

SOUTH AFRICA / JUDGMENT

Independent Newspapers (Pty) Ltd v Brittania Bay Developers (Pty) Ltd (6680/08) [2012] ZAWCHC 258 (17 April 2012) [2012] ZAWCHC 258

COURT

Western Cape High Court, Cape Town

BEFORE

P.A.L. Gamble

CASE / FILE NUMBER

6680/08

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IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no: 6680/2008

In the matter between:

INDEPENDENT NEWSPAPERS (PTY)

LIMITEDPlaintiff

And

BRITTANIA BAY DEVELOPERS (PTY)

LIMITEDDefendant

JUDGE P.A.L. GAMBLE

FOR THE PLAINTIFF Adv. R.G. Patrick

INSTRUCTED BY Messrs John Taylor and Associates Inc

FOR THE DEFENDANT Adv. M. Daling

INSTRUCTED BY Malherbe Hanekom Inc

DATES OF HEARINGS 29 February, 1 March and 19 March 2012

DATE OF JUDGMEN 17 April 2012

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

REPORTABLE

CASE NO: 6680/08

In the matter between: INDEPENDENT NEWSPAPERS (PTY)

LTDPlaintiff And BRITTANIA BAY DEVELOPERS (PTY)

LTDDefendant JUDGMENT: 17 APRIL 2012 GAMBLE, J:

INTRODUCTION

[1] On 19 October 2007 the Plaintiff company placed a full page advertisement in the Business Report section of four of its titles

viz the Cape Times, the Star, the Pretorian News and the Mercury. The advertisement contains an ambitious message by one Gert Leopold Joubert (“Joubert”) to his fellow citizens on the issue of poverty alleviation and suggests, in fairly simplistic terms, his perception of the panacea to South Africa’s economic woes.

[2] Joubert, together with his brother, is a director and shareholder in the Defendant company which develops and markets seaside properties on the Cape West Coast. He is, by all accounts, the “guiding mind” of the Defendant and although the advertisement was formulated in his name, Joubert accepts that for purposes of its placement and payment, the Defendant is the entity with which the Plaintiff dealt and to whom it is entitled to look for payment, if any such payment is due. 1 [3] The Plaintiff’s case on the pleadings is that during October 2007 its sales representative in Johannesburg, Sonja Coetzer,

concluded a contract for the placement of the advertisement with the Defendant represented by one Elize van den Bergh and a certain Ryan Wilder. It is alleged that van den Bergh placed the advertisement while Wilder supplied the advertising material to the Plaintiff. The Plaintiff claims that these two individuals were duly authorised to act on behalf of the Defendant. [4] The Plaintiff says that it duly placed the advertisement in the four titles referred to above on 19 October 2007 and it wants to be paid the sum of R137 538,82 by the Defendant. The Plaintiff says in its particulars of claim that the total cost of the publication of the advertisement in the four titles was R177 531,85. It acknowledges receipt of the sum of R39 999,03 paid by the Defendant in respect of publication in the Cape Times and claims the balance due to it.

[5] In its plea the Defendant denies that either van den Bergh or Wilder were its representatives or that they were authorised to represent it in negotiating the transaction in question. In regard to the payment in respect of the Cape Times the Defendant admits that part payment was made on the Plaintiff’s original account to it. The Defendant goes on to say that payment was made as a consequence of an advertisement placed in the Cape Times which appeared after being authorised in accordance with Defendant’s “internal procedures”².

In the matter between:

INDEPENDENT NEWSPAPERS (PTY) LTDPlaintiff

BRITTANIA BAY DEVELOPERS (PTY) LTDDefendant

JUDGMENT: 17 APRIL 2012

GAMBLE, J:

INTRODUCTION

[1] On 19 October 2007 the Plaintiff company placed a full page advertisement in the Business Report section of four of its titles

viz the Cape Times, the Star, the Pretorian News and the Mercury. The advertisement contains an ambitious message by one Gert Leopold Joubert (“Joubert”) to his fellow citizens on the issue of poverty alleviation and suggests, in fairly simplistic terms, his perception of the panacea to South Africa’s economic woes.

