

SOUTH AFRICA / JUDGMENT

Castcrete (Pty) Limited v Assasi Bham's Investments (Pty) Ltd (CIV APP FB 02/2024) [2024] ZANWHC 261 (18 October 2024) [2024] ZANWHC 261

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen, J T Djaje, F M M Reid

CASE / FILE NUMBER

CIV APP FB 02/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE

NO.: CIV APP FB 02/2024

Reportable:

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

In the matter between:

CASTCRETE

(PTY)

LIMITED

Appellant

and

ASSASI

BHAMS INVESTMENTS (PTY) LTD

Respondent

Date

Heard: 17 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 18 October 2024 at 10H00.

ORDER

Consequently, the

following order is made: The appeal is dismissed with costs, which costs shall include costs of the application for leave to appeal.

JUDGMENT

PETERSEN J

Introduction

- [1] This appeal against the whole of the judgment of the court a quo handed down on 22 October 2022, served before the Full Court on 17 May 2024, with leave of the court a quo. The citation of the parties in the court a quo is generally adopted in this judgment. The appellant was cited as the plaintiff and the respondent the defendant, in the court a quo.
- [2] The issues in this appeal of relevance, extrapolated from a plethora of grounds of appeal, are: (i) whether the plaintiff proved its claim; (ii) whether the plaintiff bore the onus in respect of the credits purportedly due to the defendant, raised the only defence by the defendant (otherwise stated whether the defendant bore this onus; and (iii) whether the plaintiff had locus standi to institute the claim.
- [3] The grounds of appeal are stated, for the sole reason of appreciating the three main issues in this appeal. They are stated as follows: (i) the court a quo erred in finding that the appellant's claim was ceded to a company, Credit Guarantee, whilst there was no evidence that such claim was ceded; (ii) the court a quo erred in finding the respondent had no onus in the matter, when the respondent raised various specific defences; (iii) the court a quo erred in finding that a witness for the appellant, Ms. Horton, conceded that errors could have been made in respect of the indebtedness of the respondent; (iv) the court a quo erred in finding that Ms. Horton conceded that the respondent may have understood that it was entitled to a discount on the basis of the invoices sent to it; (v) the court a quo erred in finding that there was doubt whether the claim amount was correctly computed; (vi) the court a quo erred in finding that Ms. Horton did not satisfactorily explain why the respondent was not entitled to a refund for the return pallets; (vii) the court a quo erred in finding that the balance of probabilities indicated that it was not agreed between the parties that the respondent would only be entitled to a discount if the breakages constituted more than 2.5% of the order; (viii) the court a quo erred in placing weight on the fact that no evidence was led in respect of the locus standi of Credit Guarantee to prosecute the claim in the name of the appellant and that Credit Guarantee is not a party to the proceedings; (ix) the court a quo erred in finding that there were flaws in the reconciliation statement of the appellant; (x) the court a quo erred in

finding that the invoices relied on by the appellant were not proved by the appellant and that same constituted hearsay; (xi) the court a quo erred in finding that the appellant did not prove its case. The finding that Ms. Horton was no longer employed by the plaintiff is conceded by the defendant, as a ground of appeal. Nothing hinges on this ground of appeal.

- [4] To my mind the first two issues above, relevant to the incidence of onus and burden of proof above are interrelated when regard is had to the evidence adduced at trial and are determinative of the issues in the appeal. The issue of locus standi was not raised as a special plea by the defendant. It appears to be a red herring, which the plaintiff latched onto in the court a quo and in this appeal. A reading of the judgment of the court a quo demonstrates that the issue of locus standi had no impact, if any, on the dismissal of the plaintiff's claim. For this reason, this judgment focuses in the main on the issue of the incidence of onus and burden of proof.

Background

- [5] It is common cause that the plaintiff and the defendant entered into a partly written, partly oral agreement ('the agreement') in terms of which the plaintiff sold and delivered roof tiles ('the goods') to the defendant. In terms of the agreement, the defendant would make payment of the goods delivered within thirty
- (30) days. The plaintiff duly complied with its obligations in terms of the agreement and delivered the goods to the plaintiff. The defendant upon delivery was indebted to the plaintiff in an amount of R124 868.47 as at, 13 February 2016. Despite demand, the defendant failed to make payment to the plaintiff of the amount of R124 868.47.
- [6] In its plea, the defendant admitted that the agreement was concluded, and that payment was due within thirty (30) days. Whilst not explicitly disputing that the goods were delivered, the defendant essentially admitted that the goods were delivered to it. The only defence raised by the defendant in its plea, is that it was entitled

to certain credits in respect of discounts, shortages, damages, breakages, overcharges and refunds. To this end, the defendant

specifically claimed that it was entitled to the following credits. R27 628.27 in respect of discounts; R7 638.12 in respect of "short deliveries"; R12 073.31 in respect of goods which were damaged; R3 450.10 in respect of goods that were broken; R30 444.30 in respect of amounts which the plaintiff overcharged; and R49 698.30 in respect of pallets which the defendant had returned to the plaintiff.

