

SOUTH AFRICA / JUDGMENT

Coetzee v Wilsenach Van Wyk Goosen & Bekker Inc (57161/11) [2013] ZAGPPHC 451 (4 December 2013)

[2013] ZAGPPHC 451

COURT

North Gauteng High Court, Pretoria

BEFORE

H J Fabricius

CASE / FILE NUMBER

57161/11

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IN THE HIGH COURT OF SOUTH
AFRICA
(NORTH GAUTENG HIGH COURT)
Case Number: 57161/11
Date: 4 December 2013
Not reportable
Not of interest to other judges

In the matter between:

CAROL
COETZEE.....PLAINTIFF
And
WILSENACH VAN WYK GOOSEN
& BEKKER
INC.....
DEFENDANT

JUDGMENT

Fabricius J,

1.

On 3 May 2008, Plaintiff and her husband Dr. G. Coetzee, entered into a written agreement of sale with The Cartridge Sales CC”, of which Mr. S. Phillips was the only member. The main subject matter of this agreement was the sale by Cartridge Sales CC of a property in Woodhill Golf Estate, Pretoria, to Plaintiff for the purchase price of R5 000 000. At the same time, Plaintiff and her

husband sold two urban properties in Shelley Beach to Cartridge Sales CC and it was agreed that their price would be set off against the purchase price payable by Plaintiff to Cartridge Sales CC. The remainder of the purchase price of the said property in Woodhill would be paid as follows:

1.1

R1 000 000 as deposit by way of bank transfer, not later than 10 May 2008 in the personal bank account of 'Phillips';

1.2

R3 100 000 on registration of the "erf" in the name of Plaintiff, for which amount, an irrevocable guarantee, issued by a registered financial institution for the said amount, would be delivered by Plaintiff to the Conveyancer not later than 30 April 2009.

It was also agreed that occupation would be given to Plaintiff on 1 June 2008 and that Defendant would attend to the transfer of all the relevant properties.

2.

For a proper understanding of what the background circumstances were, it is at this stage convenient to quote the two relevant clauses in the agreement:

"4.1.1 R1 000 000 (one million rand) payable as a non-refundable deposit to Cartridge Sales CC. I Carol;"

"4.4.1 The deposit referred to in 4.1.1 above by not later than 10 May 2008 by way of bank transfer into the following bank account 'Mr. S. F. Phillips' ..." Clause 12.1 further provided that Cartridge Sales CC would pay from the proceeds of the deposits, the costs for the drawing and the preparation of the agreement. I may just add at this stage that Mr. Phillips testified that he did do so.

3.

Plaintiff complied with her obligations and took occupation of the property, but thereafter realised that transfer of the property had become impossible due to the fact that Cartridge Sales CC and/or Phillips failed or refused to settle arrear rates taxes due to the local authority, as a result of which a Rates Clearance Certificate could not be obtained and they also could not settle the balance outstanding in respect of a mortgage bond loan agreement registered in respect of relevant property. Performance was demanded, but was not forthcoming, and as a result Plaintiff cancelled the agreement on 21 October 2008. The amount that had been paid to Defendant in Trust was repaid to Plaintiff, but not the deposit of R1 000 000. Plaintiff obtained judgment against Cartridge Sales CC and Phillips, jointly and severally, under case number 4082/2009, but no amount whatsoever could be recovered from them

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As a result Plaintiff instituted this delictual action and formulated its cause of action as follows:

4.1

Prior to the signature of the relevant agreement, Defendant, represented by J. de Beer, represented to Plaintiff that Phillips and Cartridge Sales CC were then in a sound financial position and might safely be trusted to be in a position to give transfer of the relevant property to Plaintiff;

4.2

J. de Beer, when Plaintiff was concerned about payment of the deposit into the bank account of Phillips, in particular represented to Plaintiff that he was familiar with Phillips over an extended period, and that the amount of R1 000 000 could safely be paid directly into the bank account of Phillips, and that Phillips and/or Cartridge Sales CC would be in the position to repay the amount of R1 000 000 should the sale transaction not proceed;

