of catalogue game is subject to the resolute, alternatively, suspensive condition that no agreement of sale will come into effect between the seller and purchaser:

 - 10.1.1 Unless and/or until both the seller and purchaser sign the Liaison Service Agreement and the seller and purchaser thereafter fully perform in terms of the General Conditions of Sale and the Liaison Service

Agreement, alternatively unless or until both seller and purchaser perform fully despite the failure by one or both parties to sign the Liaison Service Agreement;

10.1.2 A deposit of 25% of the purchase price of catalogue game will be payable to GWK as agent of the seller directly after the auction or on the day of the auction;

10.1.3 The balance of the purchase price will become due to GWK, as agent of the seller, when the game is ready to be delivered to the purchaser.

10.1.4 The catalogue game will only be delivered to the purchaser after payment of the balance of the purchase price to GWK, as agent of the seller, in order to pay it over to the seller after settlement of expenses and commission.

11. In short, the above are the terms of the agreement pleaded by GWK which are of relevance to the appeal.
12. GWK's defence as pleaded is that the appellant failed to perform in terms of the agreement as pleaded in its Particulars of Claim. In addition, the failure of the appellant, on the one hand, and the two purchasers of the game on the other, to sign the Liaison Service Agreement or to perform in terms of the General Conditions of Sale and the Liaison Service Agreement resulted in no sale agreement coming into effect between the appellant and the purchasers, consequently relieving GWK from

any liability towards the appellant in respect of the stated catalogue game.

The evidence

13. In the court *a quo* the appellant called two witnesses to testify on its behalf.

13.1 Mr J Van der Bergh, a neighbouring farmer, testified that GWK's auctioneer, Klopper, had informed him and Van der Westhuizen of the appellant, about a year after the auction in issue, that GWK is liable to the appellant for the monies claimed. That GWK owes the appellant the money since it did not issue and deliver invoices to the purchasers, did not collect the deposits and failed to attend to the delivery of the game during September 2015.

13.2 Van der Westhuizen who also testified, gave evidence to the effect that it was the agreement throughout that GWK would collect the purchase price from the purchasers otherwise he could have held the auction himself. He confirmed the agreement as pleaded in appellant's Particulars of Claim as well as the conversation which Klopper had with himself and Van der Bergh as alluded to above.

13.2.1 Van der Westhuizen testified that he knew the General Conditions of Sale applicable to the auction which were also attached to the 2015 auction

catalogue. He denied having been alerted to the terms of the Liaison Service Agreement or being aware of its terms. In fact he testified that he had never seen such a document either at previous auctions or at the 2015 catalogue game auction.

The Court *a quo*'s findings

14. In granting the respondent's application for absolution from the instance, at the end of the appellant's case, the court *a quo* in essence found that:

- 14.1 It was not normal or customary for the auctioneer, being the seller's agent to take on the obligations of the purchasers to the seller;

- 14.2 An essential averment was missing from the claim as pleaded in the Particulars of Claim that would establish a factual or legal basis for holding the GWK liable for the obligations of the respective purchasers; and

- 14.3 Without an underlying contractual basis pleaded for a claim for specific performance by GWK on an obligation that rests on the respective purchasers, the allegations of what Mr Klopper may or may not have said amount to nothing more than an opinion without any discernible basis in fact or in law to hold such an opinion. Such assertions and opinion are untenable and inherently

unacceptable as evidence, even at the close of plaintiff's case.

The grounds of appeal

15. Mr Van Tonder SC, who appeared for the appellant, has raised four grounds of appeal in the appellant's heads of argument. These grounds differ to a certain extent from those raised in the notice of appeal but since all the issues have been covered in the trial there can be no prejudice to GWK. I therefore intend to deal with the grounds as argued and raised in the heads of argument.
16. The grounds of appeal are, that the trial court erred in; (i) finding that the appellant's particulars of claim lacked an averment essential to establish a factual or legal basis for holding GWK liable for the obligations of the two purchasers, (ii) holding that the evidence relating to Klopper's confirmation of the respondent's liability to pay was irrelevant; (iii) speculating that the statement attributed to GWK's Mr Bosman, gleaned from GWK's response to a request for trial Particulars, that his attempt to arrange for delivery to one of the purchasers was merely to facilitate delivery as part of his duty as agent; and (iv) concluding that the Particulars of Claim allowed for no other reasonable explanation but that the appellant sought specific performance from GWK of the obligations of the purchasers.

