

SOUTH AFRICA / JUDGMENT

ABSA Bank Limited v Wernich (665/2004) [2008] ZANCHC 47 (23 May 2008)

[2008] ZANCHC 47**COURT**

Northern Cape High Court, Kimberley

BEFORE

C J Olivier

CASE / FILE NUMBER

665/2004

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**IN THE HIGH COURT OF
SOUTH AFRICA
(Northern Cape
Division)**

Case Nr: 665/2004

Case Heard: 29/04/2008
Date
delivered: 23/05/2008
In

the matter between: ABSA
BANK LIMITED PLAINTIFF
and
MARIE
CAROLE LOUISE WERNICH RESPONDENT

JUDGMENT

Olivier J:

The plaintiff, Absa Bank Limited, issued summons against the defendant, Mrs Marie Carole Louise Wernich, in which it claimed payment of outstanding balances on an overdrawn cheque account and a bond account. The plaintiff's claim is based on a suretyship in terms of which the defendant bound herself for payment of the debts of PJ's Biltong Bar CC.

At the commencement of the trial it was placed on record that agreement had been reached on several issues:

The issues concerning the bond account had been settled and was no longer in dispute (The plaintiff had apparently received and accepted payment in respect of that account, but only after summons had been issued and any costs pertaining to that part of the plaintiff's claim will therefore be regarded as costs in the cause).

The only issue to be decided was whether the parties had concluded a settlement agreement which would prevent the plaintiff from proceeding with its claim in respect of the overdrawn cheque account (see *Hamilton v Van Zyl* 1983 (4) SA 379 (E) at 383H-384B and *Gourlay v Canoa KZN (Pty) Ltd t/a Canon Office Automation*

[2008] 2 ASS SA 194 (N)) . If so, the plaintiff's claim fell to be dismissed. If not, judgment should be granted in favour of the plaintiff in the amount of R1 032 272.52, interest a tempore morae on that amount calculated from 5 November 2007 and costs on the scale as between attorney and own client (as agreed to in the deed of suretyship).

As regards the defence that the plaintiff's claim against the defendant had been settled, the defendant initially pleaded the following under paragraph 4 of her plea:

“ 4.

Defendant pleads further that she entered into a verbal agreement with the Plaintiff during July 2004 with the following relevant terms:

That the only assets belonging to the Defendant are her interests in the close corporations Biltong Huts 2 through 5.

That the four close corporations be liquidated and a Liquidator appointed who would be best suited to distribute the assets of the close corporations between creditors.

That the defendant will 'cede' or pay over her interests in the said close corporations to the Plaintiff in full and final settlement of all claims by the Plaintiff under case number 665/2004 in the High Court of South Africa (Northern Cape Provincial Division).

In the alternative, the Defendant agreed that neither she nor any of her family receive any funds or payment whatsoever from the liquidation of the close corporations in exchange wherefore the Plaintiff will lodge a claim or claims with the Liquidator in terms of a suretyship given by Biltong Hut 2 CC in favour of the Plaintiff in full and final settlement of all claims by the Plaintiff, but in any event will the Plaintiff not proceed with the action provided neither Defendant nor any of her family receive any such funds or payment, under case number 665/2004 in the High Court of South Africa (Northern Cape Provincial Division).”

At a later stage the plea was amended by the insertion of paragraph 4.4 therein, which reads as follows:

“4.4 The Defendant pleads further that this action and/or litigation has been settled between the parties on or about 27 August 2004, by virtue of:

Plaintiff's attorneys' settlement proposal contained in the letter dated 15 July 2004, hereto attached as annexure WA;

Defendant's attorneys' settlement offer contained in their reply (to annexure WA), dated 27 August 2004 hereto attached as annexure WB; and

Plaintiff's attorneys' acceptance thereof in their reply (to annexure WB), dated 27 August 2004 hereto attached as annexure WC, and received in Victoria West on or about 27 August 2004".

During the trial the date in paragraph 4.4.2 was amended to read "16 July 2004".

The defendant assumed the duty to begin and on her behalf the evidence of her husband, mr P J Wernich, and of their attorney, mr W Viljoen of the firm M D Visser & Partners in Victoria West, was presented. The evidence of mr T R de Wet, an attorney in the firm Marais Müller Yekiso in Cape Town, who represents the plaintiff, was presented on its behalf.