4.3

De Beer was presented by Defendant as an Attorney and Conveyancer with authority to act on Defendant's behalf in that;

4.3.1

Administrative employees of Defendant, acting in the course of their employment with Defendant in furtherance of their duties with Defendant, orally confirmed that De Beer was a "Director" and attorney of Defendant;

4.3.2

De Beer conducted the practice of an attorney at the premises of Defendant under the name and logo of Defendant;

4.3.3

De Beer was allowed to make use of Defendant's letterhead, and was allowed to practice as an attorney representing Defendant. Defendant as attorneys, including De Beer, should in accordance with the convictions of the community, have provided correct information to Plaintiff, and should not have persuaded Plaintiff to make payment directly into the bank account of Phillips without proper investigation of the financial position of Phillips. It was then further alleged that Defendant knew that the Plaintiff would act on De Beer's assertion and that Plaintiff signed the Deed of Sale because reliance was placed on the truth of the representations made. It was accordingly alleged that the representations relating to the financial position of Cartridge Sales CC and Phillips were made recklessly by Defendant, alternatively were made negligently under circumstances where Defendant was aware of the true financial position of Cartridge Sales CC and Phillips, alternatively Defendant should have been aware of the true financial position of Cartridge Sales CC and Phillips, further alternatively, that Defendant made the representations without properly investigating the financial position of those parties, under circumstances when a reasonable diligent attorney would have done so.

5.

After evidence was lead, it became clear that the only issue between the parties was whether or not the said De Beer had made the representations to Plaintiff, in fact her husband. It was accepted by Defendant that if this representation had been made, delictual liability would follow inasmuch as that conduct would have deviated from the norm. In this context the parties, by agreement handed up a “summary of experts meeting” in which par. 2.5 stated that “a Conveyancer has a duty to point out the risks of, and advise a purchaser against payment of any advances to a seller prior to the registration of the property into his or her name.” Par. 2.6 also stated that “although it is an exception to well established conveyancing practices, guidelines, procedures and rules, it is not uncommon, but remains inadvisable, that advances to a seller on the purchase price is made prior to registration.” It was also stated in par. 3 of this summary, that “it would be grossly negligent of a Conveyancer to be instrumental in the drafting of a Deed of Sale that is not in compliance with the established practices as explained in par. 2.1 to 2.7 above, unless such Conveyancer had in advance, accurately and effectively by way of a consultation, in person and/or written recommendation, advised the purchaser and/or seller of the detrimental consequences of not complying with the above practices in par. 2.1 to 2.7.”

6.

The only issue before me therefore was whether or not the said representation was made to Plaintiff (in fact her husband). It is not necessary, in this context, to deal extensively with the evidence of Mrs. C. Coetzee who had no dealings with Mr. De Beer but, was informed of such by her husband and was kept up to date with developments. Obviously Defendant denied that any such representations were made and in this context, where two mutually exclusive versions exist, I must follow the approach set out in, amongst others, *Baring Eiendomme Bpk v Roux* [2001] 1 all SA 399 A, *National Employers General Insurance Company Ltd v Jagers* 1984 (4) SA 437 (E) at 440 e) to 440 A and *Koster- Korporatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* 1974 (4) SA 420 (W). In the *National Employers* decision, the following was said in this context and was referred to with approval by the Supreme Court of Appeal in the *Baring Eiendomme* decision: “Where there are two mutually destructive stories, [the Plaintiff] could only succeed if he satisfies the Court on the preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff’s case anymore than they do the Defendant’s, the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that

his evidence is true and that the Defendant’s version is false.”

The approach that must be followed in determining the value of the evidence, in the context of factual disputes, is set out in *Stellenbosch Farmers Winery Group Ltd & Another v Martel I Et Cie & Others* 2003 (1) SA 11 SCA. Along the same lines, in *Cohen & Another v Lench & Another* 2007 (6) SA 132

SCA, it was held that oral evidence can only be properly evaluated by testing it against the inherent probabilities.