The arguments

17. The main thrust of the appellant's argument is that there has been an overly technical approach to, and an over-analysis of the matter beyond the pleadings. Its claim for specific performance merely required from the appellant to allege and prove the terms of the contract, compliance with any antecedent or reciprocal obligation or to tender compliance. This the appellant had done by adducing the evidence in support of its claim. It has never been the appellant's case that GWK was liable to perform the obligations of the respective purchasers or to stand good for the obligations of the respective purchasers. The obligations imposed on GWK in terms of the agreement pleaded by the appellant required of GWK to collect a 25% deposit in respect of the purchase of the game, issue invoices in respect of the purchases and to collect the balance of the purchase price and make payment thereof to the appellant against tender of the game. GWK has admittedly failed to comply with its obligations as pleaded by the appellant and raised tacit and/or implied terms to the agreement which GWK has the onus to prove.
18. The argument is further that to have granted absolution at the end of the appellants case was to allow GWK to escape compliance with its obligations under the contract by relying on its own breach, which is not allowed in law.
19. Mr Gilliland, for GWK, argued in essence that the appellant's contention pertaining to GWK's obligation to specifically perform

its own obligations, as opposed to those of the purchasers of the game, should be considered in the context of an agency agreement and that the only obligations which GWK is obliged to perform are those that arise from the naturalia of an agency agreement. The purported obligation of an auctioneer to pay the purchase price of goods sold at an auction is not one of the naturalia of an agency agreement. Such an obligation, it is argued, can only arise if there is a special agreement to that effect and such an agreement must be pleaded. In the absence of such special agreement having been pleaded, there is no persuasive and inherently acceptable evidence to support such a finding.

Discussion

20. The test to be applied for absolution from the instance at the end of the plaintiff's case has been formulated as follows in *Gordon Lloyd Page and Associates v Rivera and Another* 2001(1) SA 88 (SCA) at 92:

"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

"... when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p. 173; Ruto Flour Mills (Pty.) Ltd. v Adelson (2), 1958 (4) SA 307 (T))." This

implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) 37G-38A; Schmidt Bewysreg 4th ed 91-92). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (Gascoyne loc cit) - a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice." (own underlining)

21. The argument by Mr Gilliland for GWK, which was upheld by the court *a quo*, that the agreement postulated by the appellant is not the normal or customary agreement relating to agency and auctions, is correct. It is however not the test to be applied at the end of the plaintiff's case. The court must assume in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, that the evidence is true. The court should not at this stage evaluate and reject the

plaintiff's evidence. (see *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525(E), at 527C).

22. The fact that GWK admits to a large extent the oral agreement alleged by the appellant, save for the plea of non-compliance with certain conditions, the evidence relating to Kloppe's confirmation of GWK's liability, however tenuous, together with Bosman's attempts to facilitate delivery of the game to the first third party, these factors as a whole, in my view lend some support for the appellant's version of the agreement entered into with GWK. Mr Van Tonder is correct in my view when he argued that the court *a quo*'s finding that Bosman's actions could very well have been solely in pursuance of an attempt to collect a commission for GWK is speculative at this stage of the proceedings and is not the only reasonable inference to be made in the circumstances.
23. It is clear from the test for absolution restated in the extract from the *Gordon Lloyd Page* matter (*supra*) that absolution from the instance at the end of the plaintiff's case should be granted sparingly. All the appellant had to do was to make out a *prima facie* case i.e. to present evidence relating to all the elements of its claim, which it has done. It is not for the court at the end of the plaintiffs case to weigh up all the different possible inferences, but merely to determine whether one of those inferences is in favour of the plaintiff (see *Marine & Trade Insurance Co. Ltd v Van der Schyff* 1972(1) SA 26 (A) at 38H).

- 24 If follows from the foregoing that I am of the view that the court *a quo* should have refused the application for absolution from the instances, in the circumstances of this matter. I therefore do not deem it necessary to deal with any of the other arguments *inter alia* the issue of cession, raised by the parties. Those are issues best left for argument at the end of the trial.

The following order made:

- a) The appeal is upheld with costs, such costs to include the costs of two counsel.**
- b) The order of absolution from the instance with costs in favour of the respondent is set aside.**
- c) The trial is to proceed in the normal course.**



CC WILLIAMS
JUDGE

I concur



MV PHATSHOANE

DJP

I concur



A STANTON

JUDGE

For Appellant: Adv LJ Van Tonder SC
 With Adv GJ Gagiano
 Engelsman Magabane Inc

For Respondent: Adv JG Gilliland
 Van de Wall Inc