

SOUTH AFRICA / JUDGMENT

Singh v Minister of Education, Kwazulu-Natal (13243/2005) [2009] ZAKZDHC 2; ; 2009 (5) BCLR 480 (CC) (3 March 2009)

[2009] ZAKZDHC 2

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Msimang

CASE / FILE NUMBER
13243/2005

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IN
THE HIGH COURT OF SOUTH AFRICA
DURBAN
AND COAST LOCAL DIVISION
CASE
NO: 13243/2005
In

the matter between:	PRADEEP SINGH Plaintiff and THE MINISTER OF EDUCATION KWAZULU-NATAL Defendant
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JUDGMENT

MSIMANG, J.

1] At all material times hereto the plaintiff was a school teacher in the employ of the defendant and stationed at Pinetown senior Primary school. On 31 December 2001, and for reasons not relevant

to the present proceedings, he resigned his position with the defendant and, at the same time, lodged an application with the defendant for payment of his pension. His resignation was approved by the defendant and the proceeds of his pension were only paid on 2 January 2004.

2] He was the registered owner of a certain immovable property (the property) over which the First Rand Bank Limited trading as First National Bank (the mortgagor) held a mortgage bond. It would appear that, as a result of the cessation of his regular income, resulting from his aforesaid resignation, the plaintiff fell into arrears in his monthly payments with the mortgagor. The latter foreclosed and the property was placed under judicial attachment. The date of its sale by public auction was set down for 20 November 2003.

3] The plaintiff testified that, on a number of occasions, he had been to the Durban offices of the defendant to make enquiries as to the date when he would receive the proceeds of his pension as he needed to utilise the same to settle the arrears on his bond but that, on all those occasions, he had not been advised of that date. On 20 February 2003 was one such occasion during which he consulted with the defendant's Acting Senior Regional Manager, one Mr. S D Nkosi, informing him that his bond account with the mortgagor was in arrears. Mr. Nkosi addressed a letter to the mortgagor in the following form :-

"The above matter refers.

Please be informed that Mr. P Singh was employed by the Department of Education Durban South Region until 31/12/2001.

This office would like to confirm that his pension benefits has (sic) not been paid. This office is still processing his pension payout."

4] The defendant's processing of plaintiff's pension payout, however, took inordinately long. On 1 August 2003 the mortgagor instituted foreclosure proceedings and, upon his receipt of the summons in the matter, the plaintiff took a copy thereof to the defendant where he showed the same to Mr. Nkosi and the latter made a copy thereof and undertook to despatch the same to the defendant's pensions department.

5] However, by 18 November 2003 the plaintiff had not received those proceeds. When on the morning of the said date he was on his way to make further enquiries at the defendant's offices, he received a telephone call from the mortgagor's legal collections department, Johannesburg and spoke to the mortgagor's employee, one Mr. Naresh Beosumbar. The latter informed the plaintiff that the property would be sold in execution on the following day.

6] When he arrived at the defendant's offices later during the day and spoke to Mr. Nkosi, he informed him of the earlier telephone call from the mortgagor's collections department and requested that a telephone call be placed to the said department so that Mr. Nkosi could intercede on his behalf, thereby causing the sale to be cancelled. Indeed, a call was placed and the plaintiff first spoke to Mr. Beosumbar, informing him that he was at the offices of the defendant and requesting him to speak to Mr. Nkosi who would confirm that there were monies due to him by the defendant. Mr. Beosumbar acceded to the request and spoke to Mr. Nkosi. The

latter enquired from Mr. Beosumbar as to what he could do to assist in effecting the cancellation of the sale. When the two stopped their conversation the plaintiff took the phone from Mr. Nkosi and again spoke to Mr. Beosumbar who informed him that the requirements he had conveyed to Mr. Nkosi for stopping the sale was either a settlement of the arrears or a written confirmation of the estimated amount to be paid out to him as well as the date when the same would be paid. He would shortly send a telefax transmission to Mr. Nkosi confirming the said requirements, and upon receipt of a telefax transmission from Mr. Nkosi containing the necessary information, he would cause the sale to be stopped.