The evidence in the court a quo

- [7] No issue is taken with the summary of the evidence of the plaintiff's single witness, Ms. Horton, the Managing Director of the plaintiff at all times relevant to the claim. The succinct aspects of her evidence are as follows. She was in charge of the day-to-day operations of the plaintiff and had the final say on any discounts to customers. The plaintiff and defendant had engaged in business for more than two years prior to the dispute relevant to the claim in this matter. The defendant specifically bought from the plaintiff, roof tiles which were packed on pallets, sealed and transported to the defendant's premises. The plaintiff would invoice the defendant for every purchase and consequent delivery of the goods. The plaintiff discovered multiple copies of such invoices relevant to the claim. A statement of account on which the plaintiff relied at trial, was compiled from such invoices. As a result of the sole defence raised by the defendant in its plea, predicated on an entitlement to credits, the plaintiff caused Ms Horton to compile a reconciliation statement.
- [8] The court a quo noted that the reconciliation statement was compiled, when on the evidence of Ms. Horton, the plaintiff implemented a more reliable bookkeeping system, as the previous system on which the defendant, amongst others, was invoiced, was not very reliable. Ms. Horton testified that it was discovered on 13 February 2018, that the defendant owed the plaintiff R124 868.47, once the invoices were reconciled.
- [9] According to Ms. Horton, Credit Guarantee, an insurer, compensated the plaintiff 70% of its loss in terms of the dispute with the defendant. The rights to any claim against the defendant were consequently ceded to Credit Guarantee.
- [10] Ms. Horton explained that the norm in the relevant industry which found general application was to make an allowance for breakages at 2.5% of the total of the goods delivered, per invoice. A refund or deduction would, however, be applied only if breakages exceeded 2.5% of the total goods delivered. This much was stipulated on the invoices. A refund would also be applied when the pallets on which the goods were placed was returned in good condition within thirty
- (30) days. The plaintiff charged a tariff of R1,52 per item if its transport service was used, but only R1,00 per item if the plaintiff sourced transport from independent third parties, when link-truck deliveries were made.
- [11] In cross examination, Ms. Horton made several concessions. She conceded that for at least half the period of just over two years of the business relationship with the defendant, the plaintiff's bookkeeping system was unreliable. As a result, the concession was further made that errors may have occurred to the detriment or disadvantage of the defendant. The court a quo found that, on a balance of probabilities, this in fact had occurred.

- [12] Ms. Horton conceded that the invoices referenced the industry standard of a 2.5% discount on the invoiced amount if the invoice was settled within the period of thirty (30) days. The defendant would therefore have been entitled to a discount of 2.5% of the amount invoiced on each of the invoices. This inscription on the invoices remained, even after the bookkeeping system had been upgraded. To this end, Ms. Horton conceded that Mr Bham of the defendant may well have construed this as entitling the defendant to the 2.5% discount upon prompt settlement of the invoice. The concession was made when confronted with the fact that on her own version, she was inconsistent in allowing the discount. The court a quo found that on a balance of probabilities, the discount should have been allowed and consequently deducted from the invoiced amount. As a result, doubt existed, found the court a quo whether the amount allegedly claimed is correctly computed.
- [13] Ms. Horton was also at pains to explain the inconsistency in allowing refunds when pallets were returned since the defendant at times was refunded and at other times, not. As to the issue of breakages, Ms. Horton testified that the defendant claimed the discounted price per item that was broken contrary to the industry standard that it would only be allowed if breakage was more than 2.5%. The court a quo found that Ms. Horton could not satisfactorily explain if this was a term of the agreement with the defendant. On a balance of probabilities, the court a quo found that it was in all probability not agreed between the parties, and consequently never communicated to Mr. Bham of the defendant. This would be the only logical explanation why Mr. Bham would claim a deduction or refund for the breakage.
- [14] Ms. Horton finally conceded in respect of the inconsistency of the transport tariff that charging the defendant an escalated tariff was erroneously done.
- [15] The defendant closed its case without calling any witnesses.

