

SOUTH AFRICA / JUDGMENT

Van Heerden and Another v MT Earthmoving CC and Others (2140/2020) [2023] ZANWHC 99 (30 June 2023) [2023] ZANWHC 99

COURT

North West High Court, Mafikeng

BEFORE

J T Djaje

CASE / FILE NUMBER

2140/2020

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****NORTH WEST DIVISION –****MAHIKENG****Case****Number: 2140/2020****Reportable:**

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In

the matter between: WILLEM
JACOBUS VAN HEERDEN
First Plaintiff
ALANA
VAN HEERDEN
Second Plaintiff
And
MT
EARTHMOVING CC
First Defendant
MELCHOIR
JACOBUS TERBLANCHE
Second Defendant
BRENDA
TERBLANCHE
Third Defendant

Reserved: 02 MAY 2023

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 30 JUNE 2023.
ORDER
The

following order is made: 1.
The Plaintiffs' claim is dismissed;
2.
The Plaintiffs are ordered to pay costs of suit.

JUDGEMENT

DJAJE DJP

- [1] This action arises from a loan agreement between the plaintiffs and the first defendant. The second and third defendants bound themselves as sureties and co-principal debtors in favour of the first defendant. The amount claimed by the plaintiffs is R2 301 140-00 (two million three hundred and one thousand one hundred and forty rand). The agreement was concluded on 1 March 2018. In the particulars of claim the plaintiffs aver that the loan amount was R3 325 000-00 (three million three hundred and twenty-five thousand rand) and interest in the amount of R176 140-00 (one hundred and seventy-six thousand one hundred and forty rand) with the total amount repayable of R3 501 140-00 (three million five hundred and one thousand one hundred and forty rand).
- [2] Prior to commencing with the trial there was an application in terms of Rule 39(11) of the Uniform Rules of Court in relation to the duty to begin. The plaintiffs argued that the defendants had the duty to begin as the dispute was whether payment was made or not. The defendants pleaded that payment was made to the plaintiffs in settlement of the loan. On the

other hand, the defendants submitted that the onus rests with the plaintiffs as they need to prove what they received and what is outstanding. The claim by the plaintiffs is based on non-payment in terms of a loan agreement. The defendants'

plea that payment was made attracted the duty to the defendants to prove that payment was indeed made to the plaintiffs contrary to what is alleged in the particulars of claim. It was for that reason that I ordered that the defendants had the duty to begin.

Defendant's Evidence

- [3] Only one witness was called to testify for the defendants, Mr Melchoir Jacobus Terblanche ("Mel") who is the son of the second and third defendants. He represented the first defendant at the time of the loan agreement as he had 34% interest in the first defendant. The balance of the interests in the first defendant are held by the second and third defendants. It is common cause that the plaintiffs and the defendants have been family friends for a long time and have enjoyed good relations with one another. The loan agreement with the plaintiffs was as a result of a transaction that the first defendant had with a mine in Kimberley to purchase and remove steel structures on the mine. The first defendant had secured funding for the deal from Mr Mike Oppen, who was prepared to provide funding on condition that the first defendant would sell him the scrap metal.
- [4] There was a deposit of three million rand required. The plaintiffs' sons, Riaan and Wimpie were informed by Mr Martin Esterhuizen about the deal and how they could be part of it and make a profit. They contacted the defendants and proposed that they could secure the three-million-rand deposit required from their father (first plaintiff). The plaintiffs agreed to make the funds available. There were two joint venture agreements concluded by the first defendant, one with Bosveld Vervoer & Konstruksie (Wimpie's company) and the other with Van Heerden Auto Engineering (Riaan's company).
- [5] The terms of the joint venture agreements were similar for both companies and reference to Bosveld includes reference to Auto Engineering as well. The JVs provided as follows in relation to the loan by the first plaintiff and the repayment thereof:

"Capital Loan"

Mr Willem Jacobus Van Heerden Id: 4[...] who is not part of this Jv agreement, commits and agrees to the following:

Mr Van Heerden agrees to finance the start-up funds needed for this project.