The plaintiff's case was that no consensus had been reached and that no settlement agreement had therefore been concluded (see *Lake and Others NNO v Caithness* 1997

(1) SA 667 (E) at 372C, *The Principles of the Law of Contract*, Kerr, 6th edition, p 241 and *Diamond v Kernick* 1947 (3) SA 69 (AD) at 83-84).

The defendant bore the onus of proving that such an agreement had indeed been concluded (see *Cecil Nurse (Pty) Ltd v Bongile Nkola*

[2008] 1 All SA 428 (SCA) para [14], *The Torch Moderne Binnehuis Vervaardiging Venn (Edms) Bpk v Husserl* 1946 CPD 548 and *Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2006 (6) SA 379 (C) para [24]).

The following facts were common cause:

The defendant and mr Wernich were the only members of, inter alia, close corporations known as Biltong Hut 2 through 5 and which owned fixed properties (houses).

The plaintiff had claims against Biltong Hut 2 CC, one as the holder of a first mortgage bond over its property and the other in terms of a suretyship by the close corporation in respect of the debts of PJ's Biltong Bar CC.

The plaintiff had no claims against the other Biltong Hut close corporations, the properties of which were the subject of mortgage bonds in favour of Old Mutual Finance.

The fixed properties of the Biltong Hut close corporations were sold and yielded nett proceeds in the total amount of approximately R544 000,00.

When these close corporations were wound up early in 2005 the plaintiff lodged no claims in the liquidation of Biltong Huts 3, 4 or 5, but did receive payment of an amount of approximately R81 500,00 as a concurrent creditor in the liquidation of Biltong Hut 2 CC.

The plaintiff never received any payment or benefits by virtue of the settlement agreement/s alleged by the defendant in her plea (as amended).

Mr Wernich's estate was provisionally and finally sequestrated in or about June 2004 in an application in which the plaintiff had intervened as sequestrating creditor.

After the evidence had been led mr Grewar, counsel for the defendant, announced that the defendant was abandoning what was pleaded in paragraph 4.4 of the amended plea and would only be relying on the agreement alleged in paragraphs 4.1 to 4.3 (and the alternative thereto).

This announcement did not come as a surprise:

I found it difficult to understand how a matter that had been settled in terms of an earlier verbal agreement could at a later stage once again have formed the subject of a settlement agreement, unless the later agreement constituted an amendment of the earlier agreement or a novation thereof (which was not pleaded).

The contents of the three letters referred to in paragraphs 4.4.1 to 4.4.3 of the amended plea (and which, according to the amended plea, constituted a settlement agreement) could in my view by no stretch of the imagination be read as indicating that there had been consensus on the very material issue regarding what the plaintiff would accept in settlement of its claim.

In the first of these letters (dated 15 July 2004, annexure WA to the amended plea and exhibit B18 - 20) mr de Wet made the "proposal" that the fixed properties of the Biltong Hut close corporations be sold and that "The remaining nett proceeds (i.e. purchase price plus occupational interest collected less bondholders' claims less estate agents commission) will be paid on day of registration of transfer by the relevant transferring attorneys to insolvent estate P J Wernich c/o mr Spangenberg of Van De Wall & Partners, to be dealt with in terms of the Provisions of the Insolvency Act".

In reply (annexure WB to the amended plea and exhibit B21, dated 16 July

2004) mr Viljoen stated that the defendant and mr Wernich were "in agreement to pay over the proceeds of their interests in the CC's ...". This quite clearly did not amount to an acceptance of mr de Wet's "proposal".

In his evidence mr Viljoen was constrained to concede, albeit reluctantly, that there was a very clear difference between the notion of the nett proceeds of a property belonging to a close corporation, on the one hand, and that of the nett proceeds of a member's interest in a close corporation, especially where other creditors were involved.

Apart from this, and possibly a further indication of the fact that the defendant and mr Viljoen must have been aware of the difference

between what mr de Wet had offered and what the defendant was prepared to agree to, there is the fact that it was specifically

pleaded that mr Viljoen's letter was a "settlement offer" (and therefore not an acceptance of mr de Wet's earlier proposal).

In the last of these three letters (annexure WC to the amended plea, exhibit B32, dated 27 August 2004) mr de Wet, however, made it quite clear that what the plaintiff would be prepared to settle for, was the nett proceeds "as defined in our previous letter dated 15 July 2004". This could never be construed as an "acceptance" of what was proposed in the letter of 16 July 2004.

Much was made in cross-examination of how many times mr de Wet, the attorney for the plaintiff, had in his correspondence alluded to an agreement which had been reached between the parties. In my view this would not take the matter any further if it later transpired that there had in actual fact never been consensus between the parties.

