

SOUTH AFRICA / JUDGMENT

Soul Africa Group (Pty) Ltd and Another v Venter Food (Pty) Ltd (CIV APP MG04.23) [2024] ZANWHC 264 (24 October 2024)

[2024] ZANWHC 264

COURT

North West High Court, Mafikeng

BEFORE

Mfenyana, Makoti

CASE / FILE NUMBER

CIV APP MG04/23

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION –

MAHIKENG

CASE NO: CIV APP

MG04/23

Reportable: NO

Circulate to Judges: NO

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NO

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Magistrates: NO

In the matter between: SOUL
AFRICA GROUP (PTY) LTD
First Appellant
(REG NO. 2012/096152/07)
TEBOGO
TWALA
Second Appellant
And
VENTER
FOOD (PTY) LTD
Respondent

Coram: Mfenyana J et
Makoti AJ
Delivered: This judgment
is handed down electronically by circulation to the parties through
their legal representatives’
email addresses. The date for the
hand-down is deemed to be 24 October 2024.

JUDGMENT

Makoti AJ

Introduction

- [1] What came before us in this appeal is principally the question: ‘when does a legally binding contract come into existence?’ It is a question that the court a quo grappled with and sought to resolve. The appellant has brought the court a quo’s decision before us to decipher. Simply, the parties in this case disagree about the coming into existence of a compromise agreement on 14 September 2017. We provide the answer below.
- [2] This matter was decided in favour of the respondent by Magistrate Smith, of the Magistrate Court for the District of Rustenburg, in a judgment dated 04 March 2022. The judgment is impugned by the appellants who contend that the Magistrate erred in respect of the factual findings as well as in the application of the law.
- [3] It is apt to first explore the grounds upon which the appeal is predicated.

Grounds of appeal

- [4] There are several grounds of appeal that have been raised by the appellants in their notice of appeal, some of which are related if not repetitious. I summarize the grounds of appeal as follows:

[4.1] First, the appellants contend that the court a quo failed to give sufficient weight to the evidence of the respondent's four witnesses. The point being made is that the court a quo failed to make a finding on the issue of ownership of a number of items which were sold by the respondent to the first appellant and which they discussed on 14 September 2017. The witnesses had testified about those items;

[4.2] Second, the Magistrate failed to have regard to the terms of the sale agreement between the parties. The issue here is that the court a quo failed to determine whether the sale agreement was vitiated by fraudulent misrepresentation by the respondent;

[4.3] Third, the appellants argue that the Magistrate failed to properly deal with the principles of ownership as it related to certain goods that were sold to the first appellant;

[4.4] Fourth, the appellants contend that the court a quo failed to consider and apply the basic contractual principles of offer and acceptance; and

[4.5] Lastly, the appellants took issue that the court a quo failed to make findings on the credibility of the witnesses who testified during trial.

[5] Expectedly, the appellants want the appeal to be upheld and that the

judgment

and orders issued by the court a quo be set aside. If successful, the appellants want the orders to be substituted with an order dismissing the respondent's claim against them, with costs. The appeal is opposed by the respondent.

Summary of facts

[6] During or about 28 March 2017 the parties concluded a written sale

agreement in terms of which the respondent sold a business to the first appellant.[1] The second appellant stood as surety and co-principal debtor in which he guaranteed due and punctual performance of the contractual

obligations by the first appellant. The terms of the sale agreement are not in dispute.

[7] In terms of the sale agreement:

[7.1] The first appellant purchased a business from the respondent, based at Plot 3[...] Waterkloof 305, Rustenburg.

[7.2] Consideration was agreed at R1 400 000-00 (One Million and Four Hundred Thousand Rand) payable as follows:

[7.2.1] a deposit of R100 000-00 (One Hundred Thousand Rand) that was to be paid on 01 May 2017;

[7.2.2] a further amount of R100 000-00 was payable on 01 June 2017; and

[7.2.3] the remaining balance was to be paid in equal monthly installments of R50 000-00 (Fifty Thousand Rand), starting from 01 July 2017.

[8] The deposit was paid as agreed. The first appellant also duly paid

the agreed deposit on 01 June 2017. The first appellant performed these actions ostensibly in compliance with their respective

obligations in terms of the terms of the agreement. It then stopped making any further payments towards the remaining balance as the parties had agreed.

