

SOUTH AFRICA / JUDGMENT

Potgieter v Sasol chemiese Nywerhede Beperk (A787/12) [2013] ZAGPPHC 254 (16 August 2013)

[2013] ZAGPPHC 254

COURT

North Gauteng High Court, Pretoria

BEFORE

A A Lamprecht, NV Khumalo

CASE / FILE NUMBER

A787/12

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA (NORTH GAUTENG, PRETORIA)

CASE

NUMBER: A787/12

DATE:16/08/2013

In

the matter between:

FERDINAND

POTGIETER.....

APPELLANT

(Defendant

a quo)

AND

SASOL

CHEMIESE NYWERHEDE

BEPERK.....RESPONDENT

(Plaintiff

a quo)

RESERVED

JUDGMENT

LAMPRECHT. AJ Introduction

[1] This is a civil appeal emanating from the Magistrate's Court, District of Barberton, Senior Magistrate JG Liebenberg presiding.

Plaintiff in the court a quo (now respondent), SASOL Chemiese Nywerhede Beperk (SASOL), obtained judgment against defendant (now

appellant), Ferdinand Potgieter (Potgieter), in the amount of R85, 387.41 plus interest, as well as costs. Potgieter now seeks to have the a quo judgment overturned on appeal.

Common cause facts and cause of action

[2] Harmonie Boere Edms Bpk (Harmonie) is a company that inter alia specializes in the provisioning of agricultural fertilizer products

to farmers in the Lowveld area of Mpumalanga. It has an agency agreement with SASOL to, as its agent, order and obtain fertilizer

products from SASOL to be provided to farmers and farming operations at their insistence. In the instance that specific mixes of

fertilizer were required, Harmonie would acquire the different fertilizer products from SASOL and, still acting in terms of its

mandate, mix the products before supplying them to the relevant farmers. Potgieter is one such farmer, who, for many years, has been ordering and buying SASOL fertilizer through Harmonie.¹

[3] At first, farmers who ordered and bought their SASOL fertilizer through Harmonie could exercise one of the following options, namely:

(a) They could order and buy their fertilizer in cash (at a certain discount, of course); or

(b) They could order and buy their fertilizer on credit, in which case the terms of credit (price, interest and payments) could be financed through any of three parties with whom the farmer held an account, namely:

(i) Harmonie;

(ii) SASOL; or

(iii) The local Agricultural Co-operation.²

- [4] When the fertilizer was bought on account through the local Co-operation, SASOL awarded a percentage of the price of the goods to the Co-operation for the administrative risk incurred to finance the farmer.³ When Harmonie financed the farmer, SASOL awarded an extra three (3) percent of the commission entitled to Harmonie as agent, to Harmonie to cover their administrative risk involved in financing the farmer.⁴
- [5] Regardless of the method used, all fertilizer products were however ordered and bought through Harmonie, as SASOL's agent, and Harmonie employed various marketing agents to solicit farmers into buying the products supplied by SASOL. In addition, all stationery used by Harmonie, namely, orders, delivery notes and invoices bore a stamp or some other indication that it operated as SASOL's agent - e.g., "HARMONIE BOERE -

AGENT VIR SASOL KUNSMIS".⁵

- [6] In the beginning of the year 2000, Harmonie started to encounter cash-flow problems due to farmers having owed it more than

R1,000,000.00 on their accounts, many of them fell in arrears with their payments; and, the risk for its continued financing fertilizer

bought on account became too great for Harmonie to handle.⁶ (Incidentally, almost certainly owing to his personal friendship with the Executive Director of Harmonie, Mr Douw Steyn,⁷ Potgieter was one of those farmers that did not regularly and constantly pay their accounts with Harmonie,⁸ which contributed to Harmonie's cash-flow problems. Harmonie however never took action against him in this regard.) This state of affairs resulted in Harmonie agreeing with its principal, SASOL, during the year 2000 that, in future, Harmonie will no longer provide a credit facility to farmers buying fertilizer through its agency. The accounts of all the farmers that used Harmonie to finance their fertilizer products were then closed in September 2000⁹ so that they could no longer acquire fertilizer through Harmonie with the latter as their financier. Thus, from there on, farmers could only order and buy fertilizer from SASOL through Harmonie's agency by paying cash or by financing their credit through either the Co-operation or on direct credit account with SASOL. On strength of Harmonie's assurances that they have good credit records, SASOL agreed to take over the accounts of most of the farmers, including Potgieter, without requiring that new credit agreements with SASOL be completed and vetted.¹⁰

- [7] This is where SASOL's cause of action arose. According to the simple summons issued by SASOL against Potgieter,¹¹ the pleadings¹² and the evidence¹³ for SASOL in the court a quo, Potgieter paid for only one delivery of fertilizer invoiced after Harmonie ceased the practice of financing deferred payment by farmers; and, after Potgieter's credit was extended by SASOL directly. This delivery was effected by SASOL (through Harmonie as its agent, in trucks bearing SASOL's logo) after having been ordered by Potgieter and, SASOL invoiced Potgieter directly for payment. In terms of the changed mandate of the agent, Harmonie still managed the marketing and all orders of fertilizer and delivery thereof on behalf of its principal against payment of commission, but no longer extended credit to the farmers. It was thus expected from debtors to pay their dues to SASOL directly, who took

over the extension of credit. As was customary in the past, however, this cheque payment by Potgieter (as were those of a few other farmers in the same position) was again made to Harmonie instead of directly to SASOL. The payments that were wrongly made to Harmonie were therefore received into a trust account, after which Harmonie paid the monies over to SASOL.¹⁴ According to the undisputed evidence of one of the witnesses for SASOL, the Administrative Head, Mr DA Scholtz, he then personally

phoned every farmer involved in these erroneous payments, impliedly also Potgieter, and informed or, at least, reminded them of the change in affairs.¹⁵

[8] Thereafter, however, Potgieter continued ordering SASOL's fertilizer products through, and receiving delivery thereof from Harmonie as SASOL's agent; but, although he was invoiced directly by SASOL, he either neglected or refused to pay the accounts invoiced to him, resulting in his having fallen in arrears with an amount of R85, 387.41 from the 19th of December 2000 to 31 January 2002. He did not pay (or offer to pay) either SASOL directly or, even Harmonie (as he did with the first payment after Harmonie's mandate as agent was changed).¹⁶ SASOL therefore sued POTGIETER in the court a quo for payment of said account as well as interest and costs of action as was apparently

contractually agreed upon. After having considered the evidence of three witnesses on behalf of SASOL (Potgieter did not testify nor present any evidence) and legal arguments by the representatives of the parties, the court a quo upheld SASOL's claim and awarded

judgment in its favour for payment of R85, 387.41 plus interest on that amount calculated at 20% per annum from 1 February 2002 and, at 24% per annum from 12 July 2002, as well as costs on the scale of attorney-and-client.

The issues in dispute: pleadings in the court a quo

[9] Potgieter, very belatedly, amended his plea to indicate a new defence, *inter alia* challenging the locus standi of SASOL after first admitting same. The end result was that the issues between the parties became blurred and obscured rather than clarified as required in terms of the function and purpose of pleadings in civil proceedings based on summons.¹⁷ The way that he conducted his defence in the court a quo does not evidence the openness and candour that one would expect from an honest bona fide businessman and good personal friend of one of SASOL's witnesses, Mr Douw Steyn.