Loan Amount agreed upon:

R3 000,000.00 (Three Million Rand) Deposit to secure the Purchase Agreement with Petra Diamonds.

R500,000.00 (Five Hundred Thousand Rand) for start-up Running cost towards this project.

Security for the outstanding R4 000,000.00 (Four Million Rand) will be provided.

Mr Van Heerden shall be reimbursed fully before distribution of profits.

MT Earthmoving will be held liable for payment of Loans to Mr Van Heerden.

Distribution of profits

Bosveld shall receive a total amount of R1 000,000.00 (One Million Rand) Excluding VAT from the income generated from this project. Bosveld shall supply MT with a VAT invoice”.

[6] Mel testified that after the conclusion of all the agreements including the suretyship agreements, the plaintiffs advanced an amount of R3 400 000-00 and not R3 325 000-00 as stated in the loan agreement. The deal with the mine was not a success as a result of a number of delays. Eventually there were no profits for the joint ventures. It was Mel's evidence that the defendants paid back the entire monies advanced by the plaintiffs albeit late but the plaintiffs accepted the late payments. He indicated that the first plaintiff would from time to time stipulate an account into which payment should be made by the defendants. This resulted in certain payments being made directly to the first plaintiff and the rest to the different companies as instructed by the first plaintiff.

[7] It is common cause that payment was made in cash in the amount of R2 200 000-00 into the different accounts, R1 150 000-00 from the sale of a FAW Truck and Trailer. The amount of R50 000-00 was from the transportation of the plaintiffs' loader to their farm in Uniondale. The total amount paid was R3 400 000-00. The only outstanding amount is the interest of R176 140-00.

Plaintiffs' Evidence

[8] The first plaintiff and his son Wimpie testified. According to the first plaintiff the loan amount was supposed to be paid before 18 November 2018 and that was not done. He confirmed that he was not part of the Joint Venture agreements but acted as a financier and administrator to ensure that payments were made to his sons' companies. In addition, to ensure that he and the JV's were paid first before the distribution of profits. He went on to explain the payments that were made by the first defendant and for who they were. Some of the payments made were for the loan account, some into the account of Van Heerden Auto Engineering, Bosveld Vulstasie and

Bosveld Vervoer. The first plaintiff testified that the first defendant in terms of the JV agreements had to pay his sons'

entities the amount of R1 000 000-00 each excluding VAT. The payments that were made into the account of Bosveld Vervoer amounted to R1 000 000-00 and it was in terms of the JV with the first defendant.

- [9] The plaintiffs denied that there was payment by a Truck and Trailer from the defendants towards the loan. The first plaintiff testified that the defendants did offer him the truck, but he refused as he wanted the money in cash. Wimpie was present during the said meeting pertaining to the truck and he informed the defendants that he will take the truck as payment to Riaan's company in terms of the JV. That is how the truck was used as payment, not for the loan but in terms of the JV with Van Heerden Auto. The amount agreed on for the truck was R1 150 000-00 which is the amount that was due to Van Heerden Auto in terms of the JV. It was the plaintiffs' evidence that the total amount payable by the defendants in terms of the loan and the two JVs was R5 801 140-00 and the outstanding amount is R2 301 140-00.
- [10] During cross examination the first plaintiff confirmed that the defendants were guided by his letters as to where payment should be made as he was the administrator for the sons' companies. Further that he was allocating the money paid to the specific companies but it was not in reduction of the loan. It was put to him that the defendants would not have paid the two companies as there were no invoices received from them in accordance with the JV agreements.
- [11] Wimpie confirmed that there was a JV agreement between his company Bosveld Vervoer and the first defendant and that the first plaintiff financed the mine project. He confirmed that an amount of R1 000 000-00 was paid into his account by the defendants as income generated from the project in Kimberly mine in terms of the JV. Wimpie testified that he did not communicate with the defendants about where the money should be paid, it was the first plaintiff who made all the arrangements regarding the payments. He confirmed the plaintiffs' version that the truck was offered as part of payment and the first plaintiff refused. Instead, he took it for Riaan's account that was due in terms of the JV. He explained further that the R50 000-00 for transportation of the loader was deducted from the amount he was still owed by the defendants in terms of the JV which was R150 000-00 VAT on the R1 000 000-00. Wimpie did concede that there were no invoices sent to the defendants as the amount due to him was not paid in full.
- [12] The issue to be decided in this matter is whether the defendants did make the payments towards the loan amount in full to the plaintiffs and whether there was a set off as a result of the transfer of the truck and trailer.