[10] Because of the first appellant's failure to honour the payment terms, the respondent, on 05 July 2017 issued combined summons against both appellants. In the claim the respondent wanted payment of the remaining balance from the appellants.

[11] Once served with court papers, the second appellant addressed a letter to the respondent in which an amicable resolution of the dispute was proposed. The respondent seemingly warmed up to the proposal for settlement and a meeting between the parties and their legal representatives was arranged. It took place on 14 September 2017.

[12] I retrace my steps to mention that the first appellant proposed payment of an amount of R650 000-00 (Six Hundred and Fifty Thousand Rand) in full and final settlement of the dispute between the parties. The proposal was countered by the respondent at the meeting on 14 September 2017, and proposed payment of R700 000-00 (Seven Hundred Thousand Rand) in full and final settlement of the dispute instead.

[13] What actually transpired at the meeting of 14 September 2017 is a point at which the parties parted company. The respondent says that the parties reached a compromise agreement in terms of which their dispute was finally settled. That is disputed by the appellants who argued that there was no agreement that was reached on that date, reasoning that the second appellant was still going to consider the propriety of the proposed payment of R700 000-00 for purposes of making a final decision.

[14] The question now is whether a compromise agreement was concluded by the parties on 14 September 2017. I do not decide the issue at this stage. However, it is common cause between the parties that a draft agreement was prepared by the respondent's legal representatives in which the apparent terms were recorded. The draft was shared with the appellants through their lawyers as well. In the exchange of documents that followed the meeting, the appellants' legal representatives appear to have applied their minds to the draft agreement before giving an indication that it was to be given to the appellants for signature.

[15] I sum up what was recorded in the compromise agreement as follows:

[15.1] the deposit that was paid by the first appellant subsequent to the conclusion of the initial agreement was to be retained by the respondent;

[15.2] the appellants were to pay a settlement amount of R700 000-00 (Seven Hundred Thousand Rand), in full and final settlement of the dispute between the parties to the respondent;

[15.3] the settlement amount of R700 000-00 was to be paid initially in three equal installments of R200 000-00 (Two Hundred Thousand Rand), with the first payment on 10 November 2017; and

[15.4] lastly, the balance of R100 000-00 (One Hundred Thousand Rand) was to be paid on 10 February 2018.

[16] The appellants contend that the contractual terms were mere proposals and were never agreed on. This is the main issue that had to be decided by the trial court and, likewise, this court. As I understand their contention, the compromise agreement did not come into existence as it was not signed by the parties. The case thus turned on the question whether a compromise agreement did come into existence. Save to say the appellant did not make any of the payments as per the compromise agreement.

The judgement of the court a quo

[17] The Magistrate thoroughly interrogated the existence or otherwise of the compromise agreement between the parties. He was alive to the fact that the party that alleges the existence of a compromise agreement is the one responsible for proving its existence on a balance of probabilities. So too, the Magistrate was alive to the nature of a compromise agreement which entails the waiver of the parties' existing rights or entitlements, and that a compromise must be clearly and unambiguously proven.

[18] This is what the Magistrate said in paragraph 15.2 of the judgement:

"A compromise is the settlement by agreement of disputed obligations which has, as its aim, the prevention, avoidance [or] termination of litigation. A compromise agreement must accordingly relate directly or indirectly to an issue or [lis] between the parties. It is common [cause] that, when the meeting of 14 September 2017 took place, the Plaintiff had already instituted action against the Defendants based on the sale agreement. The Defendants had also already declared a number of disputes relating to the sale agreement. There was accordingly an existing [lis] between the parties and disputed obligations under the sale agreement when the meeting was held. It is further evident from the evidence that the purpose of the meeting was to resolve (settle) the dispute pending litigation between the parties. The only remaining question is thus whether a settlement agreement had indeed been reached." (Emphasis and clarifications added)

[19] The Magistrate had a proper understanding that, for a contract to come in to existence it is necessary that consensus be reached between the parties on all the essentialia of the agreement. To decide the issue, the Magistrate took into account the evidence that was led by the witnesses who testified for both sides. He took into

consideration the fact that their respective versions were consistent and that neither of them contradicted themselves in any material

respects.