The incidence of onus

- [16] There are two distinct issues impacting the incidence of onus which is contentious in this appeal. The first is the onus on the plaintiff to prove its case, and the second is whether the defendant bore any onus to prove its sole defence predicated on its entitlement to credits. In my view, these two issues on the incidence of onus, when applied to the evidence of Ms. Horton, considered as a whole and placed in proper perspective, is dispositive of the appeal.
- [17] The court a quo correctly found as follows at paragraph 5 of its judgment:

“[5] The onus is on the plaintiff to prove its case on a balance of probabilities. The defendant did not raise a special plea. There was therefore no onus placed on the defendant to prove its case. The onus remained on the plaintiff, who alleged that it was owed an amount of R124 868.47, to prove its claim on a balance of probabilities. This much is trite...”

Submissions

by the appellant on the incidence of onus

- [18] Adv Louw for the plaintiff submits that since the defendant failed to lead evidence, the plaintiff was only required to prove its claim on a prima facie basis, that is where the evidence is such that a court can or would find in favour of the plaintiff, and in the absence of an explanation from the defendant, the court would be entitled to conclude that the prima facie case becomes sufficient.
- [19] The high watermark of the aforesaid submission is premised on a contention by Adv Louw, that as the only witness for the plaintiff, Ms. Horton's evidence stands uncontested that: the defendant purchased the goods set out in its statement from the plaintiff; the goods set out in the statement were delivered to the defendant; the outstanding amount due by the defendant for the goods was R124,868.47 as set out in the statement; the defendant was not entitled to any discounts; the defendant was not entitled to a credit in respect of short deliveries; the defendant was not entitled to a credit for goods which were purportedly damaged or broken; the defendant was not entitled to a credit in respect of alleged overcharges; and the defendant did not return any pallets to the plaintiff for which it did not already received a credit.
- [20] Adv Louw further submits that Ms. Horton successfully refuted the defendant's version that it was entitled to certain credits. And for that reason, the plaintiff had no onus to refute the defendant's version since the defendant bore the onus to proof its defence that it was entitled to the credits. Reliance for the contention that the defendant bore the onus to prove its defence, is placed on the locus classicus of *Pillay v Krishna* 1946 AD 946, with selective reference to the following excerpts at pages 951 and 953:

"If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: ... Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.

...

Where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof..."

(my emphasis)

Submissions

by the respondent on the incidence of onus

- [21] Mr Wessels for the defendant submits that the plaintiff, relying heavily on the selective dictum in *Pillay v Krishna*, fails to paint the full and correct picture of the ratio of the judgment, since the respondent in that matter raised a special defence. Mr Wessels goes on to quote the full extent of the test on the onus of proof, postulated in *Pillay v Krishna*, which reads as follows:

"I must make three further observations. The first is that in my opinion, the only correct use of the word "onus" is that which I believe to be it's true and original sense namely the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his c/aim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima facie case made out by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof which have nothing to do with each other, same of course that the second will not arise until the first has been discharged. The third point is that the onus, in the sense in which I use the word, can never shift from the party at on whom it originally rested."

- [22] Mr Wessels in expounding on *Pillay v Krishna*, makes reference to the clarity provided by the Appellate Division as it was then known in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)* at 548 A-B, that:

"As was pointed out by DAVIS, A.J.A., in Pillay v Krishna and Another, 1946 AD 946 at pp. 952 - 3, the word onus has often been used to denote, inter alia, two distinct concepts.' (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be, 'and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in the true and original sense. In Brand v Minister of Justice and Another, 1959 (4) SA 712 (AD) at p. 715, OGILVIE THOMPSON, 1.A., called it "the overall onus". In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be transferred in the course of the case, depending upon

the measure of proof furnished by the one party or the other."

- [23] With reference to *Masuku v Mdlalose 1998 (1) SA 1 (SCA)*, the point is made by Mr Wessels that it is trite that the onus rests on a defendant to prove the facts underlying a special plea. And, in the context of the present matter, the defendant's sole defence as pleaded is not a special plea. The submission is ultimately made that the notion that the defendant bore the onus of proof in respect of its sole defence should be rejected. The plaintiff bore the onus of proof to the extent that it had to satisfy the court a quo that the defendant is indebted to the plaintiff as pleaded in its declaration. And that is only once that onus was satisfied that the defendant would have been required to produce evidence in rebuttal, and not that the defendant would have an onus to prove its defence which was not formulated as a special plea (defence).