[2] Joubert, together with his brother, is a director and shareholder in the Defendant company which develops and markets seaside properties on the Cape West Coast. He is, by all accounts, the “guiding mind” of the Defendant and although the advertisement was formulated in his name, Joubert accepts that for purposes of its placement and payment, the Defendant is the entity with which the Plaintiff dealt and to whom it is entitled to look for payment, if any such payment is due. 1

[3] The Plaintiff’s case on the pleadings is that during October 2007 its sales representative in Johannesburg, Sonja Coetzer,

concluded a contract for the placement of the advertisement with the Defendant represented by one Elize van den Bergh and a certain Ryan Wilder. It is alleged that van den Bergh placed the advertisement while Wilder supplied the advertising material to the Plaintiff. The Plaintiff claims that these two individuals were duly authorised to act on behalf of the Defendant.

[4] The Plaintiff says that it duly placed the advertisement in the four titles referred to above on 19 October 2007 and it wants to be paid the sum of R137 538,82 by the Defendant. The Plaintiff says in its particulars of claim that the total cost of the publication of the advertisement in the four titles was R177 531,85. It acknowledges receipt of the sum of R39 999,03 paid by the Defendant in respect of publication in the Cape Times and claims the balance due to it.

[5] In its plea the Defendant denies that either van den Bergh or Wilder were its representatives or that they were authorised to represent it in negotiating the transaction in question. In regard to the payment in respect of the Cape Times the Defendant admits that part payment was made on the Plaintiff’s original account to it. The Defendant goes on to say that payment was made as a consequence of an advertisement placed in the Cape Times which appeared after being authorised in accordance with Defendant’s “internal procedures”2.

- [6] In its reply to a request for trial particulars the Defendant amplified its case by alleging that: 6.1. Wilder had on occasion prepared advertising material for it and delivered same to Plaintiff for publication; 6.2. it was unable to say who delivered the advertisement in question to the Plaintiff but suggested that it was possible that Wilder had done so; 6.3. in regard to the Cape Times, the advertisement was authorised by Joubert personally; and 6.4. the Defendant could not recollect who represented the Plaintiff in regard to the placing of the Cape Times advertisement. The Defendant declined to furnish any further particularity regarding the terms of the oral agreement pursuant where to it was alleged that the Cape Times advertisement was placed, saying that this was a matter for evidence. [7] The Plaintiff filed a replication to the Defendant's plea in which it persisted in its allegation that van den Bergh and Wilder were duly authorised. In the alternative, the Plaintiff alleged that the Defendant was estopped from denying the authority of van den Bergh and Wilder on the following basis: " 1.2.1. The Defendant placed adverts with the Plaintiff historically through the agency of Elize van den Bergh, and Ryan Wilder historically had provided advertising material to the Plaintiff from the Defendant; 1.2.2. At no time did the Defendant advise the Plaintiff that the mandate afforded by the Defendant to Elize van den Bergh and Ryan Wilder was terminated or limited; 1.2.2.(bis) In the published advertisement the Defendant's Mr. Joubert stated that the advertisement comprised a message published 'in all the newspapers of South Africa'; the Defendant accordingly represented to the Plaintiff that Elize van den Bergh and Ryan Wilder were duly authorised without limitation to place adverts and provide advertising material on its behalf in newspapers published throughout South Africa; 1.2.3. The Plaintiff relied upon the authority of Elize van der Bergh and Ryan Wilder so represented in accepting the advertisements, payment for which is now in dispute. " THE EVIDENCE [8] The Plaintiff presented the evidence of Coetzer and the Defendant the evidence of Joubert. These were the only witnesses to testify at the trial. In addition the parties handed in an agreed bundle of documents which were used during evidence and in argument. Regrettably, neither of the witnesses was of much assistance to the Court in determining the issues between the parties.
- [9] Much of Coetzer's evidence was riddled with hearsay, particularly in regard to her dealings with van den Bergh. It appeared that van den Bergh worked for Beeld newspaper in Johannesburg where Coetzer had also worked until the end of September 2007 when she joined the Plaintiff. Coetzer knew that van den Bergh had regularly placed advertisements for the Defendant in Beeld and that she and Joubert therefore had a working relationship.
- [10] Coetzer explained that in October 2007 she received a so-called "booking form" from van den Bergh in regard to the placing of the advertisement, a document which was placed before the Court as an exhibit. The background discussions between Coetzer and van den Bergh regarding this document are however inadmissible hearsay, as are much of its contents.