Submissions

- [13] The defendants' argument in this case is that the plaintiffs were paid in full for the loan. It was submitted that the loan agreement made no provision of where the payments should be made or specify an account into which the defendants would make payment. As a result, the defendants were relying on the first plaintiff to decide the account into which payment should be made. Each time the defendants made a payment, a letter was addressed to the first plaintiff enquiring about the account for payment and thereafter the first plaintiff would nominate an account. Various accounts were nominated by the first plaintiff for payments,

which were the accounts of the entities belonging to the plaintiffs' sons, Van Heerden Auto Engineering, Bosveld Vervoer, Bosveld Vulstasie and WJ Van Heerden's account. In total an amount of R2 200 000-00 was

paid into the accounts nominated by the first plaintiff.

- [14] In relation to the Truck and Trailer it was argued that there is no dispute about the value and the agreement for payment by truck. The dispute is for whom was the performance to be rendered. The defendants argued that the first plaintiff attended at the farm and insisted that he be paid the outstanding monies. As the defendants could not pay, he insisted that the truck be transferred to him as set off from the loan. The plaintiffs' version is however that the truck was transferred to Wimpie as payment to Riaan's company. The reason for the truck to be registered in Wimpie's name was because he was owed money by Riaan and his company. It was conceded in evidence that the defendants were not privy to any loan between Riaan and Wimpie or their respective companies. In addition, no documents were produced as proof of such loan.
- [15] As far as the JVs are concerned the defendants submitted that the agreements provided that "Mr Van Heerden shall be reimbursed fully before distribution of profits". It is the defendants' argument that the JV agreements provided a ranking for the payment and distribution of profits to be made to the two companies. As a result of there being no profits realised in the JVs, no payments were made to the two companies and the only payments made were in terms of the loan agreement as designated by the first plaintiff. Further that the two companies never issued any invoices for payments to be made as required in terms of the agreements.
- [16] In contention, the plaintiffs argued that the defendants failed to discharge the onus that the full payment was made to the plaintiffs. It was submitted that the defendants could not rely on the *maxim adjectus solutionis gratia* (payment made to a third party). The submission made on behalf of the plaintiffs was that in terms of the JV the defendants were liable to the two companies in the amount of one million each. Therefore, the plaintiffs could not have agreed that the payments for R1 000 000-00 meant for the companies be accepted as payment towards the loan payment. As a result, the plaintiffs' case is that appropriation of payments by the first plaintiff cannot be an issue.
- [17] The plaintiffs argued that during the sale agreement of the truck and trailer, Mel was not present and it was the second and third defendants who were present. However, failure to call them as witnesses is fatal to the defendants' version that the sale agreement of the truck, was for payment of the loan. It was contended that failure to call the second and third defendants leads to an inference that their evidence would contradict the evidence of Mel in every material respect. The plaintiffs' submission was that their version of the sale of the truck and trailer is probable in that the agreed purchase price for the truck and trailer corresponds exactly with the amount due under the JV including VAT. Further that the plaintiffs would not have agreed to receive the amount of R1 150 000-00 for a truck and

trailer which was never registered in their names.