[24] Mr Wessels therefore submits in conclusion that the standard of proof that the plaintiff had to satisfy to prove its claim, was proof on a balance of probabilities that it was entitled to a payment in the amount claimed from defendant. In this regard, it is said that

Ms. Horton's evidence simply did not tip the balance of probabilities in favour of the plaintiff.

Discussion

[25] As stated above, this appeal turns in the main on the issues of the burden of proof and incidence of proof. As in *Pillay v Krishna*, the same rings true in the present appeal that in the main "... it should be noted immediately that this is a matter of substantive law and not a question of evidence; *Tregea and Another v Godart and Another* (1939 AD 16, at p. 32)." Once the issues as aforesaid are clarified, the evidence or lack thereof in proving the plaintiff's claim can be considered, which implicates the sixth ground of appeal.

[26] At page 951 to 952 of *Pillay v Krishna*, relied on by Adv Louw, the full quotation, with reference to its place in our law, is stated as follows:

"The first principle in regard to the burden of proof is thus stated in the Corpus Juris: "Semper necessitas probandi incumbit illi qui agit" (D. 22.3.21). If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: "Agere etiam is videtur, qui exceptions utitur: nam reus in exceptione actor est" (D. 44.1.1). (Exceptio does not mean, of course, an exception in the sense in which the term is now used in our practice.) Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it. (I am not here going into questions as to how far either party may be assisted by presumptions: nothing of the kind arises here, so far as I know, and I am only stating the general rules which, as I see them, are applicable to the present case.) I have given one version of each rule from the Corpus Juris; there are a number of others, all to the same effect. Voet (22.3.9, Horwood's translation) sums up the two rules as follows: "First the plaintiff proves his declaration unless it be admitted and then the defendant his plea (exceptio) since he is plaintiff so far as that goes." Again leaving out all questions of presumptions (with which Voet deals later in the Title), this states these two general rules with admirable clarity."

[27] Immediately following the two rules as aforesaid, Davis AJA highlights a third rule, which to my mind is on all fours with the peculiar circumstances attendant in the present matter, where he states:

"But there is a third rule, which Voet states in the next section as follows: "He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute." This rule is likewise to be found in a number of places in the Corpus Juris I again give only one version: "Ei incumbit probatio qui dicit, non qui negat" (D. 22.3.2). The onus is on the person who alleges something and not on his opponent who merely denies it. This rule is stated by Matthaeus, de Prob. (8.1) to be lippis et tonsoribus nota, that is to say, known to everyone, but in fact its application is, as pointed out by Best (10th ed., sec. 270), the subject of much

misconception. He particularly remarks that it is not universal, but that "in the ordinary course of things the burden of proof is not cast on the party who merely denies an assertion". (Indeed, its very existence is denied by Goudsmit (Gould's trans., sec. 104, p. 316,

- n. 2.) Before I leave the subject of the Roman law I should add that the three rules to which I have referred are very shortly referred to, and approved, by KOTZÉ, J.A., in *Kunz v Swart and Others* (1924 AD at pp. 662, 663)."

(my emphasis)