What remains to be decided is whether the conclusion of an agreement as alleged in paragraphs 4.1 to 4.3 (and the alternative thereto) has been proved on a balance of probabilities.

In my view this question can be easily disposed of without discussing the credibility and the inherent probabilities of the evidence that was led in any detail. This is so because the evidence led on behalf of the defendant quite simply did not prove the conclusion of such an agreement.

Mr de Wet denied the conclusion of such an agreement and on mr Viljoen's own version he had not been involved in the conclusion of such an agreement. According to mr Viljoen he acted on the instructions of mr Wernich in the telephonic discussions that he had with mr de Wet and in the letters that he drafted.

Mr Wernich's evidence in this regard was briefly the following:

During a telephonic discussion between himself and mr de Wet the latter had conveyed to him that the plaintiff would be prepared to write off money on condition that the defendant and mr Wernich "do not get any financial benefit from the sale of the houses and out of the close corporations".

He testified that mr de Wet was, however, not prepared to negotiate with him and asked him to "get mrs Wernich to do it and send it to me so that I can take it up with my client".

According to mr Wernich this then led to the letter dated 12 July 2004 (exhibit C), which the defendant addressed to mr de Wet. Mr Wernich described this letter as "the basis of the agreement".

In the letter the defendant proposed "ceding" her interests in the close corporations to the plaintiff in full and final settlement (Interestingly enough no mention was made of mr Wernich also being prepared to "cede" any interest that he might have had in the close corporations, an undertaking that mr Wernich would as unrehabilitated insolvent not have been in a position to give at that time).

Mr Wernich then consulted mr Viljoen and after telephonic conversations between mr Viljoen and mr de Wet, the latter addressed the letter dated 15 July 2004 (annexure WA to the amended plea, exhibit B18-20) to mr Viljoen.

I have already dealt with the contents of this letter. It quite clearly did not constitute an acceptance of what had been proposed in the defendant's letter of 12 July 2004 (exhibit C). Although mr de Wet did refer to the defendant's proposal in his letter, he made a completely different proposal in his letter.

That the defendant herself had not seen the letter of 15 July 2004 as an acceptance of her offer, is borne out by the fact that it was referred to as a "settlement proposal" in paragraph 4.4.1 of the amended plea.

in any event, mr Wernich insisted that the settlement agreement had been verbal (not in writing or partially in writing). He conceded, however, that he had not been "part of that verbal agreement". When asked whether the defendant had concluded the alleged verbal agreement, mr Wernich responded as follows:

"Where you part of that verbal agreement? === No.

Who was? === According to this it must be the Plaintiff. And I am not saying that I was not, I am saying that I can not remember. I can not sit here and honestly say to the Court that I can distinguish between July 2004 and September 2004. Sitting here, I am just not capable of doing that My Lord. I am sorry.

Did your wife enter into this agreement of July 2004? === She would not have a problem in entering into it.

Sir, did she or did she not enter into it? === I believe she did.

You believe she did? === She might have, I do not know.

You do not know? === No.

So we can take the proverbial blue pen and draw a line through the first part of that plea. 4.1, 4.2, and 4.3 we can draw a line through, because you do not know? === I can not sit here and honestly say that I can remember what happened in July 2004 or September 2004."

The defendant was not called as a witness herself. Mr Wernich testified that "It would have been very difficult for her to come and give evidence". Mr Wernich said that the defendant was from Canada. When asked in chief-examination "En is sy Engels magtig?", mr Wernich's answer was "In 'n sekere mate ja Edelagbare. Nie perfek nie." Although mr Wernich testified that he had assisted the defendant in this, the fact remains that she also signed several letters which were drafted in English. The deed of suretyship which she signed was also drafted in English.

Even if the defendant would only have been able to testify in some other language, she could have made use of an interpreter. No other explanation was tendered for the fact that she was not called to testify.

These circumstances would in my view justify the drawing of a negative inference from the failure to present the defendant's evidence (see *Just Names Properties 11 CC and Another v Fourie and Others* 2007 (3) SA 1 (W) at 16-17), but even without drawing such an inference the position would be that the only witness that would have been able to testify about the conclusion of the alleged verbal agreement was not called to testify.

In my view, and on the evidence that was led, the probabilities are in any event overwhelmingly against the conclusion of such a verbal agreement. In view of the conclusion to which I have already come, I will only briefly refer to a few of these:

The contents of the letters by the defendant herself (exhibit C), her attorney mr Viljoen (annexure WB to the amended plea and exhibit B21) and the attorney for the plaintiff, mr de Wet (annexures WA and WC to the amended plea, exhibits B18-20 and B32) are simply completely irreconcilable with the conclusion of such an agreement.

