

SOUTH AFRICA / JUDGMENT

King Williams Town Business Park (Pty) Ltd v Mr Fuel (Pty) Ltd (689/2011) [2012] ZAECGHC 14 (30 March 2012)

[2012] ZAECGHC 14

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen

CASE / FILE NUMBER

689/2011

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IN THE HIGH COURT OF

SOUTH AFRICA

(EASTERN CAPE,

GRAHAMSTOWN)

CASE NO: 689/2011

Date

Heard: 29 March 2012

Date

Delivered: 30 March 2012

In the matter between:

KING WILLIAM'S

TOWN BUSINESS PARK (PTY) LTD

.....Plaintiff/Excipient

and

MR FUEL (PTY) LTD

.....Defendant

JUDGMENT

GOOSEN, J:

This is an exception taken by the plaintiff/excipient against the defendant's plea on the basis that the plea does not disclose a defence.

The Plaintiff's claim against the defendant is for payment of the sum of R15,000,000.00 together with interest. Its claim is founded upon an oral agreement concluded between the plaintiff, represented by its board of directors, and the defendant, represented by its director and principal shareholder, Dean De Villiers. The plaintiff alleges that the oral agreement was concluded in October 2006 and that it was agreed that the plaintiff would provide from its bankers a guarantee in favour of Sasol Oil (Pty) Ltd (hereinafter Sasol) in the sum of R15,000,000.00 in order to serve as security for the payment of the defendant's indebtedness in respect of fuel supplied by Sasol to the defendant on credit. It was further agreed that Dean De Villiers, a director also of the plaintiff, was authorised to give effect to the plaintiff's obligations.

On 29 April 2010 the plaintiff's board of directors passed a resolution to invest R15,000,000.00 with ABSA Bank Ltd (hereinafter ABSA) to enable ABSA to issue two guarantees in the aggregate sum of R15,000,000.00 in favour of Sasol for and on behalf of the defendant. Dean De Villiers was subsequently authorised by the board to give effect to the resolution by signing all necessary documentation. Thereafter on 17 May 2010 ABSA, upon plaintiff's instructions, issued guarantees to Sasol for and on behalf of the defendant for the due payment of any amount owed by the defendant to Sasol.

On 30 July 2010, as a result of the defendant's failure to effect payment of that owed by it to Sasol, Sasol claimed payment from ABSA in the sum of R15,000,000.00. On 12 August 2010 ABSA paid to Sasol R15,000,000.00 in settlement of the defendant's liability to Sasol. It is upon this basis that the plaintiff now seeks to recover the R15,000,000.00 from the defendant.

The defendant admits the oral agreement and its terms as well as the payment made by ABSA to Sasol and the basis upon which such payment was made. The defendant pleads however that the terms of the resolution adopted by the plaintiff's board of directors have not been fulfilled and accordingly that the amount of R15,000,000.00 is not due and payable to the plaintiff. In its pleading defendant refers to the resolution as an "agreement", although it is nowhere pleaded that an agreement in these terms was concluded between the parties nor that the terms of the resolution reflect terms of the previously concluded oral agreement between the parties.

The resolution is in the following terms:

"That the company invest an amount of R15,000,000.00 (fifteen million rand) with ABSA Bank Limited to enable the bank on behalf of Mr Fuel (Pty) Ltd to issue two guarantees in favour of Sasol Oil (Pty) Ltd, one for R7,000,000.00 (seven million rand) and another for R8,000,000.00 (eight million rand). The investment with ABSA Bank Limited and the subsequent guarantee to be issued by them is subject to the express condition that the guarantees will be withdrawn and the amount of

R15,000,000.00 (fifteen million rand) be refunded to the company by ABSA Bank Limited immediately a liquidation dividend is paid by the company to its shareholders, provided that such dividend to the D De Villiers Family Trust is the amount equivalent to the guarantee/s or of at least R15,000,000.00 (fifteen million rand) or the company is liquidated, whichever happens soonest.