[20] However, he identified a discrepancy in respect of the testimony of one Mr Van der Westhuizen when testifying about the compromise agreement. Despite the inconsistency that he had identified, the Magistrate did not consider the incontinency to be a material contradiction. It was of the nature that could affect the eventual outcome of the case.

[21] At paragraph 15.5 the judgment reads:

“It was common cause that the intention of the parties in meeting was to settle the dispute between them. It was further common cause that the Second Defendant had offered an amount of R650 000-00 ... in full and final settlement prior to the meeting, and that a counter offer of R700 000-00 ... was eventually made by Venter Snr during the meeting. All four of the Plaintiffs’ witnesses confirmed that the Second Defendant and his Attorneys verbally conveyed the Defendant’s acceptance of Mr Venter Snr’s counter- offer; which acceptance was followed by the parties shaking hands.”

[22] In an attempt to explain the position, the second appellant testified before the court a quo that the negotiations only represented discussions and that he still had to consider the offer that was made by the respondent, after which he would then decide whether to accept it or not. He did not say by when he was required to revert to the respondent with an express decision whether he accepted their offer of settlement or not.

[23] The Magistrate found amongst others that:

“15.7 Mr Twala’s evidence is belied by the content of the documentary evidence presented at the trial. The email addressed to the Defendant’s Attorneys the day after the meeting referred to the settlement agreement as a conclusion, and that it was to be made an order of Court. The draft deed of settlement also recorded that a settlement agreement in full and final settlement had been reached. When the Defendants’ Attorney made changes to the agreement, none of this conclusion[s] were challenged. Probabilities strongly suggests that, had Mr Keeny been informed by the Second Defendant at the conclusion of the meeting that he was still to consider the offer and wished to make further investigations regarding ownership of the assets with the Landlord, that Mr Keeny would pertinently have raised such issue on receipt of the first draft of the settlement. No such indication was however made in any of the correspondences and draft deed

settlement until the penning of the final email from the Defendant’s former Attorney on 17 November 2017.” (Emphasis added)

[23] Having considered the issues, more so the facts surrounding the compromise agreement, the Magistrate concluded that a binding agreement had come into existence. To reach that conclusion he took into consideration that the appellants’ representatives never raised the point that a compromise was not concluded between the parties. He instead noted that the legal representatives had merely indicated, upon receiving a draft of the compromise agreement, that he was going to meet with his client for the purpose of signing the agreement. At no point was there ever indication that there was no agreement reached between the parties as yet.

- [24] Lastly, the court a quo also took into account the contents of a letter that was prepared by the appellants' legal representative on 26 October 2017. In that letter the legal representative proposed changes to the payment terms based on lack of means or affordability on the part of the appellants. Still, in that letter the notion of conclusion of a compromise agreement was not challenged. He simply indicated that the payment terms as recorded were not suitable to the appellants. But importantly, the legal representative confirmed in the letter the settlement amount of R700 000-00.
- [25] What was proposed on behalf of the appellant was that the monthly amounts be reduced so as to ease the burden on them in respect of payment of the amount of R700 000-00. Assuming that no agreement was reached, what could possibly have led the appellants' legal representatives to mention the amount in their letter to the respondent's lawyers? I answer this question below.

Analysis and application of the law

- [26] It is common cause that the parties met and discussed settlement. Further that the settlement was discussed pursuant to the issuance of court papers by the respondent. It was the appellants who had initiated discussions for purposes of settlement. Although the parties could not agree on the originally proposed offer of settlement that was made by the appellants, it is significant that their proposal is what triggered discussions. A proposal for settlement in the amount of R650 000-00 which was made by the appellants is what triggered the meeting of September 2017. An amount of R50 000-00 separates that proposal to the eventual settlement value of R700 000-00, with no gulf in between.
- [27] Adams J dealt in *D.K and Others v DF*[2] with the fundamental consideration as to the existence, or not, of a contract between parties. He stated that:

"[8]. In my view, the real question to be asked is whether subjectively there was a meeting of the minds in relation to this aspect of the agreement and whether the parties were ad

idem about this particular term of the agreement. This question is asked at a fundamental level and relates to the basic general principle relating to contracts that there must be consensus *ad idem* between the contracting parties." (Emphasis added)