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As I have said, Mrs. Coetzee was not involved in any of the dealings proceeding the signing of the agreement, but gave evidence as to what was reported to her by her husband and also gave certain views which were not challenged. One of those comments was that she said her husband was a deft/competent/skilful businessman (“vaardig”). They had bought 10 properties together in the past. She herself had purchased three properties. She knew the risk of paying a deposit to a seller before transfer. She and her husband discussed all relevant issues and made decisions together thereafter. She had never seen or met Mr. De Beer. In this context it is interesting to note that Defendants Counsel, Mr. De Koning SC, in his written Heads of Argument, stated that one of the facts that I would have to consider was that Dr. Coetzee was at the relevant time a skilful businessman (“bedrewe”)

with wide experience in the purchase of fixed property and had further experience in the purchase of two Wimpy franchises and the

running of a plastic business. He also stated in the same written argument that both Plaintiff and Dr. Coetzee were aware of the risk of paying any part of a purchase price for fixed property before transfer thereof. Keeping that in mind, let me return to the facts which were not in dispute. They emanate from the evidence of Dr. Coetzee, Mr. De Beer and Mr. Phillips. Plaintiff and her husband were interested in the purchase of a property in Woodhill Estate during the end of March/beginning of April 2008. They lived in Silver Lakes and their daughter went to school in Woodhill Estate, which entailed a travelling distance twice a day of some 20km. They viewed the property and although the price sought was initially in the R6 800 000 region, they made an offer of R5 000 000 to Mr. S. Phillips. I have referred to the relevant terms of the offer and the subsequent written agreement. Phillips testified that the deposit of R1 000 000 was for him, the decisive factor. He required that deposit to be paid either to himself or to the Close Corporation. He made contact with Mr. De Beer of Defendant to handle the relevant transaction. In evidence-in-chief, he said that he had done one or two transactions with Mr. De Beer before this particular one. And when he asked him to assist, Mr. De Beer said that it was not his field of expertise, but that he would refer the transaction to Dr. D. Smit, who did contract

work at Defendant’s firm. He also added that when the relevant clauses were inserted by himself (i.e. those reflecting the payment of the deposit to his Close Corporation), he did not discuss this with Defendant. During cross-examination he said that he had met Mr. De Beer when he did a transfer of a property in Ramsgate for him. He then added that he was not 100% certain but that he thought that De Beer had also done four or five transactions for him in Sunnyside, Pretoria. I

may just add at this stage that Mr. De Beer had no knowledge and/or memory of this allegation. He told Dr. Smit what was basically required, and he only recalled that now after having looked at the documentation prior to his appearance in Court. He was 100% certain that he did not discuss the question of the deposit being paid directly to him or to his Close Corporation with anyone at all. The fact of the matter was that before re-reading the documentation he wouldn't have remembered any particular detail except that he wanted the money (the deposit) as soon as possible. He remembered changing the banking details in the document that was forwarded to him to make provision for the payment of the deposit. From day 1, as he put it, he insisted on such payment of the deposit directly to himself or to his Close Corporation. He certainly did not instruct the Attorneys that the deposit would have to be paid into a Trust account. De Beer never told them that he was not a qualified Attorney or Conveyancer but simply said that contracts were not his field of expertise. De Beer knew nothing of his financial position or that of the Close Corporation except that he had done some transfers for him in the past, as he put it. He had no business dealings with him outside the field of conveyancing, and certainly did not partner him in any developments in Woodhill. He never asked him whether he was a qualified Attorney, but simply viewed him as being such.

8.

The transaction was discussed by Dr. Coetzee and Mr. De Beer on a number of occasions and a file was opened by Dr. Smit for the intended transaction. A document that was part of this file was referred to during the evidence, and it was a note made by Dr. Smit in his own hand writing referring to certain details of the intended transaction. Mr. De Beer had also made a number of notes on the same page and identified his own hand-writing. He also identified the writing of Dr. Smit, who was deceased. One of the notes on this document reads as follows "directly to seller" beneath the word "deposit". Mr. De Beer testified that it was not his hand-writing, and did not know whose it was. In the absence of any indication by anyone that a third person would or could have made this entry, it is probable that this entry was made by Dr. Smit.