It is recorded that the D De Villiers Family Trust: IT 2252/96 is a shareholder of the company and will accordingly be entitled to a liquidation dividend. In the event of an investment not being repaid to the company by ABSA Bank Limited upon the declaration by the company of a liquidation dividend to its shareholders, whereupon the liquidation of the company, the payment to ABSA Bank Limited will be regarded as payment made to the D De Villiers Family Trust by way of a liquidation dividend and will be offset against any dividend to which the D De Villiers Family Trust is entitled.”

In paragraph 2.4 of the defendant’s plea the defendant pleads that:

“... the agreement marked annexure “A” provides only for the refund of the sum of R15,000,000.00 by ABSA Bank to the plaintiff, immediately upon a liquidation dividend being paid by the plaintiff to its shareholders.”

Annexure “A”, being the resolution of the plaintiff’s directors, is not an agreement concluded between the plaintiff and the defendant. This is conceded by Mr Cole, who appeared for the defendant. Indeed Mr Cole made it clear that the defendant does not contend for the existence of an agreement between the parties which embodies the terms of the resolution. Despite this it was argued that the plea is to the effect that the resolution does not oblige the defendant to repay the R15,000,000.00 since that sum “will be setoff against the dividend to which the De Villiers Family Trust is entitled”.

The argument advanced by the defendant proceeded along these lines. It relied upon an “understanding” of a commercial transaction. Since the resolution only deals with the circumstances in which ABSA would repay the monies to the plaintiff and does not provide for repayment by the defendant, so it was argued, “the defendant concludes that annexure “A” does not oblige the defendant to repay the R15,000,000.00”.

The first difficulty is to be found in the fact that it is not the resolution upon which the plaintiff relies. The plaintiff’s cause of action is an oral agreement concluded between the plaintiff and the defendant, the terms of which are admitted. Furthermore the plaintiff bases its claim on the fact (which is not disputed) that the plaintiff’s bankers paid out R15,000,000.00 (in accordance with the oral agreement) to Sasol in settlement of the defendant’s debt to Sasol. This too is admitted as is the fact that the defendant was indebted to Sasol.

The further difficulty with the argument is that the defendant pleads no relationship whatsoever between it and the De Villiers Family Trust, and accordingly no basis at all upon which the resolution can have any bearing upon the release of the defendant from any obligation to make repayment of an amount of R15,000,000.00 to the plaintiff. Furthermore the resolution deals with

the repayment by ABSA of the R15,000,000.00 which plaintiff invested with it, in the event of withdrawal of the guarantee and in circumstances where the plaintiff is liquidated. In this latter event provision is made for the R15,000,000.00 to be set off against the liquidation dividend payable to the De Villiers Family Trust. The resolution does not address the circumstance where ABSA makes payment in terms of the guarantee.

Mr Cole argued that in order to succeed with an exception the excipient has the duty to persuade the court that upon every interpretation which the pleading may have no cause of action or defence is disclosed. He relied in this regard on a passage in *Pete's Warehousing and Sales CC v Bowsink Investments CC* 2000(3) SA 833 (e) where Kroon J said at 839 g:

"It was also correctly not in dispute that the test applicable in this matter was to be posed as follows: In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action nor defence (as the case may be) is disclosed; failing this the exception ought not to be upheld."

That matter however concerned the construction, at the stage of an exception, to be placed on a written agreement of lease which had been concluded between the parties to the action. In this matter the plaintiff relies on an oral agreement the terms of which are not disputed by the defendant. The resolution of the directors of the plaintiff company is annexed as evidencing the fact that the plaintiff gave effect to the agreement concluded between the parties. Its terms are, on the plaintiff's pleaded case, irrelevant to the plaintiff's cause of action. The defendant, in turn does not rely upon the resolution as evidence of an agreement concluded between the plaintiff and the defendant nor even as evidencing the terms or amended terms of the oral agreement which was concluded between the parties. In these circumstances the question of a reasonable interpretation of the agreement does not arise since no such agreement is pleaded.

Mr Cole further sought to rely upon *Callender-Easby v Grahamstown Municipality* 1981(2) SA 810 (E), particularly the dictum at 813 (A) to the effect that:

"What is clear is that the uncertainty attaching to the pleader's intention cannot avail the third party unless he shows that on either construction the defendant's claim is excipiable ..."