- [28] The meeting of minds in respect of the existence of an agreement was a critical consideration in *D.K and Another v DF*, as it is in this case. The meeting of minds does not depend on the existence of a written contract which is signed by the parties or their representatives. That notion was rejected by the court on appeal in *Pillay and Another v Shaik and Others*[3] in which it was held amongst others that:

"[50] I do not agree with the court a quo's conclusion that there could be no binding contracts

between the parties unless each was signed by or on behalf of the buyers and the sellers. In my opinion it is clear from Goldblatt

v Freemantle, supra, and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here), an agreement between parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence. That this is so is clear, for example, from C W Decker's annotation on Van Leeuwen's Roman Dutch Law 4.2 sec 1 (not sec 2as Innes CJ says at 129) where he pointed out (Kotzé's translation, 2 ed, vol 2, p 12) that we no longer uphold the distinction drawn in Roman law between real, verbal, literal and consensual contracts because all contracts with us are made with consent. ...”

- [29] Thus, save where formalities are required, a contract comes into existence upon the meeting of minds on the subject matter of the agreement. It is of no moment, as I see things in this case, that the compromise agreement was not signed by the representatives of the parties.
- [30] What I found crucial was that, when the appellants later on requested relaxed payment terms, the request was based on the question of affordability and not because they disputed the settlement amount of R700 000-00 and the payment terms which were recorded in the draft that was produced by the respondent's lawyers that raised a dispute. The correspondences exchanged between their respective legal representatives render this point palpable.
- [31] The discussion on reduction of payment terms took place after the respondent's lawyers had been told by the appellants' representatives that the agreement was going to be signed. I find it perplexing that the lawyer who represented the appellants, and who was present at the meeting, would not immediately raise an objection that a compromise agreement had not yet been reached. His apparent understanding, in my view, accords with that of the respondent in so far as the existence of an agreement is concerned. This includes the understanding of the value of the settlement and the payment terms. Even when, after some passage of time, the appellants negotiated reduced payment terms, they were always clear that they were negotiating towards making it easy for themselves to pay the compromise amount of R700 000-00.
- [32] The court in Pillay and Another v Shaik and Others, above, went on to further say that:

“[53] This raises the question as to whether the doctrine of quasi-mutual assent can be applied in circumstances where acceptance does not take place in accordance with a prescribed mode but the conduct of the offeree is such as to induce a reasonable belief on the part of the offeror that the offer has been duly accepted according to the prescribed mode. Viewed in the light of basic principle, the question must surely be answered in the affirmative because the considerations underlying the application of the reliance theory apply as strongly in a case such as the present as they do in cases where no mode of acceptance is prescribed and the misrepresentation by the offeree relates solely to the fact that there is consensus.”

- [33] In the present case the wording of the written texts exchanged between legal representatives reveals that there was consensus between the parties on, at least, the value of the settlement amount of R700 000-00. I have already mentioned above that this was the amount which formed the basis upon which the parties discussed the payment terms, with the appellants not disputing that the settlement amount was as proposed by the respondent's legal representative. Rather, they simply proposed new payment terms to ease the financial burden on themselves. The respondent, in any case, was prepared to accept the terms proposed by them.
- [34] On the facts canvassed above, I am unable to fault the Magistrate on any of the grounds listed earlier in this judgment. Once the pivotal point for the existence of a compromise agreement has been cleared, and in favour of the respondents, the result is that the appeal must fail.
- [35] In so far as costs are concerned, there are no reasons why they ought not to follow the result.

Order

[36] In the circumstances, the following order is made:

[a] The appeal is dismissed with costs.

M.Z MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION: MAHIKENG

I concur

S MFENYANA

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing

: 14 June 2024

Date of judgment

: 24 October 2024

Counsel for Appellant : Mr K Simango

Instructed by

: Memela KS Inc

c/o Sephecholo Lechuti Lesofe Att.

Counsel for Respondents : Mr C B Clemente

Instructed by

: Du Plessis Van Westhuizen Inc.

c/o Nienaber & Wissing Inc.

- [1] Agreement was signed by the respondent on 27 March 2017.
- [2] D.K and Others v C.F (26567/2021) [2023] ZAGPJHC 1331 (20 November 2023).
- [3] Pillay and Another v Shaik and Others (006/08) [2008] ZASCA 159; 2009 (4) SA 74 (SCA) ; [2009] 2 All SA 435 (SCA) (27 November 2008).
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