[10] First, after having requested and received further particulars to the claim, he pleaded that he admits that the fertilizer products have been delivered to him as alleged by SASOL, but that he denies that he owes any payment in respect thereof to SASOL because, more specifically, he had already paid the full amount owing to SASOL's agent.¹⁸ Although he did not mention the agent (probably Harmonie) by name in his initial plea, it was clear from this plea that he acknowledged

that there exists an agency agreement between SASOL and an agent, and that he was indebted to SASOL, through its agent, to pay for SASOL fertilizer products ordered by and delivered to him; but, so he pleaded, his account with SASOL has been paid in full. In addition, in his further particulars to plea as requested by SASOL, Potgieter more specifically averred that he made the payments as per his defence plea to "Harmonie Boere, agent van die eiseil' and, to boot, appended a number of cheques that were made payable to Harmonie in order to make out his case that he has paid all that is due, including the amount that SASOL sued him for. This is in fact what Potgieter already averred under oath in his opposing affidavit to ward off summary judgment as requested by SASOL.¹⁹ In paragraph 3 of his opposing affidavit, he says that he became aware that some or other business relationship exists between SASOL and Harmonie, in terms of which Harmonie sells SASOL's fertilizer products on behalf of SASOL, which SASOL then delivers to the farmers who bought them. Although SASOL did not in its summons specifically allege that it sold and delivered the fertilizer products to Potgieter through agency of Harmonie, Potgieter in his initial pleadings neither challenged²⁰ nor specifically denied²¹ the locus standi of SASOL to sue him for "kunsmiss produkte verkoop en gelewer deur eiser a an die verweerder op laasgenoemde se spesiafe aandrang en versoek".²² To the contrary, this plea indicated that Potgieter was well aware of the agency agreement between SASOL and Harmonie and that he continued doing business with Harmonie after becoming aware of the situation²³

[11] The defence plea appeared to be relatively simple and innocuous, so that the dispute would in the end only be whether Potgieter had in fact paid all that is due; and, if so, whether Harmonie has failed to pay the principal's (SASOL's) due after it received payment from Potgieter - a simple dispute of fact, not law. All of this however changed when, at a very late stage, apparently when the matter was already trial ready, Potgieter lodged an application in terms of Rule 55A of the Magistrate's Court Rules to amend his plea in the following terms:

"1.

AD PARAGRAWE 1 EN 2 (AD PARAGRAAF 1 VAN DIE EISER SE BESONDERHEDE)DAARVAN:

Deur die geheel van hierdie paragrawe deur te haal en te skrap en om dit met die volgende paragrawe te vervang:

'1.

AD DIE EISERSE SITASIE:

Die verweerder neem kennis dat die Eiser Sasol Chemiese Nywerhede Bpk is. Die Verweerder dra egter nie kennis van die eiser se locus standi en/of regs persoonlikheid nie, kan dit gevolglik nie erken of ontken nie en word Eiser tot bewys daarvan geplaas.

2.

AD DIE VERWEERDER SE SITASIE:

Die Verweerder erken dat hy Ferdinand Potgieter is. Die Verweerder pleit spesifiek dat hy te die plaas Richtershoek, Malelane, distrik

Barberton boer.

3.

AD EISOORSAAK:

Die Verweerder ontken dat:

3.1 hy enige kunsmisprodukte by die Eiser gekoop en/of bestel het;

3.2 daar enige nexus tussen horn en die Eiser is en/of was; en,

3.3 hy die bedrag van R85, 387.41, of enige gedeelte daarvan, aan die Eiser verskuldig is.

4.

Die Verweerder pleit spesifiek dat:

4.1 hy te alle relevante tye kunsmisprodukte by Harmony (sic) Boere bestel het;

4.2 Harmony (sic) Boere hom gefaktureer het vir al die kunsmisprodukte wat hy van eersgenoemde beste! het, op sterkte waarvan hy betalings aan Harmony (sic) Boere gemaak het; en

4.3 hy geen geld aan Harmony (sic) Boere verskuldig is vir enige kunsmisprodukte wat hy by laasgenoemde gekoop en/of bestel het nie.

5.

AD JURISDIKSIE:

Die geheel van die skuldoorsaak het binne die jurisdiksiegebied van hierdie Agbare Hof ontstaan."

[12] Despite SASOL's objection to the amendment applied for on grounds of, inter alia, that it represents a complete turnabout on the defence first pleaded; that it is vague and difficult to comprehend and traverse; that it now brings about a situation where both the onus to begin and the onus to prove its case would rest on the Plaintiff rather than on the Defendant as was the case under the previous pleadings; and, because it was brought at such a late stage of the proceedings, the court a quo, for reasons that are difficult to grasp, allowed the amendment. It however sought to ameliorate the disadvantaged position of Plaintiff (SASOL) by granting a postponement to prepare for trial on basis of the new defence and by awarding punitive costs against Potgieter on an attorney- and-client scale.²⁴

[13] The amended plea, more particularly lacked clarity on the issue whether Potgieter was still admitting that Harmonie was at all relevant times acting as agent for SASOL or whether he now specifically wanted to join issue with that possible averment of the Plaintiff when the matter goes to trial. There is nothing in the amended plea to suggest that he now specifically

denies any probable averment that an agency agreement existed between Harmonie (as the agent) and SASOL (as the principal), except for a vague plea on citation that he is unsure of Plaintiffs locus standi and its juristic personality and that he requires plaintiff to prove same;²⁵ and, a vague assertion that there exists no "nexus" (or 'business relationship') between him and Plaintiff in terms of which he is contractually liable for payment to Plaintiff of the sum that he is being sued for. ²⁶ The implied denial through refusal to admit or deny due to lack of knowledge²⁷ in the amended plea of SASOL's locus standi, however now indicated that SASOL had to specifically allege and prove its locus

standi²⁸ Nevertheless, he then specifically pleads that, at all relevant times ordered fertilizer products from Harmonie, that Harmonie invoiced him for all the fertilizer products delivered, on strength of which he made payments directly to Harmonie and that he does not owe Harmonie any money for any of the fertilizer products that he bought and/or ordered from Harmonie. This suggests that, should SASOL succeed in proving its personality and locus standi, and the nexus between SASOL and Potgieter on which Potgieter can be held liable in terms of contract and the law of agency, he is reviving his initial plea that he paid for all fertilizer products that he has ordered and received. However, still riding on the assumption that his amended plea places the existence of an agency relationship in dispute, he then adds to this specific plea that he does not owe Harmonie (not SASOL) anything, thereby implying that, if anything, Harmonie is liable to SASOL, not him. This convoluted amended plea left one confused as to what the plaintiff now had to do in order for it to prove its case.

[14] Nevertheless, sensing that Potgieter has now made a complete turnabout with regards to its locus standi in refusing to either

admit or deny same, SASOL subsequently replied to the amended plea by specifically pleading that Harmonie was at all relevant times the mandated agent of SASOL.

[15] It initially concerned us that SASOL did not particularly allege in the summons already that it was relying on an agency agreement

between itself and Harmonie to found its locus standi, because, in motion proceedings in the High Courts, it is regarded as trite law that locus standi must particularly be alleged and established in the founding affidavits, and not in replication²⁹ We confronted Mr Pretorius for SASOL in this regard, and he responded by arguing that it was not necessary for plaintiff in the a quo proceedings to specifically and particularly allege in its simple summons (which is not akin to application or motion proceedings where 'evidence' is already tendered in the founding affidavit accompanying the Notice of Motion) that it would rely on an agency relationship to establish and prove its standing. According to him, it was enough to allege that the goods were sold and delivered by SASOL to Potgieter at his insistence. He further based his argument on the fact that Potgieter in any event then pleaded that he knew about the agency relationship and particularly alleged that he paid everything he owed SASOL to the agent, Harmonie; and, that it was only after amendment of the plea that SASOL became aware of the fact that its locus standi as a result of agency might be in dispute. He argued that SASOL was therefore within its rights to

allege agency only in replication, with an amended plea responding to the amended plea of the Defendant.