The circumstances of that matter differ from the present case. In *Callender-Easby* the exception was taken by the third party to a prayer embodied in the third party notice. It was contended that the prayer introduced

a claim for payment of money and that it was accordingly bad in law. The court accepted that the wording of the prayer was ungrammatical

and ambiguous. It is in this context when ambiguity in the pleadings is evident and where the determination of the pleaders'

intention is relevant, that the court set out the dictum referred to.

This matter does not involve ambiguity. The plea is clear. There is no pleaded agreement contra that already admitted and no basis is set out in law upon which the defendant is entitled to rely upon the terms of annexure “A” as binding between the plaintiff and the defendant. Yet this is the defence put up and it is this defence which excipient contends does not constitute a valid defence to its claim.

Finally Mr Cole referred to the general principles applicable to determining an exception with reference to the judgment of *Francis v Sharp & Others* 2004(3) SA 230 (C) at 237 where these principles are set out in the following terms:

“First, in Colonial Industries v Provincial Insurance Company Ltd 1920 CPD 627 at 630 Benjamin J said in regard to the general approach to exceptions:

‘Save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to proceed.’

This approach has been consistently followed in this division (see, for example, *Carl v Stuart & Others* 1942 CPD 386 at 391; *Lobo Properties (Pty) Ltd v Express Lift Company (SA) (Pty) Ltd* 1961(1) SA 704 (C); *Leviton v New Haven Holiday Enterprises CC* 1991(2) SA 297 (C) at 298 a-c; *South African National Parks v Ras* 2002(2) SA 537 (C) [2001]4 B All SA 380 at 385 e).

Secondly, the courts are reluctant to decide upon exception questions concerning the interpretation of a contract (*Sun Packaging (Pty) Ltd v Vreulink* 1996(4) SA 176 (A) at 186 j). In this regard, it must be born in mind that an excipient has the duty to persuade the court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed (*Theunissen v Transvaalse Lewende Hawe Kö-op Bpk* 1988(2) SA 493 (A) at 500 d; *Lewis v Oneanate (Pty) Ltd & Another* 1992(4) SA 811 (A) at 817 f).

Thirdly, it has been held that a commercial document executed by the parties with a clear intention that it should have commercial operation should not likely be held to be ineffective (*Burrows Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964(1) SA 669 (W) at 670 g-h; *Murray & Roberts Construction Ltd v Finat (Pty) Ltd* 1991(1) SA 508 (A) at 514 e-f).

In my view, a similar approach should, in broad terms and mutatis mutandis, be adopted in regard to an oral commercial agreement.”

These are indeed the principles generally applied in determining an exception. They do not however avail the defendant. Mr Cole argued that since the resolution is binding upon the plaintiff’s directors, the plaintiff cannot claim payment of the R15,000,000.00 from the defendant. It is only entitled to proceed in terms of the resolution. This argument is without merit. This exception does not involve the interpretation of a contract concluded between the parties, nor does it involve a commercial document executed by the parties and which the parties intended should have commercial operation. It is noteworthy that the defendant does not contend in its plea for the terms of the resolution as reflecting the terms of the commercial oral agreement concluded between the parties. The defendant has admitted the oral agreement upon which the

plaintiff relies and has admitted that the R15,000,000.00 paid to Sasol was paid on its behalf. The defendant's reliance upon a resolution of the plaintiff's directors, to which it was not a party, finds no basis to resist the plaintiff's claim for payment of the R15,000,000.00 paid by it on defendant's behalf. In the circumstances the defendant's plea does not disclose a defence to the plaintiff's claim.

I make the following order:

The plaintiff's exception to the defendant's plea is upheld.

The defendant is granted leave to file an amended plea within 15 (fifteen) days of the date of this order or within such further period as the parties may agree, failing which the plaintiff may set the matter down for

judgment.

The defendant is ordered to pay the costs of the exception.

G GOOSEN

JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE PLAINTIFF/EXCIPIENT: Mr D de la Harpe, instructed by

McCallum Attorneys

FOR THE DEFENDANT: Mr S Cole, instructed by

Leon Keyter Attorneys

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