7] After the plaintiff had finished speaking to Mr. Beosumbar, Mr. Nkosi informed him that he would await the arrival of the telefax transmission from the mortgagor's collections department and that the plaintiff should return to his office later in the day so that he would be given a copy of the same. The plaintiff accordingly left.

8] Later during the day the plaintiff indeed returned to Mr. Nkosi's office and spoke to Mr. Nkosi who informed him that the transmission had arrived and gave him a copy thereof. Discussing the contents of the transmission Mr. Nkosi made it clear to the plaintiff that, as the proceeds of his pension had not been paid, there is no question of settling the arrears at that stage but that he would, on that day, despatch a telefax transmission to the mortgagor's collections department furnishing them with the rest of the requirements contained in the department's transmission to enable Mr. Beosumbar to stop the sale. The plaintiff accordingly left Mr. Nkosi's office assured that Mr. Nkosi would furnish the department with the necessary information so that his property would therefore not be sold in execution.

9] It is now history that Mr. Nkosi did not provide the collections department with that information on the said day, that the sale in execution proceeded as scheduled and that plaintiff's property was sold to a third party.

10] It is against this background that the plaintiff instituted the present action against the defendant alleging that, in failing to supply the said information to the mortgagor's collections department, Mr. Nkosi breached the agreement he had concluded with him and that, as a result of the said breach, he had suffered damages being the approximate value of his property. At all material times, the plaintiff continues to allege, the said Mr. Nkosi was acting in the course and within the scope of his employment with the defendant.

11] It was not disputed that, at all material times, Mr. Nkosi acted in his capacity as an employee of the defendant and in the course and within the scope of his employment as such and, at the commencement of the trial Counsel informed me that the parties had agreed that issues of quantum and liability would be separated and that the trial should proceed only on issues of liability. As I was satisfied that such a route was a feasible one in the circumstances, I made the necessary order in terms of Rule 33(4) of the Uniform Rules.

12] The facts underlying the institution of these proceedings which I have set out above constitute a summary of events as narrated by the plaintiff and his witness Mr. Naresh Beosumbar when each gave his evidence-in-chief. However, when they were being cross-examined by Ms. Henriques, who appeared for the defendant, it became clear that the crucial part of their evidence would be denied by the defendant. By way of example, it was put to the plaintiff that Mr. Nkosi would deny that during the occasions when the plaintiff made enquiries regarding the payout of the proceeds of his pension he interacted with Mr. Nkosi but, that Mr. Nkosi would say that he had, for the first time, seen and had a discussion with the plaintiff on 18 November 2003. Though he would admit having addressed a letter on behalf of the plaintiff on 20 February 2003, he had not seen him on that day. Plaintiff's matter had been referred to him by his subordinate official, one Mr. Kwazi Mchunu. Mr. Nkosi would further deny that the plaintiff had presented the summons to him and that he had made a copy thereof, undertaking to despatch same to the defendant's pensions department. Finally, though he would admit having seen and spoken to the plaintiff in his office on that occasion, that a call was placed to the mortgagor's collections department from his office and that he had spoken to Mr. Beosumbar on the telephone, he would deny the rest of the allegations made by the plaintiff and his witness as to what transpired during the occasion.

13] Indeed, when he was later called upon to testify, Mr. Nkosi confirmed the denials. His version as to what transpired in his office on 18 November 2003 is the following. On the day the plaintiff came to his office accompanied by Mr. Kwazi Mchunu. He had come to make enquiries regarding the payout of his pension. He was informed that the paper work relating to the application had been despatched to the Treasury in Pretoria. A call was then placed to that office and when that office requested to be to be presented with proof of plaintiff's contributions, Mr. Mchunu was instructed to source them from the computer and fax them to Treasury. It was then that the plaintiff informed Mr. Nkosi that his property would be sold in execution on the following day and that he had only learnt of the said fact that morning when he was on his way to the defendant's offices. Upon hearing this, Mr. Nkosi offered to place a call to the mortgagor's collections department so that he would intercede on plaintiff's behalf for the purpose of postponing the sale. Indeed, the call was placed and Mr. Nkosi spoke to a gentleman and enquired from him as to what he could do to help postpone the sale. When the gentleman told him of the mortgagor's requirements for postponing the sale, he informed him that it was not possible for him to comply with those requirements because, as to the settlement of the arrears, he did not have plaintiff's money with him. Regarding the rest of the requirements the exact amount was still being calculated at the Treasury Department in Pretoria. He was therefore not in a position to give the gentleman the estimated

amount which would be eventually paid out to the plaintiff neither was he in a position of giving the estimated date of such payment.