[16] In this regard, and taking into account the fact that the Magistrates' Courts Rules at the time of action in the court a quo³⁰ did not, like the High Courts' Uniform Rules, require specific particularity of allegations of locus standi in summonses, I subsequently considered the judgment of Liquidators Wapejo Shipping Co Ltd v Lurie Bros,³¹ and other reported case law, from which I established.³²

- (a) That Rule 6(1)(a) of the Magistrates' Courts Rules (before amendment) requires only that 'particulars of claim' shall be endorsed on the summons and does not in specific terms require a cause of action to be set out in specific particularity. In any event, Rule 17(2)(a) expressly permits a defendant to except a summons on the grounds that 'it does not disclose a cause of action'; and, Rule 19(12) permits a defendant to enter a special plea of non iocus standi in judicio and may require that its outcome be determined before the trial on the merits commences.
- (b) That the phrase 'cause of action'¹ means 'every fact which is material to be proved in order to entitle the plaintiff to succeed, i.e., the facta probanda, but not the facta probantia'³³
- (c) The particulars endorsed on the summons need not disclose the cause of action with the completeness of detail which would be required in a High Court, but they must disclose it with reasonable distinctness so that the defendant may know the case he has to meet.³⁴ If it is not so disclosed, the summons is excipiable as disclosing no cause of action.³⁵

"The rules of the magistrates' courts require, as a minimum, that the claim should be set out in such a way that the liability of the defendant, at least in principle, follows as a necessary consequence from the allegations expressly set out or necessarily implied in the particulars of claim ... It does not seem to me that the rules of the magistrates' courts as they presently exist, though they have undoubtedly relaxed many of the requirements with which it was formerly necessary for a plaintiff to comply in the setting out of his claim, have gone so far as to relieve him from setting it out in such a way that, when read by itself, it leads to the necessary conclusion that, if the allegations in it are established, the defendant is liable to the plaintiff, at least in principle."³⁶

- (d) Where justified, legitimate inferences can be drawn as to the meaning of the particulars and by implication the necessary averments

can be supplied where required in requests for further particulars and even in replication or during evidence.³⁷ The Court (either a quo or on appeal) should endeavour to take benevolently instead of over-critically to a pleading, more especially at a pleading in a magistrates' court. That does however not mean that such benevolence should be pushed to the length of upholding a summons, which as it stands discloses no cause of action, by altering its language, by reading into it what is not there, and

ignoring what is, and by thus making for the plaintiff a cause of action which he has not himself put up.³⁸ A summons that does not, at least prima facie, disclose a cause of action is excipiable or, at least would fail to stand up against a special plea that no cause of action is being disclosed therein.

- (e) The cause of action in the summons must, however, appear with reasonable distinctness, so that the defendant may know the case he has to meet. If it is so imperfectly stated as to embarrass a defendant, then exception may be taken to the summons as being vague and embarrassing.³⁹
- (f) Where the particulars of claim contain sufficient information to convey to the defendant the case which he has to meet, but are lacking in some information which defendant genuinely requires before proceeding further, the matter becomes one for requesting further particulars to claim⁴⁰

[17] Thus, in actions based on summons (as opposed to application or motion proceedings based on founding affidavits) in the magistrates'

courts, iocus standi need appear only prima facie from the particulars of claim and, if standing is objected to by means of exception or by special plea, courts will tend to remedy failures by plaintiffs to properly allege iocus standi in particular much more easily than would the High Courts in either motion proceedings or action based on summons. For example, where in *Nienaberv Union Government*⁴¹ the summons did not contain the requisite allegation of locus standi of the Government as it ought to have; and, where Nienaber did not take advantage of this 'manifest defect' in the summons by means of exceptio or special plea, the trial was allowed to continue regardless to see whether evidence would establish Government's standing. (The Supreme Court, as it then was, did not intervene on this ground.) Furthermore, even though the evidence did not establish locus standi, when absolution of the instance was applied for, the magistrate did not grant absolution but allowed the Government to re-open its case. This was also not regarded as a misdirection. The Court on appeal remarked as follows:

"Thereupon the magistrate, although plaintiffs case had been closed, and after hearing the argument of the defendant's attorney, who exposed the deficiencies in the plaintiffs case, permitted the case to be reopened, and gave the plaintiff a second bite at the cherry by allowing him to lead further evidence now that he knew where the shoe pinched. In doing this, the magistrate was unduly lenient to the plaintiff, but that was in his discretion, and no complaint is now made of it."⁴²

[18] Moreover, it is by no means settled that, even in strict application or motion proceedings before the High Courts, a failure of an applicant (as opposed to a plaintiff in action based on summons) to properly allege locus standi in the founding documents cannot retrospectively be cured or remedied in the applicant's replying affidavits⁴³ Therefore, it often happens, even in those cases that advocate the triteness of the requirement that standing must be fully alleged and established in the founding papers⁴⁴ that courts are prepared to extensively interpret the allegations in the founding papers (or to infer from them) that

locus standi has been sufficiently alleged (at least on a prima facie basis) and, on argument, to hold that the relevant applicants had proper legal standing to bring the matters to court.

- [19] These observations fortify my prima facie observation above⁴⁵ that, at least in principle, the initial cause of action in the summons issued in the court a quo, sufficiently disclosed SASOL's

standing to sue Potgieter for fertilizer products sold and supplied to the latter at his special request and insistence, so as to properly inform Potgieter as to what case he had to meet. It was not necessary for SASOL to, at that stage, specifically and with particularity allege that Harmonie at all relevant times acted as its agent. As indicated, Potgieter did not take exception in this regard; neither did he enter a special plea of non locus standi in judicio, which is the way he should have proceeded if he wanted to challenge SASOL's prima facie locus standi. In fact, he admitted agency as basis for SASOL's locus standi, at least until he amended his plea as indicated above. After he amended his plea, still not challenging SASOL's locus standi in the true sense of the word, but rather indicating that he was unable to admit or deny same, SASOL did exactly what was legally required of it.⁴⁶ SASOL specifically alleged that Harmonie, at all relevant times acted as its agent in the provisioning of its fertilizer products to the Potgieter; and, as will be indicated in more detail below, it also presented evidence to prove the existence of the agency relationship that it had with Harmonie, and Harmonie's mandate.

- [20] One further thing on the amended plea pertaining to locus standi needs to be dealt with. A defendant or respondent who chooses to place in dispute that the plaintiff or applicant lacks standing, must do so in clear and unambiguous terms. Thus, where proper authority to sue is not directly questioned (for example, where a bare denial of authority is raised or where it is neither admitted nor denied) and where surrounding circumstances clearly or at least, prima facie, confirm the existence of authority to sue, the minimum formal evidence is required to establish same⁴⁷

- [21] The reason for this state of affairs is not very hard to see. Just like it can be expected from a plaintiff to make its case and particulars of claim known with enough clarity so that the defendant can know what case he has got to meet to escape liability, the defendant has to be open and candid as to what his defence would entail so that plaintiff is placed in a position to know what

evidence, if any, and legal arguments would be required to prove his case. That is what the exchange of pleadings are there for in actions based on summons and, when the plaintiff has stated enough in his particulars of claim to justify his standing and cause of action, at least on a prima facie basis as in this matter, the defendant is entitled to ask for further particulars if he is unsure of the extent of plaintiffs allegations that he has to meet. He does not need to plea before he received same.