[11] Coetzer testified that as a consequence of her discussions with van den Bergh she spoke directly with Joubert in an endeavour to explain to him the relevance of certain readership and circulation figures regarding Business Report. Although Coetzer could not give a precise date regarding this phone call she suggested that it had predated the placing of the advertisement because the call had been made at the request of van den Bergh, and would have been an attempt to justify the placing of the advertisement to Joubert.

[12] However, Coetzer was shown a letter to the Defendant dated 28 February 2008 in which she confirmed a telephonic discussion with Joubert earlier that day. The letter related to an ongoing dispute between the parties regarding settlement of the Defendant's account with the Plaintiff and it is equally possible therefore that Coetzer may have raised the circulation figures with Joubert at that stage, as a means to justify the cost of the advertisement ex post facto.

[6] In its reply to a request for trial particulars the Defendant amplified its case by alleging that:

6.1. Wilder had on occasion prepared advertising material for it and delivered same to Plaintiff for publication;

6.2. it was unable to say who delivered the advertisement in question to the Plaintiff but suggested that it was possible that Wilder had done so;

6.3. in regard to the Cape Times, the advertisement was authorised by Joubert personally; and

6.4. the Defendant could not recollect who represented the Plaintiff in regard to the placing of the Cape Times advertisement.

The Defendant declined to furnish any further particularity regarding the terms of the oral agreement pursuant where to it was alleged that the Cape Times advertisement was placed, saying that this was a matter for evidence.

[7] The Plaintiff filed a replication to the Defendant's plea in which it

persisted in its allegation that van den Bergh and Wilder were duly authorised. In the alternative, the Plaintiff alleged that the Defendant was estopped from denying the authority of van den Bergh and Wilder on the following basis:

“ 1.2.1. The Defendant placed adverts with the Plaintiff historically through the agency of Elize van den Bergh, and Ryan Wilder historically had provided advertising material to the Plaintiff from the Defendant;

12.2. At no time did the Defendant advise the Plaintiff that the mandate afforded by the Defendant to Elize van den Bergh and Ryan Wilder was terminated or limited;

1.2.2.(bis) In the published advertisement the Defendant's Mr. Joubert stated that the advertisement comprised a message published 'in all the newspapers of South Africa'; the Defendant accordingly represented to the Plaintiff that Elize van den Bergh and Ryan Wilder were duly authorised without limitation to place adverts and provide advertising material on its behalf in newspapers published throughout South Africa;

1.2.3. The Plaintiff relied upon the authority of Elize van der Bergh and Ryan Wilder so represented in accepting the advertisements, payment for which is now in dispute. "

THE EVIDENCE

- [8] The Plaintiff presented the evidence of Coetzer and the Defendant the evidence of Joubert. These were the only witnesses to testify at the trial. In addition the parties handed in an agreed bundle of documents which were used during evidence and in argument. Regrettably, neither of the witnesses was of much assistance to the Court in determining the issues between the parties.
- [9] Much of Coetzer's evidence was riddled with hearsay, particularly in regard to her dealings with van den Bergh. It appeared that van den Bergh worked for Beeld newspaper in Johannesburg where Coetzer had also worked until the end of September 2007 when she joined the Plaintiff. Coetzer knew that van den Bergh had regularly placed advertisements for the Defendant in Beeld and that she and Joubert therefore had a working relationship.
- [10] Coetzer explained that in October 2007 she received a so-called "booking form" from van den Bergh in regard to the placing of the advertisement, a document which was placed before the Court as an exhibit. The background discussions between Coetzer and van den Bergh regarding this document are however inadmissible hearsay, as are much of its contents.
- [11] Coetzer testified that as a consequence of her discussions with van den Bergh she spoke directly with Joubert in an endeavour to explain to him the relevance of certain readership and circulation figures regarding Business Report. Although Coetzer could not give a precise date regarding this phone call she suggested that it had predated the placing of the advertisement because the call had been made at the request of van den Bergh, and would have been an attempt to justify the placing of the advertisement to Joubert.
- [12] However, Coetzer was shown a letter to the Defendant dated 28 February 2008 in which she confirmed a telephonic discussion with Joubert earlier that day. The letter related to an ongoing dispute between the parties regarding settlement of the Defendant's account with the Plaintiff and it is equally possible therefore that Coetzer may have raised the circulation figures with Joubert at that stage, as a means to justify the cost of the advertisement ex post facto.
- [13] Of greater importance, however, is a letter written to Joubert by Coetzer on 25 February 2008 in which she explained to him in great detail how the Plaintiff had relied on the say-so of van den Bergh when placing the advertisement. It is clear from this letter that Coetzer did not

suggest to Joubert at that stage that there had been a prior telephonic discussion at the time that the advertisement was placed which had led the Plaintiff to believe that Joubert knew that van den Bergh had placed the advertisement on behalf of the Defendant and/or that the Defendant had authorised it. The gist of the letter is that the placing of the advertisement had occurred as a result of a mistaken belief on the part of the Plaintiff that van den Bergh had acted on the authority of the Defendant.