- [28] Having regard to the third rule espoused in *Krishna v Pillay*, the submissions of Adv Louw falls shy of taking account of the third rule relevant to the denial of the defendant of the claim amount so asserted by the plaintiff. The onus (burden of proof) in respect of the claim amount, irrespective of the plea of the defendant which raises credits as a defence, had to be proven by the plaintiff.
- [29] Mr Wessels reference to the clarity provided in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* emanates from three further observations made by Davis AJA relevant to the three rules delineated earlier in the judgment. It is immediately apparent from the three further observations, that a clear distinction is drawn between a claim and a special defence (special plea). Applying the principles enunciated in *Pillay v Krishna* to the present matter, the duty was cast on the plaintiff, in order to be successful in finally proving its claim. The defendant did not raise a special plea. At most, what would have been required of the defendant was a duty to adduce evidence to combat a *prima facie* case made out by the plaintiff, if the plaintiff succeeded in putting up a *prima facie* case.
- [30] The overall onus (in the true and original sense) coined in *Brand v Minister of Justice and Another* and cited in *Pillay v Krishna* rested with the plaintiff and could not shift to the defendant. The duty to combat a *prima facie* case, if same was established by the plaintiff, at most would have placed on the defendant a burden and not a duty, of adducing evidence in rebuttal ('weerleggingslas'). The burden of rebuttal was all dependent upon the plaintiff setting up a *prima facie* case. The defendant therefore had no burden of proof or onus to prove its defence.
- [31] That brings me to the main question on the evidence adduced by the plaintiff; whether the court a quo erred in its finding that there was doubt whether the claim amount was correctly computed. The sixth ground of appeal purports to suggest that Ms. Horton testified extensively about the amount claimed and the manner in which it was calculated, and that such evidence remained uncontested since the defendant did not adduce evidence. Adv Louw sought to bolster this contention, with a submission that the plaintiff relied on its statement of account as part of its claim, and that the reconciliation statement used at trial was merely to address the defence of the defendant. The reconciliation statement formed the bedrock of Ms. Horton's evidence, which was shown by the defendant to be fraught with anomalies which favoured the defendant. It should follow from the exposition of *Krishna v*

Pillay, that the plaintiff's proof of its claim was not dependant on the evidence of the defendant in rebuttal.

- [32] It is indisputable that Ms. Horton's evidence under cross examination was replete with concessions which favoured the sole defence of the defendant. These concessions went straight to the heart of the plaintiff's claim. They included concessions on the alleged terms of the agreement; the plaintiff's failure to consistently pass on discounts to the defendant; the plaintiff's failure to pass on credits to the defendant for returning pallets; the plaintiff's failure to consistently and correctly invoice the defendant on the agreed transport tariffs; and the plaintiff's consistent failure to pass on discounts for breakages. The court a quo pointed out that the defendant took issue with the fact that it was entitled to credits totalling an amount of R130 932.40,

which it broke down with specificity relevant to the concessions by Ms. Horton. On the allegations, the defendant was not indebted to the plaintiff for any sum.

- [33] The defendant in cross examining Ms. Horton, elicited specific concessions regarding the plaintiff's migration from the QuickBooks accounting software to Microsoft AX, as the former was found to be problematic and not secure. For the first year of the just over two-year business relationship with the defendant, the plaintiff utilised Quickbooks. The defendant in this regard was overcharged an amount of R2451,00. Ironically, the statement relied on by the plaintiff in its claim and the consequent reconciliation statement used at trial by Ms. Horton, was compiled on the invoices generated by the problematic QuickBooks accounting software. Notwithstanding the concessions by Ms. Hortons, the plaintiff at no stage in the court a quo, applied for an amendment of its particulars of claim in accordance with Uniform Rule 28.

- [34] The evidence of Ms. Horton adduced on behalf of the plaintiff simply did not meet the threshold of the first rule, that the burden of proof was on the plaintiff to prove its case; and the concessions made were such that no prima facie case was set up by the plaintiff, meriting rebuttal by the defendant. The ultimate finding by the court a quo at paragraph 16 of its judgment as it stated, therefore cannot be faulted:

"The defendant's failure to testify is not proof of the plaintiff's case. Evidence, at least to establish a prima facie case, is required from the plaintiff. The question that needs to be answered is the sufficiency of the evidence thus given. The balancing of probabilities, drawing of inferences and conclusion came into play only after, and not before, the plaintiff has made out a prima facie case. Court decisions must be

based on proven facts. If the plaintiff fails to adduce evidence on which to prove its allegations, the case should be dismissed."

- [35] For all the reasons aforesaid, the appeal stands to be dismissed with costs, which costs shall include the costs of the application for leave to appeal.

Order

[36] Consequently, the following order is made:

The appeal is dismissed with costs, which costs shall include the costs of the application for leave to appeal.

A H PETERSEN

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree.

J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

F M M REID

Appearances

For the Appellant: Adv N G Louw Instructed by: RWL INC C/o Maree & Maree Attorneys 11 Agate Avenue RIVIERA PARK MAHIKENG Tel: 018 381 7495 Email: lit2@maree-mareeattorneys.co.za

For the Respondent: Mr M Wessels Instructed by: Carel Zietsman Attorneys C/o Van Rooyen, Thlapi Wessels Attorneys 9 Proctor Avenue MAHIKENG Tel: 018 381 0804/7 Email: litigation@vtwinc.co.za

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