- [22] In this matter, after having obtained further particulars,⁴⁸ Potgieter first pleaded that he knew that Harmonie was acting as SASOL's agent, and that he admits to having bought and received the fertilizer products; but, then countered with an allegation that he has paid

everything to Harmonie, and that Harmonie was therefore probably indebted to pay the monies that it received over to SASOL. It was only subsequent to that plea, and after even having provided further particulars to that plea, that he succeeded in amending his plea as outlined above. Furthermore, as indicated above, his plea was not clear as to exactly how he proposes to deal with the issue of SASOL's locus standi. His amended plea cannot be regarded as an exception to the claim or as a special plea of non locus standi in judicio. At best, his amended plea is a challenge to plaintiff to allege the specific basis of its standing and, in addition to prove same. Responding to this, plaintiff pleaded in replication that it would rely on the existence of an agency relationship to establish its locus standi proper. There was therefore nothing wrong with plaintiff only raising the issue of agency in replication. Lastly, in this regard, the fact that it was pleaded only in replication was not complained of in the court a quo, and only a feeble attempt was made to address that issue on appeal to this Court, and I am therefore inclined not to hold it against plaintiff that its reliance on agency was only pleaded in replication. It would however be advisable to plaintiffs, such as SASOL in this matter, to in future disclose their reliance on agency agreements to establish locus standi in their founding papers (be it summons or founding affidavit) in order to evade difficulties such as those that presented themselves here.

The trial: How the issues identified in the pleadings were dealt with

[2] Against this background, one can now establish how Potgieter dealt with this allegation of and evidence for SASOL at the trial.

Surprisingly, the existence of the agency agreement and the mandate of Harmonie were never placed in issue, and the undisputed evidence tendered on behalf of SASOL appeared to be accepted as correct by Counsel on behalf of Potgieter. Most of Counsel's cross-examination

of SASOL's witnesses was devoted to the issue of whether either Harmonie or SASOL at any stage expressly indicated to Potgieter that Harmonie was acting as SASOL's agent in terms of its specific mandate to provide fertilizer products to farmers, including himself; and, if not, how he could have been expected to know about this relationship and pay someone (SASOL), with whom he did not contract directly, without knowledge of any relationship {nexus} between the two of them. Employing typically lawyerly (I regret to say in South African current day legal practice) antics and histrionics, Mr Botes (for Potgieter) would regularly submit that his client, to his own mind, had nothing to do with SASOL; that all he knew is that he was doing business with Harmonie (not SASOL); and, that he could not be expected to pay someone (SASOL) in terms of invoices issued by it; whereas, according to his knowledge, he was only contractually liable towards Harmonie, whom he knew as the party with which he contracted. At one stage, as a result of his antics and histrionics, a witness for SASOL, Daniel Visagie, responded sarcastically to his hypothetical question to make his point of argument with the court a quo:

"[Botes:] Ek voorsien u van regsadvies vir die afgelope 5 jaar, en ek stuur vir u die rekening, volgende maand kry u 'n rekening van Johan van Rensburg Prokureurs gaan u daai rekening betaal? — [Visagie:] Maar kyk soos ek die Regspraak profesie ken mag 'n Advokaat jou nie direk 'n rekening vir jou stuur nie hy gaan dit via die Prokureur na my toe stuur."49

[24] It was never suggested to any of the witnesses that Potgieter did not receive any invoices from SASOL as the witnesses testified. To the contrary, Mr Botes put it to Steyn during cross examination that, although Potgieter, out of the blue as it were, received invoices from SASOL instead of Harmonie, he refused to pay SASOL on strength of these invoices because as far as he knew, he contracted with Harmonie, and not with SASOL, with whom he had no relationship whatsoever.⁵⁰ Mr Botes further acknowledged that, at one stage, Potgieter did receive a 'credit agreement application' form from SASOL in the post, but asserted that he (Potgieter) had disdainfully discarded it in the dustbin because he had nothing to do with SASOL and all he knew about was his existing credit agreement with Harmonie (not SASOL); and, therefore, he did not think it necessary for him to apply for credit with SASOL directly.⁵¹ Mr Botes further asserted throughout his cross-examination of SASOL's witnesses that Potgieter could not be blamed for not knowing that Harmonie was acting as SASOL's agent in terms of a very strict mandate for the provisioning of fertilizer products on behalf of SASOL, because he was never expressly and in detailed terms informed by either the agent (Harmonie) or the principal (SASOL) of the existence of the agency relationship relied on.

[25] In the process, Botes expounded⁵² on a fallacy that was already included in Potgieter's opposing affidavit to ward off summary judgment, by asserting that the documents supplied to Potgieter by Harmonie, although containing the names or trademarks of both Harmonie and SASOL, Harmonie's particulars were in bold and SASOL's not, and that only Harmonie's address appeared on the documents.⁵³ This is of course misleading because, when one has regard to Annexure "A" that Potgieter attached to his opposing affidavit to avoid summary judgment,⁵⁴ it reflects only the name, address and particulars of SASOL in bold and at the heading thereof, whereas Potgieter's relationship with Harmonie is only reflected insignificantly at the bottom of the invoice.⁵⁵

Final determination of the appeal

[26] Be it as it may. It matters not whether Potgieter was expressly and formally informed of the agency relationship and the specific terms of Harmonie's mandate issued by its principal, SASOL. In terms of the so-called 'doctrine of the undisclosed principal',⁵⁶ SASOL could at any time when it perceived Harmonie unable to enforce payment in terms of its mandate, as SASOL's agent, step forward and claim that the contracting party that acquired the goods through its agent, pay for what he received in terms of this relationship, albeit undisclosed. Whether disclosed or undisclosed, normally only the principal acquires rights or incurs obligations under the contract concluded by his agent with a third party. The agent does not become either entitled or obliged, and cannot personally sue or be sued under the contract.⁵⁷ Nor can he sue or be sued in his own name, as representing his principal, unless

he is specifically mandated to represent his principal in legal proceedings.⁵⁸ Otherwise, an agent may only sue or be sued, where the contract is in such terms as to entitle or to obligate the agent,⁵⁹ as was the case when Harmonie was still providing credit to buyers of SASOL's fertilizer products; and in other instances that are not directly relevant here.⁶⁰