[14] Joubert was an equally unimpressive witness. His arrogant and bombastic nature (which is clear also from the wording of the article) shone through in the witness box. He was vague on crucial issues (as to whether he and Coetzer had spoken on the phone) and he seemed to make things up as he went along. For example, his eventual explanation of the rationale behind paying only for the Cape Times advertisement was that he had personally authorised the placement thereof with either of Ian Jeffreys or Tommy Moodley (both alleged erstwhile employees of the Plaintiff at that title) because they were the people with whom he customarily dealt at the Cape Times. The Court is not persuaded either that Joubert was a candid witness.

[15] But what Joubert's performance in the witness box did show was that he is decidedly the "guiding mind" or alter ego of the Defendant and that no decisions are made by the company which do not cross his desk or meet with his approval. Indeed, Joubert's

inability to distinguish between personal liability and corporate liability was manifest: he is the Defendant, so he would believe, and nothing of importance happens at the Defendant without his direct involvement. This is particularly so in relation to advertising. Given that the advertisement was to portray his philosophical meanderings rather than the availability of a sea-side plot at some idyllic location, it is all the more likely that Joubert would have wanted to have been involved in

issues

relating to its placement. It is most unlikely that he would have left this function up to van den Bergh.

THE PLAINTIFF'S ARGUMENT

[16] No doubt realising that the Plaintiff had a mountain to climb on the authority issue, Mr Patrick limited his argument on behalf of the Plaintiff to two sharply focussed points.

[17] In the first place, it was argued that the Defendant was bound to pay the Plaintiff the outstanding amount as a consequence of Joubert's part ratification of the entire transaction when Defendant paid for the Cape Times copy.

[18] Secondly, Mr. Patrick argued that during the alleged telephone discussion between Joubert and Coetzer, there had been a duty on Joubert to speak out and to draw Coetzer's attention to the fact that his authorization, rather than that of van den Berg, was required before the advertisement could be placed. With reference to the authoritative English work by Spencer

Bower 3. it was suggested that, where Joubert was under a duty to correct any mistaken belief on the part of Coetzer as to the existence of authorization by the Defendant for the placement of the advertisement, the Defendant was later estopped from denying such authority.

[19] It will immediately be noticed that neither of the points so astutely argued by Mr. Patrick are traversed in the pleadings. Undoubtedly they should have been, for both set up very specific defences which needed to be dealt with in the evidence. In addition, this is not a case where the points were covered by the evidence and could then be said to be there for the taking during argument.

[20] It is as well to reconsider the leading judgment of Innes CJ in *Robinson v Randfontein Estates Gold Miners Company Limited* 4 on the purpose of pleadings:

“The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court and not the Court for the pleadings. And where a party has every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been. We are therefore bound to give full effect to the failure of the appellant to establish the genuineness of the contract upon which he relies. ”

[21] And, more recently, in *Imprefed (Pty) Ltd v National Transport Commission* 5 the Court stressed that the object of pleading is to obtain certainty regarding that which is at issue between the parties and this can only be achieved when the parties state their cases in the pleadings with the requisite degree of precision.

[22] In argument Mr. Patrick submitted that it was not necessary for the Plaintiff to plead the partial ratification point since this was a conclusion of law to be drawn from the circumstances. I do not agree. In my view an issue such as ratification (or its half-brother, part-ratification) is a particular species of assertion (much like estoppel) which needs to be expressly pleaded (often by way of replication) so that the other party is alive to the point and can explore its applicability to the facts at hand by either the advancing of evidence or by cross-examination. 6 But if I am wrong on this aspect, I do not believe in any event that the limited evidence before the Court establishes, on a balance of probabilities (and the onus is of course on the Plaintiff), that Joubert purported to ratify the authority of van den Bergh to bind the Defendant to all of the Plaintiff's titles when he paid for the advertisement in the Cape Times.