9.

The first draft Agreement of Sale is dated 21 April 2008 under the reference of

Dr. D. Smit, and in par. 4.1 provision is made for the payment of the relevant purchase prices to be paid "by the Carol to the Cartridge as follows:

4.1.1 R1 000 000 payable as a non-refundable deposit directly to Cartridge by Carol". Clause 4.4.1 then states "the deposit referred to in 4.1.1 above by not later than 15 May 2008 by way if a bank transfer into the Conveyancer's bank account." There is an obvious contradiction between the plain wording of these two clauses but one could read them together by saying that the deposit would first have to be paid into the Conveyancer's bank account by not later than 15 May 2008 whereafter it would be paid to Cartridge. That interpretation however would ignore the plain wording of clause 4.1.1 which mentions payment to Cartridge directly by Carol. What the clauses, in any event, do not say is that the deposit would be payable upon registration. This first draft was sent by fax to Mr. Phillips on 22 April 2008. It also appears that on 23 April Mr.

De Beer had determined that the outstanding amount on the bond of Cartridge was some R4 500 000. Phillips then phoned De Beer (and not Dr.

Smit) and indicated that certain amendments would have to be made to this draft, and accordingly Mr. De Beer made such in his own hand writing. This draft does not refer to Dr. Smit as being the reference on the first page, but merely refers to the name of the Defendant firm. Clause 4.1.1 was changed by Mr. De Beer by adding the words "on date of signature of this contract".

Clause 4.1.1 was changed by him by changing the date of 15 May 2008 to 7 May

2008. Having regard to these changes made by Mr. De Beer and the clear reading of Clause 4.1.1, I can mention at this stage that Mr. De Beer's evidence was that he denied making any representations to Plaintiff or Dr. Coetzee concerning the financial status of Mr. Phillips and/or his Close Corporation, but that he also stated that he became aware of the terms of the final signed agreement only on 20 August 2008, and noticed with shock that it contained the clause that the deposit had to be paid directly to the seller. Having regard to his own addition to Clause 4.1.1, this evidence is difficult to accept. Having regard to his own evidence that never in his 27 years of experience in dealing with conveyancing matters (although he was not an admitted Attorney or admitted Conveyancer) had he suggested that a deposit be paid directly to the seller before transfer, or had recommended such transaction, one wonders what he thought when he made the addition to Clause 4.1.1?

10.

A second draft was sent to Mr. Phillips by email on 1 May 2008 and there is no dispute about that. This draft is dated 28 April 2008, and again contains the reference to Dr. D. Smit. Clause 4.1.1 was changed by the deletion of the word "directly". Clause 4.4.1 remained as it is. De Beer did not see this second draft. The two drafts that I have mentioned, clearly contain on each individual page in large capital letters the word "DRAFT". A Deed of Sale was handed to Plaintiff's husband during the first week of May 2008 at Ramsgate, where Dr. Coetzee had a business right opposite the Estate Agency run by Mr. Phillips. Dr. Coetzee made certain amendments thereto in his own hand writing and Clause 4.1.1 remained as it is, whilst Clause 4.4.1, which had previously stated that the deposit referred to in 4.1.1, was to be paid into the

Conveyancer's bank account, was changed by Mr. Phillips, on his own version, without consulting Defendant, to read as follows "the deposit referred to in 4.1.1 above by not later than 7 May 2008 by way of bank transfer into the following bank account

- Mr. S. F. Phillips ...". This Deed of Sale was then signed by Phillips, Plaintiff and her husband and the deposit was paid as I have said. After the power to the Woodhill residence had been disconnected by the City Council, because of the outstanding rates, and because Phillips had mentioned to Dr. Coetzee that he had insufficient funds to pay the bond that was owing on the property, Dr. Coetzee wrote to Mr. De Beer on 21 August 2008. Reference was made to the insufficient funds to pay off the bond, occupational rent that would be the monthly interest

on the R3 100 000 held by Defendant in trust, and the problem with the electricity disconnection. Dr. Coetzee mentioned that the whole matter was of the utmost importance and that he expected satisfactory reply in writing the very next day. De Beer received this letter and sent it to Phillips for his commentary. On 1 December 2008 Coetzee and De Beer met and the letter mentioned that ways and means had to be thought of to safeguard the R1 000 000 deposit, and a number of options were discussed.