- [27] Despite various criticisms against the operation of this doctrine in common law systems⁶¹ and, especially in the hybrid system of South Africa, the doctrine and all its ramifications is undoubtedly part of South African law⁶² Contractual liability of and against undisclosed principals can only be escaped in situations where it is clear that, at the time of the contract it was of the utmost importance in terms of the contract for both the contracting parties to know that they are contracting with each other and with no one else; or, where the third party would not have entered into the contract with the agent if he knew exactly who the principal was.⁶³ None of these situations can be said to have arisen here, simply because that was never expressly put in cross-examination to any of the witnesses for SASOL;⁶⁴ and, secondly, because Potgieter never testified so that the court a quo could be made aware of his intentions, which means that the court had no evidence to rely on for such an inference and, therefore, an adverse inference had to be drawn against Potgieter for his failure⁶⁵ Furthermore, if Potgieter's version is to be accepted as correct that the identity of the principal was not disclosed to him before he contracted, he has suffered no prejudice from the fact that he contracted with an undisclosed principal at the time. According to the facts that are common cause, he needed the fertilizer products, he ordered and took delivery thereof and consumed them. Why should he not be held liable for payment, albeit to an undisclosed principal?⁶⁶
- [28] It can however not be said that, on the probabilities, Potgieter was never aware of the agency relationship between Harmonie and SASOL. To the contrary: All the witnesses for Plaintiff were at pains to show, that such mandate existed; that everyone in the Lowveld of Mpumalanga knew about it; that all the stationery used by Harmonie reflected that fact; that even the phones at Harmonie would be answered as if they were operated by SASOL or, at least, its agency; and, that the trucks delivering the fertilizer products to the farmers (including Potgieter) bore the markings of SASOL. Although Botes at various occasions indicated that Potgieter would come and testify that he was completely unaware of this relationship between Harmonie and SASOL, Potgieter never testified. He also did not call any witnesses to support this assertion of his. Thus, due to Potgieter's silence when given the chance to present evidence in rebuttal, the court a quo was correct in accepting the prima facie evidence of the Plaintiff, justifying the inference that Potgieter knew about this relationship (or, at least that he could reasonably have been expected to know about its existence).⁶⁷
- [29] This is however not where it all ends. For the first time on appeal, Mr Botes argues on behalf of Potgieter that it was never SASOL's case on the pleadings that Harmonie at all relevant times acted as its agent.⁶⁸ This argument is of course not entirely correct. Firstly, while SASOL's summons disclosed at least a prima facie case for its legal

standing in that it instituted the claim for fertilizer products sold and delivered to Potgieter at the latter's specific request and insistence,⁶⁹ Potgieter's own assertions in his opposing affidavit to avoid summary judgment,⁷⁰ in his plea before amendment,⁷¹ and even in his further particulars to his plea before amendment were that an agency agreement in fact existed. Secondly, ⁷² after Potgieter's plea was amended to challenge (or rather evade and contest) SASOL's locus standi in this regard, SASOL pleaded existence of an agency agreement in replication, which it was entitled to do after Potgieter withdrew his admission that surfaced in his first plea. In this regard it is also instructive that Potgieter never gave evidence to explain why he decided to withdraw his first admission to replace it, not with a clear challenge or denial, but rather with an evasion to admit or deny and demanding that proof of the agency agreement be provided.⁷³ In the third place, the evidence presented on behalf of SASOL that an agency agreement existed was never contested during cross-

examination or through evidence in rebuttal. For the latter reason, Botes' further argument that, if a party wants to rely on 'agency', he has to aver and prove the exact terms and extent of his agent's mandate, ⁷⁴ and that, where a party avers that a contract was concluded between them it necessarily implies that no agent or representative was involved and that the parties therefore contracted inter partes,⁷⁵ need not seriously be considered. He, at various occasions during cross-examination of SASOL's witnesses conceded on behalf of

Potgieter that an agency agreement existed, and that the terms of Harmonie's mandate was perfectly clear; but, so he constantly argued, Potgieter was never aware of the agency agreement and relationship and, therefore, Potgieter was not in debt towards SASOL.

[30] It is clear that Potgieter's appeal cannot succeed and, in addition, it is clear that he has only abused process during the exchange of pleadings, during the trial and in lodging the appeal in order to avoid or, at least, delay the inevitable, namely that he is to be held accountable for his debt incurred by ordering and receiving fertilizer products supplied by SASOL. Punitive costs should accordingly be awarded on a scale of attorney-and-client.

The order

[31] I would therefore propose that an order in the following terms be given:

1. That the appeal is dismissed and the order of the court a quo is upheld in every respect. Thus:

1.1 Plaintiffs claim succeeds in its entirety with costs;

1.2 Defendant (Appellant) is ordered to pay Plaintiff (Respondent) the amount of R85,387.41 plus interest on that amount calculated at 20% per annum from 1 February 2002 and, at 24% per annum from 12 July 2002; as well as,

1.3 Costs on the scale of attorney-and-client for the proceedings in the Magistrate's Court;

2. That costs of appeal is awarded to respondent on a scale of attorney and client, including costs for Counsel.

A A LAMPRECHT

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree and it is so ordered

NV KHUMALO

JUDGE OF THE NORTH GAUTENG HIGH COURT

Representation for the appellant:

Counsel: Adv FW Botes

instructed by Attorneys: Van Rensburg Prokureurs

Representation for respondent:

Counsel: Adv JJ Pretorius

Instructed by Attorneys: Gerrit Coetzee Ing

1D Steyn. Vol 1.p74toVol 2. pt 19 of appeal record.

2Steyn. Vol 1, p75: DA Scholtz. Vol 2. p121 of the appeal record.

3Scholtz, Vol 2. p122. lines 1. 2 of the appeal record.

4Scholtz. Vol 2, pi 22. lines 1 8 to 23 of the appeal record.

5 E.g., Vol I. p 31 of the appeal record - "Aanhangsel 'L1: Afleweringsnota". supplied with Respondents further particulars to claim. Note that the delivery note depicted on Vol 1 p 31 is a copy of the original form, which bears the stamp, while the book copy depicted on Vol 1 p 30 does not bear a stamp, reportedly because the agent need not indicate on its own document that he is SASOIA's agent - see the evidence Scholtz at Vol 2. p 133. lines 18 to 24. Unfortunately the whole Exhibit "A" to which Scholtz refers to under cross-examination here was not included in the appeal record. Appellant, whose duty it is to submit a properly prepared and paginated record on appeal - Uniform Rule 50(7) - regrettably did not supply any reasons for the incomplete state of the record and, therefore, the evidence of Scholtz must be accepted as correct in this respect. See also the court's quos assertion 111 para 6.4.1 of its judgment. Vol 2. pi 89 of the appeal record that all the documentary exhibits indicated that SASOL was the actual contracting party (principal) while, where necessary, Harmonie was identified as only the agent for SASOL. See also Counsel for appellant's assertion at Vol 2 p 90 lines 5 to 7 of the appeal record that there were, at least on the document referred to there, an indication that Harmonic were "agente vir Sasol Kunsmis".

5 E.g., Vol I. p 31 of the appeal record - "Aanhangsel 'L1: Afleweringsnota". supplied with Respondents further particulars to claim. Note that the delivery note depicted on Vol 1 p 31 is a copy of the original form, which bears the stamp, while the book copy depicted on Vol 1 p 30 does not bear a stamp, reportedly because the agent need not indicate on its own document that he is SASOIA's agent - see the evidence Scholtz at Vol 2. p 133. lines 18 to 24. Unfortunately the whole

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6 Scholtz. Vol 2. pi 23 of the appeal record.

7 Steyn. Vol 1, pp77. line 23 to Vol 2. p85. line 4 of appeal record. Note that Steyn would later in his evidence under cross-examination

refer to his friendship with Potgieter in almost acidic terms - Vol

2. p 105, lines 18 to 21: "So as. as Yleneer Potgieter onder die indruk was ek is sy finansier (.sic) moet hy sker sy goeie pet bel en se luister my ou maat hier's 6 fakture wat nie op jou staat is nie tic. ek vvil jou graag betaal."

8 Exhibit "B" - Vol 2, ppl 70-171 of appeal record. See also Steyn. Vol 2. p83. line 23 to p84, line 4; p91. lines 15 to 17: p98. lines 5 to 7; pi 07. lines 3 to 9 of the appeal record.

9 Scholtz. Vol 2. p 146. line 16 to pi 47. line 1 1: D Visagie. Vol 2, p 157. line 1 8 to pi 58. line 20.

10 Generally see Steyn. Vol I. p74 to Vol 2. pi 18; Scholtz. Vol 2. ppl 19-154; and Visagie. Vol 2. ppl 54- 165 of appeal record.