[23] in *LAWSA* (2nd edition) Volume I at p199 para 201 the learned author Professor Wanda points out that ratification is a unilateral act which does not require the co-operation of the other party:

“Like any other expression of will ratification can be in words or conduct. Whether particular words or conduct signifies a particular intention is a question of fact. The answer to this question can be difficult especially when it has to be found by way of inference from conduct No hard and fast rules can be laid down regarding the inferences which can be made from such conduct” (footnotes omitted).

[24] When the Defendant received a letter of demand from the Plaintiff threatening listing with a credit bureau in the event of non-payment of the entire amount, Joubert’s reaction was explosive and culminated in a letter accusing the Plaintiff of, inter alia, criminal conduct. It was most decidedly not indicative of any act of approval or ratification. However, the circumstances relating to the subsequent decision to pay for the Cape Times advertisement were not fully canvassed at the trial; it seems that there may even have been without prejudice discussions which preceded it.

[25] Kerr, The Law of Agency (4th edition) p92 refers to the judgment of Greenberg J in Theron v Leon 7 in which reliance was placed on a passage in Halsbury’s Laws of England to the following effect:

"a contract cannot be ratified in part and repudiated in part, if ratified, the whole contract must be ratified, and the agency

accepted cum onere. Ratification of one of a series of acts constituting one transaction operates as a ratification of the entire transaction. ”

[26] And, as Kerr, loc cit, points out -

“it must be remembered that it is the true intent of the principal which must be considered and not merely the fact that he has used words which might be construed out of their context, as ratification of a part of a transaction. ”

[27] The learned author also quotes from the 2nd edition of the American Restatement to the following effect:

“If the principal says he is willing to accept the benefits resulting from a transaction but is unwilling to be subjected to its obligations, it is a question of fact whether or not he affirms. If he manifests that he does not intend to affirm the transaction or to receive the benefits unless he can do so without assuming the obligation, he does not thereby ratify the transaction or any portion of it...”

[28] On the evidence placed before me I cannot conclude with any degree of certainty that by paying for the Cape Times advertisement Joubert purported to ratify the entire transaction concluded on behalf of the Defendant by van den Bergh. In fact, as I have pointed out above, the evidence seems to point the other way.

[29] Finally, as the judgment in the Broderick Motors Distributors case supra shows, it is open to a principal to ratify some, but not all, transactions in a series. So much then for the suggestion that there was part-ratification by the Defendant in the instant case.

[30] I turn finally to the estoppel argument. It will be seen from the passage in the pleadings quoted in para 7 above, that the estoppel raised in the replication was in relation to the alleged historical conduct of van den Bergh and Wilder and the impressions and/or representations created thereby. Yet, when the time came to argue the point, a completely different factual scenario was relied upon. Mr. Patrick argued, with reference to the allegedly analogous situation involving a negligent misrepresentation, that Joubert's failure to correct any mistaken impression on the part of Coetzer during their alleged telephone conversation that his prior authorization was required for the placement of any advertisement, was sufficient to constitute a representation for purposes of raising an estoppel.

[31] It is trite that the defence of estoppel must be specifically pleaded, and then properly so. 8 But, the case as pleaded and the point as argued, bear no resemblance to each other, nor to the evidence: they are not even the most distant of cousins. I am accordingly not persuaded that the Plaintiff has discharged the onus in establishing the alleged estoppel either. The point may thus have been worthy of consideration if it had been pleaded and then

traversed in the evidence.

CONCLUSION

[32] It follows then that the Plaintiff has failed to establish either of the issues

upon which it ultimately relied in argument at the conclusion of the trial. Its claim is therefore dismissed with costs.

GAMBLE J

1The advertisement has nothing to do whatsoever with the business of the Defendant and purports to be the personal assertions by Joubert of his socio-economic philosophies.

2"welke advertensies volgens die Verweerder se interne voorgeskrewe prosedure goedgekeur en gemagtig is."

3The Law Relating to Estoppel by Representation (3rd edition).

4 1925 AD 173 at 198.

5 1993

(3) SA 94(A) at 107.

6Broderick Motors Distributors (Pty) Ltd v Beyers 1968

(2) SA 1 (O) at 5.

7 1923 TPD 719 at 721

8Blackie Swart Arqitekto v Van Heerden 1986

(1) SA 249 (A) at 260 I.

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