Mr. Nkosi asked for the particulars of the mortgagor's attorneys and, in response, the gentleman informed Mr. Nkosi that he would consult a colleague and thereafter send a letter by fax on the same day to Mr. Nkosi advising him of the outcome of that

consultation. Mr. Nkosi then told the plaintiff to return after an hour so that he could provide him with information he would have given to the National Treasury. After a period of approximately one hour Mr. Nkosi proceeded to the fax machine to retrieve the fax sent to him by the mortgagor's collections department as arranged but could not find the same. He then telephoned the gentleman he had earlier spoken to at the mortgagor's collections department who informed him that he had despatched the fax.

14] According to Mr. Nkosi he only received a fax from the mortgagor's collections department on 24 November 2003. Copy of this faxed letter is included in defendant's bundle and the contents thereof are as follows :-

"I refer to our telephonic conversation of even date and advise.

The abovementioned Home Loan in the name of P & AR Singh has been attached and we have a sale in execution scheduled for the 20 November 2003, in order to stop the sale in execution we require the payment of the full arrear or confirmation in writing that the pension will be paid out and estimated amount and date of payment.

Hope that the above information is of assistance to you.

Thank you

Thanks

Naresh Beosumbar

Tel: 011 363 2907

Fax: 011 353 2082 "

15] It is significant to note that the said letter is, on all fours, exactly the same as copy of the letter which, the plaintiff had earlier on testified, had been given to him by Mr. Nkosi which copy was included in plaintiff's bundle of documents.

16] In any event, Mr. Nkosi testified that, upon receipt of the said faxed letter, he responded by his own fax, informing the collections department that it was only the Department of Finance: Pensions Administration that could furnish the information required by the mortgagor. It is necessary to quote the contents of this letter which are as follows :-

"The First National Bank

Attention: N Beosumbar

Payment of pension benefits: Mr. R Singh – CS 10979239

The matter above refers.

With reference to our telephonic conversation, I would like to inform you that the Department of Finance: Pension Administration is the one which can confirm the date of payment and the amount.

“

They informed me that I have to confirm with them on 2003-11-26

Yours faithfully

Senior Regional Manager

Ethekwini Region. “

17] That is the last time Mr. Nkosi heard of or dealt with the matter.

18] Clearly therefore there are material disputes of fact in the respective versions regarding the important issue to be determined by the Court. The technique generally employed by courts in resolving disputes of this nature was summarised as follows by Nienaber JA in *SFW Group Ltd and another v Martell et cie and others* 2003(1) SA 11 (SCA):-

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows.

To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses;

(b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

(i) the witness’ candour and demeanour in the witness-box,

(ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what he pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying a bout the same incident or events. As to (b), a witness’ reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.” (para 5).

19] Comparing the plaintiff and his witness with witness Nkosi, the former fared much better. They were calm and relaxed in the witness box and gave the impression that they were comfortable with the narration they were giving to the Court. Indeed, they would respond promptly and concisely to the questions put to them and, of equal significance, they corroborated each other on all material aspects of the case.

20] The same can, however, not be said of Mr. Nkosi. He would refrain from giving direct answers to the questions put to him and would appear to be giving answers to questions not put to him. The Court had to admonish him to desist from this practice. Besides, when I observed his demeanour in the witness box it did not inspire confidence. He appeared to be visibly shaken by the questions put to him during cross-examination which condition progressively worsened as the questioning progressed, with the result that towards the end of the cross-examination he cut a poor and obviously desperate figure. Also, there were a number of contradictions between what defendant's Counsel put to the plaintiff and his witness and what Mr. Nkosi later told the Court. By way of example, it was put to witness Beosumbar that, when called to testify, Mr. Nkosi would tell the Court that when, on 18 November 2003, he had not received a fax from the mortgagor's collections department, he had telephoned the witness who informed Mr. Nkosi he had not sent a fax but that he would be sending the same shortly. However, when, during his evidence, Mr. Nkosi referred to that telephone call he testified that Mr. Beosumbar had informed him that a fax had already been despatched.