11 Vol 1, ppl-2 of appeal record.

12 Further particulars and annexures - Vol 1, pp8-45: Supplementary Discovery Affidavit - Vol

1. pp46-48: and. Reply on amended plea

- Vol 1. pp68-9 of appeal record.

13 Op cit footnote 10.

14 Exhibit "E" - Vol 2 ppl 74-175 of the appeal record indicating Potgieter's payment of R9. 1 56.48 per Harmonic's order

HB2920. See also evidence of Scholtz - Vol 2 pi 26 line 17 to pi27 line 21.

15 The evidence of Scholtz under cross-examination of Counsel for Potgieter

- Vol 2. pi 47. line 3 to 17.

16 Contra however his initial plea and further particulars to plea that will he dealt with infra.

17 In *King v King* 1971 (2) SA 630 ((>)) it was held that the function and purpose of pleadings in civil matters is threefold: (1) To inform the parties what the issues are in order to prepare for the trial; (2) To inform the court of the issues in order to ascertain the extent (scope) of the dispute; and. (3) To place the issues on record in case one of the parties wishes to reopen the same issues after it had already been decided. The purpose of pleading is to facilitate a proper decision on the merits, his therefore important that the issues are set out precisely and with sufficient particularity so that it will also be clear to somebody other than the litigants what the dispute is actually about. Preciseness should however not be equaled with furnishing of unnecessary detail

- see *Conley v Gibson* 355 U.S. 41 (1957); Kmily Sherwin "The jurisprudence of pleading: Rights. Rules, and *Conley v Gibson*" Cornell Law Library: Cornell Law Faeulty Publications available at <http://scholarship.law.cornell.edu/cgi/viewcontent>

18Vol 1, pp49-50 of appeal record.

19 Vol 1, pp4-6 of appeal record.

20By way of exception in terms of Magistrates' Courts Rule I7(2)(a) before amendment; or by way of a special pica of non locus standi in judicio in terms of Magistrates' Courts Rule !9{ 12) before amendment. Note that, at the time of action, the Magistrates' Court Rules have not yet been amended as was the Magistrates' Court Act 32 of 1944 through the Jurisdiction of Regional Courts Amendment Act 31 of 2008 and other amendments up to and including Government Gazette 33448 of 6 August

2010. The current Rules have been promulgated as the "Rules Regarding the Conduct of Proceedings of the Magistrates' Courts of South Africa" in G\ R740, Government Gazette 33487 of 23 August 2010.

21This changed when he amended his plea as indicated infra.

22Which particulars of claim, to my mind, prima facie clothed SASOL with legal standing to sue Potgieter for debts owed.

23 Cf.. *G&C Construelion Ltd v De Beer cn 'n Ander* 2000 (2) SA 378 (1), In this case it was held that plaintiff could not rely on s 63(a) of the Close Corporations Act n69 of 1984 to claim directly from a member of a CC after the CC was liquidated on the basis that, it was not initially disclosed to him that he was dealing with a CC: but. where evidence established that he continued doing business with the C'C for part of the contract period after he became aware of the status of the instance that he was dealing with. In other words, the member of the CC was held to be liable only for debts which arise while other contracting party was not aware that he or she is dealing with a CC (and not a natural person) due to the conduct of the member in not disclosing same. As soon as this information was disclosed, however, the member could no longer be held personally liable. Subject to the doctrine of the 'undisclosed principal1 that will be discussed infra, the same reasoning applies here. According to basic principles of the law of contract and the law of agency, as soon as Potgieter

became aware that Harmonie was acting as agent of SASOL. he became indebted to SASOL. through its agent and had to settle all his debts incurred towards the latter either directly or to SASOL's agent. Harmonie. According to the undisputed evidence, however, both SASOL and Harmonie. however, expected all payments to be made directly to SASOL - paras [6]-[7] supra.

24 Sec the court a quo², judgment at Vol 1. pp60-67 (duplicated for reasons unknown at Vol 2, ppl 76-1 83) of the appeal record. In this regard, the court a quo acknowledged that pleadings can be applied for any time before judgment, to bring it in conformity with the evidence, and that

postponement and award of punitive costs would ameliorate any hardship that plaintiff would suffer as a result of the amendment, I can here he noted as well that plaintiff failed to specifically set out in the particulars of claim in the simple summons that it is going to rely on an agency relationship that it had with Harmonie and that, therefore, defendant was entitled to deny locus standi in his pleadings. The pica in this regard however runs totally contra his initial plea that he was aware of the agency relationship and that he was indebted to SASOL through its agent, 1 armonie: hut. that he has paid his debts.

25Para 1 of amended plea.

26Para 3 of amended plea.

27Para 1 of the amended plea: "Die Yerweerder dra egter nie kenms van die Eiser se locus standi en/of regs persoonlikheid nie. kan dit gevolglik nie erken of ontken nie en word die Eiser tot bewys daarvan geplaas."

28 Hoole v Singei (1 905) 10 I ICG 38. See also Potchefsiroomse Stadsraad v Kotze 1 960 (3) SA 6 I 6 (A); Seal a Cafe v Rand Advance (Pty) Ltd 1975 (1) SA 28 (N); and Glolinco v Ahsa Bank Ltd t a United Bank 2002

(6) SA 470 (SCA) referred to in appellant's heads of argument.

29 E.g., Scott and Others v Hanekoni and Others I 980 (3) SA I I 82 (CPD) at I 188-9: Giant Concerts r Minister of Local Government. Housing and Traditional Affairs, KwaZulu-Natal, and Others 201 I (4) SA 164 (K.ZP) at para [16].

30 Supra footnote 20.

311924 AD 69.

32The content and structure of paragraphs [I6]-[18] mainly follows the reasoning and style of earlier editions of Jones A Buckle: The Civil Tract ice of the Magistrates Courts in South Africa: Vol 11: The Rules before amendment of the Act and Rules. The Rules have now been changed and extensive use has also been made of the DE Van Loggerenberg. Jones A- Buckle: The Civil Practice of the Magistrates Courts in South Africa: Vol II: The Rules (10th ed - Loose Leaf) 55-6 to 55-6A in terms of the terminology used and authorities cited therein.

33At 74 of the judgment. See also Brits v Coetzee 1967 (3) SA 570 (T)

34At 74 of the judgment. See also *Van Zyl v Crausc* 1945 OLD 168 at 170; *Turner r Done/ly* 195 1 (4) SA 21 (T) at 22; *Brits v Coetzee* supra footnote 33; *J 'ilfoen r kale rated Trust Ltd* 1971 (1) SA 750 (O) at 757.

35° Cf. e.g.. *Grill v Kotze* 1927 CPD 99 at 101. See however also *Jones v Raad* 1940 CPD 376 at 380.

36Per Selke J in *Nces and korving v Lout* as 1950 (4) SA 300 (N) at 302

37 *Nienaehe.r v Union Government* 1947 (1) SA 392 (T) at 393-4; *Gooscn v Reed* 1955 (2) SA 478 I I) at 481; *Maree v Died cricks* 1962 (I) SA 231 (T); *Oden dual v Van Oudtshoorn* 1968 (3) SA 433 (T) at 436 See also *Scott and Others v Hanekom* supra footnote 29 at 1 189 ei seq. where the Court was prepared, even in the High Court, to draw inferences from an incomplete statement of locus standi.

38 *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 453; *Brits v Coetzee* supra footnote 33.

39 *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* supra footnote 3 I at 74 of the judgment.