11.

On 10 September 2008, Plaintiff's Attorney wrote a long letter to De Beer setting out their complaints and mentioning to what is now the Plaintiff's cause of action, detailed in the Particulars of Claim. There was no formal reply to this letter, but De Beer testified that he had drafted such, and handed it to the senior partner of the firm so that he could deal with it appropriately. This partner had apparently adopted some or other abrupt attitude as a result, and a formal reply was never sent. The draft reply does not contain a denial by De Beer that he had drafted the contract, but contains the allegation that the agreement came about as a result of consensus between the parties. In the context of failure to comply with a legal duty, it was said that the parties were aware of the situation and that the agreement was drawn as per the consensus between them. Mr. De Beer could not explain why he had not either reminded Mr. Goosen, the senior partner, to send out a proper and detailed reply, or why he had not insisted upon such being done. His evidence was that he was merely a "Jack of All Trades, Master of None", at the firm, which included the trimming of rosebushes, and that it was not for him to tell a senior partner what to do under such circumstances. On behalf of Plaintiff, Mr. Bergenthuin SC argued in this context that apart from this being a good or satisfactory explanation, it indicated that both De Beer and Goosen knew that there was no acceptable defence to the allegations made against De Beer and/or the firm and that it was for that reason that no reply was forthcoming. Mr. De Koning SC, in turn referred me to *McWilliams v First Consolidated Holdings Pty (Ltd)* 1982 (2) SA 9 ad where it was said that "quiescence is not necessarily acquiescence" and that the parties' failure to reply to the letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as a truthful. In general however, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor tearing against him in the assessment of the probabilities and in the final determination of the dispute. I must say at this stage, in the context of this letter and, the draft reply thereto and the absence of a formal reply, the following:

11.1

The allegations made were of such a nature that I would have expected an attorney, and/or an attorneys firm to reply to the allegations made if they were not correct according to ordinary legal practice;

11.2

The draft reply is not a satisfactory answer to the specific allegations made and the clear impression is gained that the author thereof has left his options open. This is in stark contrast to Mr. De Beer's reaction in Court when it was put to him that he was not truthful. He vehemently demanded an apology from Senior Counsel;

11.3

His explanation for not replying properly, is not convincing, if it is true. Having regard to De Beer's own evidence that never in 27 years had he ever done such a transaction or had recommended such, one would have expected a firm detailed reply denying that any such representations had been made;

11.4

On the other hand, the very detailed complaint of 10 September 2008, even before the contract was cancelled on 21 October 2008, is an indication, contrary to Defendant's argument, that Plaintiff was not the author of a "fairytale" after his efforts to obtain repayment of the deposit from Phillips and/or his Close Corporation failed. I refer to "fairytale" in this context because that is what Mr. De Koning SC suggested that Plaintiffs allegations were. Although Phillips was called by Defendant as a witness, I find the almost remarkable submission, in Defendant's written Heads of Argument, to the effect that, that although Phillips wanted to receive the deposit as quickly as possible, that this was a thought which he had nurtured in secret, and that that was the reason, why he did not inform either De Beer or Smit of the changes he made to Clause 4.4.1. In the light of the evidence of Mr. Phillips himself, which was never contested, and the evidence by both of the Coetzee witnesses to the same effect, I find this submission surprising to say the least. It is an admission that is contrary to the direct evidence of Mr. Coetzee, Mr. Phillips, and the relevant draft agreements, namely, that Phillips wanted the deposit to be paid to himself or his Close Corporation as soon as possible. His submission also is contrary to the note in the file made most probably by Smit himself, as I have already said.

12.