21] The probabilities were also not kind to Mr. Nkosi's evidence. To start off with, it was not disputed that, at all times material hereto, the plaintiff had not seen witness Beosumbar and that when the latter telephoned plaintiff on the morning of 18 November 2003 the two were talking to each other for the first time. Yet the manner whereby they corroborated each other on material aspects of the case was so uncanny that the probability that they could be misleading the Court could be ruled out. Secondly, Mr. Nkosi testified that he had informed Mr. Beosumbar during their telephone discussion of 18 November 2003 that it was not possible for him to comply with the mortgagor's requirements for the postponement of the sale and yet Mr. Beosumbar sent a fax to him containing the very same requirements and requesting Mr. Nkosi to supply the information which would comply with those requirements. The proven facts clearly favour the version given by Mr. Beosumbar, namely, that, during their aforesaid telephone discussion, Mr. Nkosi had insisted that he put the mortgagor's requirements in writing and that upon receipt of the said writing he would respond, thereby stopping the sale. Then there is the undisputed evidence that the plaintiff had in his possession a copy of the said fax declaring that it had been given to him by Mr. Nkosi on 18 November 2003. The latter denies this. The denial begs one question, namely, if Mr. Nkosi had not given this copy to the plaintiff how then did it come about that he was in possession thereof. The answer is that it probably was given to the plaintiff by Mr. Nkosi as testified by the plaintiff.

22] Apart from the probabilities which clearly favour the plaintiff's case, there are certain unsatisfactory features in the evidence of Mr. Nkosi. I mention but a few. On 18 November 2003 he had been told that plaintiff's property would be sold in execution on the following day. He

must have been aware that only the intervention of the defendant could cause the sale, at least, to be postponed and, for that purpose, he was awaiting communication from Mr. Beosambar who had undertaken to despatch the same during the course of the day. When he realised that the Mr. Beosambar was not living up to his undertaking, why did he not telephone him, at least, during the morning of the following day to make further enquiries regarding the said communication and the impending sale? When, during his testimony, he was requested to explain this inaction, Mr. Nkosi could not give a satisfactory answer. Furthermore, he testified that, when he finally received this faxed communication on 24 November 2003 and when he established that the same had been faxed to his office at 11h09 on 18 November 2003, he suspected that some person or persons within the defendant's offices had deliberately kept the document away from him with a view to sabotaging his work and yet he did not take steps to ensure that this very serious suspicion was reported to his superiors. Then there is an issue of his alleged response to the said communication. For one thing, the same is undated which, by Mr. Nkosi's own admission, was unusual for the communication emanating from the Department of State. Secondly, though Mr. Nkosi testified that the same was written in response to the mortgagor's request on 18 November 2003 fax, throughout the document no reference was made to the said fax. Thirdly, now that the sale had gone through, the fact which must have been known to Mr. Nkosi, what purpose would such late response achieve?

23] All these queries have brought about a niggling uneasiness in my mind. I could not help but conclude that Mr. Nkosi did not take the Court into his confidence.

24] Having therefore analysed the evidence given during the trial I have been driven to the conclusion that the version given by the plaintiff and his witness is more probable and is to be preferred. I must accordingly find for the plaintiff.

25] I accordingly find that :-

- (a) The defendant is liable for all such damages (resulting from breach of contract concluded by the parties on 18 November 2003) as may be proved or agreed upon;
- (b) The costs are reserved pending proof or agreement on the damages.

For the plaintiff: Adv. D D Naidoo (instructed by Segie Moodley & Associates)

For the defendant: Adv. J I Henriques (instructed by State Attorney R Naidoo)

Matter heard:

23 and 24 February 2009

Judgment delivered: 3 March 2009

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