40 Ibid. See also *Cilliers v Van Biljon* 1925 OPD 4.

41Supra loc cit footnote 37.

42'Ibid. Own italics.

43

44It was held that it cannot be done in. *South African Milling Co (Ply) Ltd v Reddy* 1980 (3) SA 43 1 (SF.): *Inlcrboard SA (Ply) Lid v Van den Berg* 1989 (4) SA 1 66 ((.)); *United Methodist Church of South Africa v Sokufundumula* 1989 (4) SA (4) 1055 (O): *South African Allied Workers' Union v De Klerk* NO 1990 (3) SA 425 (E) at 181 B (confirmed on appeal in *South African Allied Workers' Union (in liquidation) v De Klerk* "NO 1992 (3) SA 1 (A) - bul the question oHocus standi was not considered on appeal, at 4H): and. *AM V Tractor ct Implement Agencies Bk v Vennootskap DSU Ciiliers ct Seuns (Kelrn Vervoer (Ldms) Bpk Tussenheitredend)* 2000 (2) SA 571 (NC). On the otiiier hand, however, it was held that it can be done and that the court has a discretion to come to the aid of the applicant in appropriate cases in *Baeck cV- Co SA (Ply) Ltd v Van Zummeren* 1982 (2) SA 1 12 (W) at 11811-119D; *Evangelical Lutheran Church in Souther)} Africa (Western Diocese) v Sepeng* 1988 (3) SA 958 (B) at 966A-B: *Dc Polo v Drever* 1991 (2) SA 164 (W) at 178C-I79B: *Nahrungsmittel GmbH v Otto* 1991 (4) SA 414 (C) at 418D: *Plettenberg Bay Country Club v Bitou Municipality* [2006J 4 All S A 395 (C) at 399c: and. *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund* 2007 (I) SA 142 (N) at I47G-H. While the SC A has yet to authoritatively and pertinently rule on this issue, it was already contended that the latter approacli has been approved by the Appellate Division in *Moos a and Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) at 181 B. See *Merlin Gerin (Pty/ Ltd v All C'itrrent and Drive Centre (Ply) Ltd* 1994 (1) SA 659 (C): *Fanny ays Mall (Ply) Ltd v South African Commercial Catering and Allied Workers Union* 1999 (3) SA 752 (W) at 753CJ-11: and. *Cyberscene Ltd v i-Kiosk Internet and Information (Ply) Ltd* 2000 (3) SA 806 (C) at 811B-812H. A contrary view was held in the a quo

decision of *South African Allied Workers' Union v De Kick NO supra loc cit.* but the matter was not considered on appeal in *South African Allied Workers' Union (in liquidation) v De Klek NO supra loc cit.* Finally, in *Smith v Kxvanonquhcla Town Council 1999 (4) SA 947 (SCA) at 954F-H.* it was emphasized (albeit obiter) that the Appellate Division in *Moosa supra* clearly adopted the correct approach in *Baeck Co supra* and that the SCA therefore fully subscribes to the view that a court has the discretion to come to the aid of an applicant that neglected to fully disclose his standing in the founding papers. It was also pointed out (at 95411) that the rule against new matter in reply is not absolute and that it should be applied with a fair measure of common sense.

44It was held that it cannot be done in. *South African Milling Co (Pty) Ltd v Reddy 1980 (3) SA 43 1 (SF): Inlcrboard SA (Ply) Lid v Van den Berg 1989 (4) SA 1 66 ((.)); United Methodist Church of South Africa v Sokufundumula 1989 (4) SA (4) 1055 (O): South African Allied Workers' Union v De Klerk NO 1990 (3) SA 425 (E) at 181 B (confirmed on appeal in *South African Allied Workers' Union (in liquidation) v De Klerk "NO 1992 (3) SA 1 (A) - bul the question oHocus standi was not considered on appeal, at 4H): and. AM V Tractor ct Implement Agencies Bk v Vennootskap DSU Ciiliers ct Seuns (Kelrn Vervoer (Ldms) Bpk Tussenheitredend) 2000 (2) SA 571 (NC).* On the otiiier hand, however, it was held that it can be done and that the court has a discretion to come to the aid of the applicant in appropriate cases in *Baeck cV- Co SA (Ply) Ltd v Van Zummeren 1982 (2) SA 1 12 (W) at 11811-119D; Evangelical Lutheran Church in Souther)} Africa (Western Diocese) v Sepeng 1988 (3) SA 958 (B) at 966A-B: Dc Polo v Drever 1991 (2) SA 164 (W) at 178C-I79B: Nahrungsmittel GmbH v Otto 1991 (4) SA 414 (C) at 418D: Plettenberg Bay Country Club v Bitou Municipality [2006J 4 All S A 395 (C) at 399c: and. Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund 2007 (I) SA 142 (N) at I47G-H.* While the SC A has yet to authoritatively and pertinently rule on this issue, it was already contended that the latter approacli has been approved by the Appellate Division in *Moos a and Cassim NNO v Community Development Board 1990 (3) SA 175 (A) at 181 B.* See *Merlin Gerin (Pty/ Ltd v All C'itrrent and Drive Centre (Ply) Ltd 1994 (1) SA 659 (C): Fanny ays Mall (Ply) Ltd v South African Commercial Catering and Allied Workers Union 1999 (3)**

SA 752 (W) at 753CJ-11: and. Cyberscene Ltd v i-Kiosk Internet and Information (Ply) Ltd 2000 (3) SA 806 (C) at 811B-812H. A contrary view was held in the a quo decision of *South African Allied Workers' Union v De Kick NO supra loc cit.* but the matter was not considered on appeal in *South African Allied Workers' Union (in liquidation) v De Klek NO supra loc cit.* Finally, in *Smith v Kxvanonquhcla Town Council 1999 (4) SA 947 (SCA) at 954F-H.* it was emphasized (albeit obiter) that the Appellate Division in *Moosa supra* clearly adopted the correct approach in *Baeck Co supra* and that the SCA therefore fully subscribes to the view that a court has the discretion to come to the aid of an applicant that neglected to fully disclose his standing in the founding papers. It was also pointed out (at 95411) that the rule against new matter in reply is not absolute and that it should be applied with a fair measure of common sense.

45 *Supra* at para [10].

46 For the requirements where reliance is placed on agency, see *Poichefsiroonise Stadsraad v Koizc: Seal a Cafe v Rand Advance (Pty) Ltd: and Glqfineo v Ahsa Bank Lid t/a United Bank* supra footnote 28.

47 *Mail (Cape) (Pty) Lid v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C); *Thelma Court Flats (Ptv) Ltd v Me Swigi* 1954 (3) SA 457 (C); *Shell Company of South Africa v liner Motors (Ply) Ltd* 1959 (3) SA 971 (W); *Pool quip Industries (Pty) Ltd v Griffin* 1978 (4) SA 353 (W); *Tat ter sail v Nedcor Bank Lid* 1995 (3) SA 222 (A) at 228 F-H; *C eke she v Premier. Eastern Cape* 1998 (4) SA 935 (Tk) at 952A-B; *Plettenberg Bay Count/y Club v Bit on Municipality* [2006] 4 All SA 395 (C) at 398f-g; *Musunduzi Municipality v Natal Joint Municipal Pension'Provident Fund* 2007 (!) SA 142 (N) at 149F-I; *Graham v Park Mews Bod\ Corporate* 2012 (I) SA 35 5 (WCC) at 360C-G.