Having regard to the evidence of the Coetzees, the evidence of De Beer and of Phillips and the relevant drafts agreement and the final agreement, it is on the balance of probabilities clear to me that Phillips from the beginning insisted that the deposit would have to be paid directly to him. This was his most important motivation for signing the agreement, and this was never challenged during the evidence. The only available note of Smit, as testified to by De Beer, states that the deposit had to be paid directly to the seller. Everyone was aware of the fact that a direct payment to the seller had to be made. The draft changed by De Beer in this context, as per Clause 4.1.1, makes this abundantly clear and his evidence, that he only became aware thereof on 20 August 2008, is highly circumspect, and in fact improbable. Having regard to the unchallenged evidence of both Mrs. Coetzee and Dr. Coetzee, that they were both experienced businesspersons who had dealt with numerous properties, and that they were aware of the risk, which Defendant's

Counsel in fact conceded, it is highly unlikely that no discussion had been held on that topic, as De Beer would have it. It is most improbable that no such discussion had been held, and it is probable that such discussion in fact convinced the rather reluctant Dr. Coetzee to enter into the agreement that he in fact did. It is also noticeable that De Beer, in his draft answer to the letter of 10 September 2008, never mentioned that the signed contract was in contradiction with that drafted by Defendant. The final agreement is substantially in the same form as the first draft in fact.

13.

In the light of all of the above I cannot accept that there was no discussion at all between Dr. Coetzee and Mr. De Beer about the risks of paying the large sum directly into Phillips and/or his Close Corporation. I believe Dr. Coetzee's evidence in this context, and in any event, his evidence accords with the probabilities seen contextually, and seen of course directly referenced to the documentation that I have mentioned. I may also add that in the context of the relationship previously between Phillips and De Beer concerning the number of transactions that the latter had done for the former, there was also a contradiction in their evidence. It is also noticeable that Dr. Coetzee's evidence that he was an experienced businessman but not was not only not challenged during cross-examination, but was in fact accepted by Defendant's Counsel.

14.

It is clear that De Beer/Defendant breached the legal duty that existed, having regard to the common view of the experts that I have referred to. In my view negligence has been established and it is clear that the legal convictions of the community demand that the mentioned representation, and the omission to make proper enquiries into the actual state of affairs, be regarded as unlawful. The existence of all the elements of a delict was not disputed by Defendant's Counsel if I found that the mentioned representations that were pleaded had in fact been made. In the context of what is required in establishing a claim based on a delict;

See: McCarthy Ltd Trading T/A Budget Rent A Car v Sunset Trading 300 CC T/A Harvey World Travel & Another 2012 (6) SA 551 GNP. Loss suffered by Plaintiff is a finite amount, namely the deposit paid and subsequently lost, as well as the costs of the previous litigation.

See: Telematic Pty (Ltd) v Advertising Standards Authority SA 2006 (1) SA 461 SCA at 465 C. It is also clear from Suid-Afrikaanse Bantu Trust v Ross en Jacobs 1966 (2) SA 428 A at 432 E to G that an Attorney who acts negligently and gives wrong advice, could be liable for an action based delict as a result of negligent

misrepresentation. The same can be gleaned from Joel v Bramwell-Jones 1998 (1) SA 836 WLD and Rampal Pty (Ltd) v Brett, Wills and Partners 1981 (4) SA 360 D and C Local Division

15.

The following order is therefore made against Defendant:

1. Payment of R1 000 000;
2. Payment of interest thereon at the rate of 15,5% per annum from date of summons to date of payment;
3. Payment of an amount equal to the taxed costs of Plaintiff under case number 4082/2009;
4. Costs of suit, including cost of Senior Counsel.

JUDGE H. J. FABRICIUS

JUDGE OF THE HIGH COURT

Case no.: 57161/11

Counsel for the Plaintiff: Adv J. G. Bergenthuin SC

Instructed by: Van Zyl Le Roux Inc

Counsel for the Defendants: Adv L. W. De Koning SC

Instructed by: Gildenhuys Malatji Inc

Heard on: 27/11/2013 to 29/11/2013

Date of Judgment: 04/12/2013 at 10:00

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