Had a verbal agreement with such terms been concluded between the defendant and mr de Wet during the same month in which most of these letters were written, there would not have been any reason or need for further proposals.

Mr de Wet's proposal that the nett proceeds of the sale of the properties of the close corporations be paid to the plaintiff is, as already discussed, completely different from and irreconcilable with an agreement that the plaintiff would accept whatever proceeds the defendant's interest in the close corporations in liquidation might yield after distribution of the assess of the close corporations "between creditors" (see paragraph 4.2 of the plea). In the one scenario the plaintiff would be entitled to the full nett proceeds of the sales and in the other at best to only a part thereof.

No reason or explanation was suggested for the fact that mr de Wet made such proposals in his letters of 15 July 2004 and 27 August 2004, if he had known that he had already concluded a verbal agreement in completely different terms.

The allegation that mr de Wet was prepared to write off his client's claims as long as the defendant and mr Wernich did not receive any financial benefits from the sale of the properties of the close corporations or their liquidation, is irreconcilable with:

mr de Wet's persistent requests for details of the assets and liabilities of the Wernich's;

mr de Wet's meticulous exposition (in his letter of 15 July 2004) of what he would accept as the nett proceeds of the sale of the houses of the close corporations; which proceeds he wanted to be paid over to mr Wernich's insolvent estate (and not, as would normally be done, to the close corporations as sellers) on the date of the transfer of the properties (and not only eventually when the close corporations were liquidated); and

the fact that mr de Wet had, even before his letter of 15 July 2004, been making calculations of what the nett proceeds of the sale of the properties of the close corporations would be.

An agreement by mr de Wet which would yield an amount of R544 000,00 in settlement of the plaintiff's claim would have made business sense, but certainly not one in terms of which the plaintiff would happily write off its claim for only the satisfaction that the Wernichs also do not draw any financial benefit from the winding-up of the close corporations.

When confronted with this improbability mr Viljoen testified that he was of the view that mr de Wet had made a mistake in concluding such an agreement and that mr de Wet had only realised his mistake when he became aware of the fact that the close corporations were insolvent and that the plaintiff would not get anything from their liquidation.

This evidence of mr Viljoen is very difficult to reconcile with his evidence that he had informed mr de Wet of the dire financial position of the close corporations as early as in May 2004.

It is also irreconcilable with mr Wernich's evidence, because according to him mr de Wet was prepared to write off everything and on his version mr de Wet could therefore not have been making any mistake in this regard.

It is not clear why mr de Wet would in July 2004 be prepared to write off his client's claim if the defendant had as recently as on 20 April 2004 promised to pay an amount of R500 000,00 to the plaintiff (exhibit B8).

I am in any event not prepared to accept on a preponderance of probabilities that mr de Wet had been made aware of the full particulars of the financial positions of the close corporations before July 2004, and especially of the possibility that the plaintiff could quite possibly not get anything from the liquidation of the close corporations.

I find it difficult to understand why mr Viljoen would have informed mr de Wet of the claim of the Meat Corporation of Namibia (Meatco) and of the fact that it would render the close corporations insolvent and could result in the plaintiff not being able to obtain any financial benefit from the liquidations by means of "cessions" of the defendant's interests, but not of the fact that Meatco's legal representative had indicated to him that it would not pursue its claim in the liquidation of the close corporations.

In the end mr Viljoen was constrained to concede that in the circumstances the conclusion by mr de Wet of an agreement as alleged in paragraphs 4.1 to 4.3 of the plea would have made no sense:

"Maar dit sal mos bitter nalatig van hom wees om te skik op die basis dat hy nie weet wat hy gaan kry nie? === Ek kan nie kommentaar daarop lewer nie. Dit sou verbasend gewees het, ja."

Mr de Wet's letter of 15 July 2004 (exhibit B18-20 and annexure WA to the amended plea), in which he stated that he was making a settlement proposal to avoid, inter alia, "liquidation", would be difficult to reconcile with an earlier agreement to the effect that the close corporations would be wound up as part of the settlement.

As far as the defendant's alleged undertaking to cede her "interests" in the close corporations is concerned, strangely enough neither mr Wernich nor mr Viljoen was able to say whether the defendant had a claim on the basis of a loan account against the close corporations.

