

SOUTH AFRICA / JUDGMENT

Unterslak and Another v Macsteel Holdings (Pty) Ltd [2005] ZAGPHC 373; 25533/04 (17 August 2005)

[2005] ZAGPHC 373

COURT

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

25533/04

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NOT

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IN

THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND

LOCAL DIVISION)

JOHANNESBURG

CASE

NO:

25533/04

DATE:2005-08-17

In

the matter between

UNTERSLAK,

R

L.....First

Plaintiff

UNTERSLAK,

S

I.....Second

Plaintiffand

MACSTEEL

HOLDINGS (PTY)

LTD.....First

Defendant

SAMSON,

E.....Second

Defendant

JUDGMENT

WILLIS, J: This case has been a veritable ostrich of litigation. Despite much kicking and chasing, flapping of wings, ruffling of feathers and intimidating displays, it has been incapable of flying. Despite numerous attempts by the plaintiffs to amend and reamend the particulars of claim so that some kind of clear and cohesive cause of action can be established, they have not succeeded.

The plaintiffs now bring an application to amend once again.

This has been opposed in certain respects by the defendants. It is common cause that the following are the amendments which the plaintiffs seek to introduce:

" 1 7. Between 1 997 or 1999 (the precise date being unknown to the first and second plaintiffs) an agreement was entered into at the Germiston head

office of Macsteel Commercial and/or first defendant by Macsteel Commercial and the first defendant, both of which were represented by the second defendant in terms of which the obligations referred to in paragraph 16 above were assigned by Macsteel Commercial to the first defendant. The aforesaid assignment was orally accepted between 1997 and 1999 (the precise date being unknown to the first and second defendants) by the first and second plaintiffs at the head office in Germiston of Macsteel Commercial and of the first defendant. The aforesaid oral acceptance by the first and second plaintiffs of the assignment was communicated by them to Oscar Goldstock on behalf of Macsteel Commercial and the first defendant. The first and second plaintiffs are not able, in the absence of discovered documentation, to furnish any further details of their agreement and assignment between Macsteel Commercial and the first defendant."

And then:-

"The second defendant accordingly guaranteed the payment to the first and second payments of the amount of R20 million each referred to in subparagraph 20.2 above. Alternatively, to paragraph 27 above, it was an expressed term, alternatively, an applied term, further alternatively, a tacit term of the agreement referred to in paragraph 19, alternatively paragraph 19 above, but the second defendant undertook the liability towards the first and second plaintiffs of a co-principal debtor together with the first defendant for the payment of the first and second plaintiffs of an amount of R20 million each referred to in subparagraph 20.2 above, 27(b). Alternative to paragraph 27 and 27(a) above, it was an expressed term, alternatively applied term, further alternatively a tacit term of the agreement referred to in paragraph 19, alternatively 19(b) above that the second defendant undertook to indemnify the first and second plaintiffs against any loss suffered by the first and second plaintiffs arising out of non-payment by the first defendant to the first and second plaintiffs in an amount of R20 million each referred to in subparagraph 20.1."

It will be immediately apparent that these proposed amendments can scarcely be described as models of lucidity. I was taken through

detailed argument by the legal representatives of the parties as to the legal principles involved with regard to the granting of

amendments. This much all of us, namely the court and the representatives for the contending side agree: if it is clear that the proposed amendment would result in an excipiable pleading, then the amendment should not be granted.

With regard to the first issue, namely the amendment relating to the so-called assignment, it glares at one that the plaintiffs are not

even able to make allegations regarding the terms of the particular agreement. In other words, the plaintiffs purport to rely on an agreement, the relevant terms of which they cannot allege. Furthermore, the proposed amendment is so obviously going to be vague and embarrassing.

In regard to the second set of amendments relating to the so-called guarantee or indemnification of the first and second plaintiffs, it should be noted that in paragraph 19 of the particulars of claim, the plaintiff allege an agreement concluded between the plaintiffs and the first defendant. In paragraph 19(b) of the particulars of claim, the plaintiffs allege an alleged agreement concluded between the plaintiffs and the first defendant. The proposed paragraph does not contain and/or will render the particulars of claim not to contain allegations in relation to any material facts rendering the second defendant a party to the agreement referred to in paragraph 19, alternatively 19(b) of the particulars of claim or disclosing any cause of action against the second defendant in terms of the agreement referred to in paragraph 19, alternatively 19(b) of the particulars of claim.

It was submitted on behalf of the defendant that the proposed 27 of the particulars of claim will be irregular for want of compliance for the provisions of Rule 1 8(3) in that they lack allegations necessary to sustain a cause of action against the second defendant and/or are vague and embarrassing and will prejudice the defendants. I am in agreement with this submission.

Furthermore, the objection is taken to the fact that clearly the plaintiffs are relying on an oral agreement and this, they submit,

notwithstanding the use of words such as 'guarantee' or 'indemnity'

relates to a suretyship agreement which would fall foul of the

provisions of section 6 of the General Law Amendment Act.

Again I was taken through detailed heads of argument on both side relating to the relevant principles of suretyship and guarantees and indemnities.

Nevertheless, we all agreed that if it is clear that a performance is accessory upon an obligation by a principal debtor, then no matter how that obligation is described, it amounts to a suretyship and accordingly would fall foul of the provisions of section 6 of the General Law Amendment Act unless, of course, it was recorded in writing.

It seems to me obvious that if one has regard to the proposed amendment, no matter how the obligation is cast, it is accessory upon a performance by the so-called co-principal debtor or principal debtor. Accordingly, in my view, the objections taken by the defendants are well founded. The amendments to which they have objection would result in an excipiable pleading.

The following order is made:

The proposed amendments to which the defendants have made objection, are disallowed. The plaintiffs are to pay the costs of this application.

ON BEHALF PLAINTIFFS:.....ADV JOSEPHInstructed by:

ON BEHALF OF DEFENDANTS:.....ADV DENDYInstructed by:

DATE OF HEARING:.....17 AUGUST 2005

DATE OF JUDGMENT:.....17 AUGUST 2005

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