48 Unfortunately the request for further particulars docs not form part of the appeal record, hut. judging from the use of the word 'Agente' in para 1.3.7 of the further particulars - Vol 1. p 10 of appeal record - it can be inferred that Potgieter did ask in his request for further particulars to whom SASOL alleges payment had to be made to escape liability .

49 Visagie. Vol 2. p.60. lines 10 to 14.

50 Botes' cross-examination of Steyn, Vol 2, pi 13. line 12 to pi 14. line 7.

51 Botes' cross-examination of Steyn. Vol 2. pi 13. lines 8 to II: of Scholl/, Vol 2. pi 52. line 21 to pi line 3: and of Visagie. Vol 2, pl63. line 24 to p 164. line 9 of appeal record.

52 Botes' cross-examination of Steyn - Vol 2 p 90lines 4 to R. r" Para 3.2 of Potgieter's opposing affidavit - Vol I p5 of appeal record.

53Vol 1 p 7 of the appeal record - referred to in para 3.2 of the opposing affidavit.

54 It perhaps has to be conceded in this regard that Potgieter. in the record that he supplied to this Court in terms of Rule 50(7).

indicated on Annexure "A" that " Dokumcut ontbrcek: 'n Voorbeeld aangeheg (Docucare)". Once again, however, appellant ventures no explanation for the original document not having been supplied to the Court - viz para 9.1. more particularly para 9.14 of appellant's practice note.

55'

56E.g., A.) Kerr *The Law of Agency*. 3rd ed. 259 el seq\ DJ Joubert "Agency and Stipulalio Alien" in R Zimmerman and E) Yisscr (cds) *Southern Cross: Civil Law and Common Law in South Africa*

(1996) 335 at 342-3: *Factory Investment (Ply) Ltd v Ismail* 1960 (2) SA 10 (I) at 14. The legal position of disclosed and undisclosed principals in the law of agency is also set out in DE Van Loggerenberg Jones ct Buckle: *The Civil Practice of the Magistrates Courts in South Africa: Vol II: The Rules* (10th cd - Loose leaf) 5-1 8 to5- 20.

57 *Logan v Read and Ash* (1 892) 9 SC 514; *Leslie's Trustee v Leslie* 1903 TS 701; *Fairbairn v Pepper* (I

909) 21 SC 1 54: Schmidt v Barnardo

(1906) 23 SC' 447: Blower v Van No or den I 909 TS 890 al 897-9: Freemantle v McKenzie 1915 CPD 568: Commaile v Jamaloodien 1917 C'PD 656: Howard's Debt Collecting Agency v Haarhoff 1925 TPD 272: SWA Amagamecrde Afskiers (Fdms) Bpk r Louw 1956 (I) SA 346 (A): Wat kiwi Shipping C'o Ltd v Thomas Barlow and Sons (Natal) Ltd and Another 1978 (1) SA 671 (A) at 680D; Sentrakoop Handelaars Bpk r Lourens

199) (3) SA 540 (W); Standard General Insurance Co Ltd v Eli Lilly (SA) (Ply) Ltd (FBC Holdings (Pty) Ltd, Third Parly> 1996 (1) SA 382 (W) at 387C-D: Graved NO v Van der Merwe 1 996 (1) S A 53 1 (D) at 537G.

57 Logan v Read and Ash (1 892) 9 SC 514: Leslie's Trustee v Leslie 1903 TS 701: Fairbairn v Pepper (I

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(1906) 23 SC' 447: Blower v Van No or den I 909 TS 890 al 897-9: Freemantle v McKenzie 1915 CPD 568: Commaile v Jamaloodien 1917 C'PD 656: Howard's Debt Collecting Agency v Haarhoff 1925 TPD 272: SWA Amagamecrde Afskiers (Fdms) Bpk r Louw 1956 (I)

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58 Fulton Co v Knox 1917 VVLD 48: Ashley v SA Prudential Ltd 1929 TPD 283: Town Conned! of Brakpan v Cohen 1938 WLD 146: Belonje v African Electric Co (Pty) Ltd 1941 (!) SA 592 (E) at 598: Sentrakoop Handelaars Bpk v Lourens supra footnote 57 at 544E-545G

59 Blower v Van Noorden supra footnote 57 at 897: Wood v Visser 1929 C'PD 55: Steenkanip v Webster 1955

(1) SA 524 (A): Edelson v Glenfields Estates (Ptv) Ltd 1955 (2) SA 527 (E): Langham Court (Pty) Ltdi' Mavromaty 1954 (3) SA 742 (T).

59 Blower v Van Noorden supra footnote 57 at 897: Wood v Visser 1929 C'PD 55: Steenkanip v Webster 1955

(1) SA 524 (A): Edelson v Glenfields Estates (Ptv) Ltd 1955 (2) SA 527 (E): Langham Court (Pty) Ltdi' Mavromaty 1954 (3) SA 742 (T).

60 Van Loggerenberg op cit footnote 32 at 5-18 to 5-20.

61 E.g., Ibrahim Sulc. "Should the Doctrine of Undisclosed Principal be retained?" Nigerian Journal of Business and Corporate Law 1.1 (2010): 68-81. Available at: http://vworks.bepress.com/ibrahim_sule7

62 Cullinan v Noordkuaplanse Aarlappelmoerhvekers Kooperasie, Bpk 1972 (I) SA 761 (A); CJ Nagel "Undisclosed Principal - Locus Standi of Agent to sue in his own name - Remedies for Breach of Contract Botha v Giyoset/a Paragon Fisheries [2007] SCA 73 (RSA)"

(2007) THRHR- I'ONNLSSE 687.

63 Lambinon v Du Toit 1952 (4) SA 431 (T). Note that in Karstein v Moribe and Others 1982 (2) SA 282 (!) at 299F.-300A, Ackermann J held that Kerr's formulation of the "personal consideration rule" is too widely stated where mere personal objection by the third party to the principal's intervention, unconnected to any prejudice, would serve to exclude the principal's intervention.

64 All that was put is that Potgieter never knew: of the fact that he was actually contracting with SASOL (the principal) and not with Harmonic (the agent) and that, therefore, he refused to pay SASOL when he was invoiced. It was never suggested to any of the witnesses that Potgieter would never have ordered, bought and taken delivery of the fertilizer products had he known that the other contracting party was SASOL, not Harmonic; or, that it was of utmost importance that the contracting parties knew exactly who the other party was.

65 Brand v Minister of Justice 1959 (4) SA 712 (A) at 715: DT Zeffert et al The South African Law of Evidence

(2003) 128. From a criminal law perspective, see also R v Mohr 1944 TPD 105 at 108: "Where a question of the state of mind of an accused person is in issue, it is not easy for a Court to come to a conclusion favourable to the accused as to his state of mind unless he has himself given evidence on the subject." Thus, a failure to produce evidence may, in appropriate circumstances, lead to prima facie proof presented by the State becoming conclusive proof as to one's state of mind. See further R v Dettlefs 1953 (I) SA 418 (A) at 422G; S v Kola 1966 (4) SA 322 (A) at 327; S v Thron 1968 (4) SA 61 (T) at 63D-H.

66 Karstein v Moribe and Others supra footnote 63.

67 Ibid.

68 Para 10 of Appellant's Heads of Argument.

69 Supra para 10J. See also para [17].

70 Para 3 of opposing affidavit - Vol 1, p5 of appeal record.

71 Vol 1, p51 of appeal record.

72 Vol 1, p 52 of appeal record.

73 Jennings v Parag 1955 (1) SA 290 (T) at 292G.

74 Para 1 1 of Appellant's Meads of Argument.

75Para 12 of Appellant's 1 leads of Argument.

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