As for the alternative pleaded under paragraph 4.3, the plaintiff in any event had a claim against Biltong Hut 2 CC and would in any event have been entitled to lodge a claim in its liquidation. An agreement as alleged in the alternative would therefore also have made no business sense at all.

As already mentioned, however, it is not necessary to make findings as regards probabilities and credibility. The fact is that the defendant abandoned her plea in paragraph 4.4 of the amended plea and that the evidence that would have been necessary to prove the other alleged settlement agreement, pleaded in paragraphs 4.1 to 4.3 (and the alternative thereto) of the plea, was never presented.

Insofar as the evidence of mr Wernich and mr Viljoen may be relevant in determining whether such a verbal agreement had been concluded, it appears quite clearly from their own versions that no consensus could have been reached in the terms pleaded in paragraphs 4.1 to 4.3 (or the alternative thereto) of the plea.

Mr Wernich himself testified that he did not think that the plaintiff's legal representative "ever worked out what I was thinking" and mr Viljoen conceded that a plain reading of mr de Wet's letters made it clear that he could not have been considering and accepting the "proceeds" as envisaged by mr Viljoen in his letter of 16 July 2004.

It follows that the plaintiff is entitled to judgment in its favour. There is no reason why costs should not follow suit and why such costs should not be awarded on the scale of attorney and own client (as undertaken by the defendant in the deed of suretyship).

What finally remains to be considered is the wasted costs pertaining to the postponement of the trial midway through the evidence of mr Viljoen. Mr Grewar applied for the postponement after the witness had been confronted in cross-examination with a letter which had not been discovered by either party.

It was a letter dated 3 June 2004 and addressed to mr Viljoen, informing him of the fact that PJ's Biltong Bar CC owed an amount of R825 214,42 to Meatco and that the close corporations had bound themselves in favour of Meatco for the payment of that debt.

Mr Grewar motivated the application for postponement by arguing that the plaintiff should have discovered the letter before using it in cross-examination and that his instructions were that there was another document (which had also not been discovered) which would show that shortly after the letter of 3 June 2004 "is daar afgesien dat hierdie eise bewys sou word".

It was not in dispute that mr Olivier, counsel for the plaintiff, had obtained a copy of the letter of 3 June 2004 during an adjournment and that he had done so as a result of mr Viljoen's evidence that Meatco never intended pursuing its claims against the close corporations. The letter had therefore not been in the possession of the plaintiff or its legal representatives at an earlier stage.

It had, however, been in the possession of mr Viljoen, the defendant's attorney. It was quite clearly relevant to the issues in dispute and should have been discovered by the defendant.

The same would have applied to the document referred to by mr Grewar in his application for postponement. It would have been relevant for the same reasons and would also have had to be discovered by the defendant.

The fact is, however, that it transpired that no such document exists. When the trial resumed, mr Viljoen testified that it had been conveyed to him telephonically, by the attorney for Meatco, that they did not wish to apply for the winding-up of the close corporations or to partake in their liquidation.

There had therefore been no reason for the postponement and there is no reason by the defendant should not be held liable for the wasted costs. There is no reason why such costs should not also be taxed on the scale as between attorney and own client, as part of the "costs ... incurred in the enforcement of this suretyship" (clause 15 of the deed of suretyship, annexure B to the particulars of claim).

Although mr de Wet is not an attorney from a firm in Kimberley, he was present on behalf of the plaintiff throughout the trial. In view of his personal knowledge of and involvement in the correspondence and negotiations which were in issue, it would not have made much sense to have a correspondent attorney represent the plaintiff and assist mr Olivier during the trial. Despite the scale on which I intend awarding costs, I will therefore specifically order that the plaintiff's costs will include those of mr de Wet.

In the premises the following orders are made:

The defendant is ordered to pay to the plaintiff:

the amount of R1 032 272.,52; and

interest a tempore morae on the said amount calculated from 5 November 2007.

The defendant is held liable for the plaintiff's costs, including the wasted costs occasioned by the postponement of 7 November 2007, on a scale as between attorney and own client and including the costs of the plaintiff's attorney, mr T R de Wet of the firm Marais Müller Yekiso of Cape Town.

C J OLIVIER

JUDGE

NORTHERN CAPE DIVISION

For the Plaintiff: Adv L M Olivier

Instructed by: Van der Wall & Partners, KIMBERLEY

For the Respondent: Adv D M Grewar

Instructed by: Elliot, Maris, Wilmans & Hay, KIMBERLEY

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