Law and application

- [18] It is common cause that there was a loan agreement between the first defendant and the plaintiffs which was preceded by an agreement with the mine in Kimberly. The agreement with the mine resulted in two JVs being entered into by the first defendant and the two entities belonging to the plaintiffs' sons. The defendants' interpretation of the JVs in relation to payment is that the first plaintiff had to be paid in full first before the distribution of the profits. The plaintiffs' version is that the defendants were indebted to the two companies in the amount of R1 150 000-00 each including VAT. The money had to be paid to the companies as well as the loan amount. The first plaintiff, who acted as the administrator of the companies was responsible for allocating the payments made to the companies as well as to himself.
- [19] The JV agreements even though they preceded the loan agreement, they were signed on the same date as the loan agreement being the 1st March 2018. The agreements are worded similarly and reference to the one includes the other. It is stated in the agreements that "Mr Van Heerden shall be reimbursed fully before distribution of profits." Under the heading of 'Distribution of profits' it is stated that "Bosveld/Auto Engineering shall receive a total amount of R1 000 000-00 (One Million Rand) Excluding VAT from the income generated from this project. Bosveld/Auto Engineering shall supply Mt with a VAT invoice".
- [20] In dealing with the JVs it is important to interpret what is contained therein. In the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at par [18] the court dealt with interpretation of documents as follows:

"[18]..... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the approach purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[21] The words in the agreements refer to the first plaintiff being paid fully before profits are distributed. Under the distribution of profits, reference is made to the companies receiving R1 000 000-00 each excluding VAT. The ordinary meaning that can be attached in this instance is that the R1 000 000-00 to be paid to the two companies is from the profits made in the project. It was not disputed that there were no profits made from the deal with the mine in Kimberley and as

such no profits to distribute. This is what stands under the heading of distribution of profits.

[22] Looking at the agreement as a whole, the only meaning that can be attached is that before the companies are paid, the first plaintiff should be fully reimbursed. This is evidenced by the defendants always enquiring from the first plaintiff where payment should be made and not from the directors of the two companies. The undisputed evidence was that the defendants were not aware that the first plaintiff is an administrator for the two companies. As such, in asking him where payment should be made, it could not have been on the basis of him being the companies' administrator.

[23] The loan agreement between the first plaintiff and the defendants does not stipulate in which bank account the payment should be made. All that stands in the agreement is the following:

“6. *TERUGBETALING*

Die hoofskuld in die bedrag van R3,501,140 (Drie miljoen vyf honderd en een duisend een honderd en veertig rand) is soos volg betaalbaar:

1. 'n Minimum maandelikse bedrag van R400,00 (vier honderd duisend rand) is maandeliks betaalbaar voor of op die 10de van elke maand.
2. Die volle bedrag van die hoofskuld plus rente en enige koste is betaalbaar voor of op 18 November 2018 vanaf 1 April 2018.
3. Die lener is geregtig om maandelikse paaient te veehoog end it af the betaal op hoofskuld indien so verkies.
4. Die eerste paaient is in April 2018 betaalbaar voor of op die 10de dag en maandeliks daarna.”

[24] The defendants' evidence was that since the agreement did not stipulate where payments should be made, they had to enquire from the first plaintiff about the account for payment to be made. This was done each time before payment could be made by the defendants as follows “Wil net seker maak in watter rekening moet ek vir oom Willie oorbetal.” This would be followed by a response on the first plaintiff's letter head as follows “HIERMEE WIL EK, W.J. VAN HEERDEN, U VRIENDELIK VERSOEK OM DIE GELDE IN TE BETAAL IN DIE VOLGENDE REKENINGE:” The response would then have the specific account into which the payment should be made. This resulted in 16 payments being made by the defendants into the accounts stipulated by the first plaintiff.

- [25] The plaintiffs argued that the defendants could not rely on making payment to a third party as that was not proven. The defendants on the other hand submitted that payment to a third party or adjectus is applicable in this matter. In the case of *Stupel & Berman Incorporated v Rodel Financial Services (Pty) Ltd* 2015 (3) SA 36 (SCA) at par [13] the following was stated about an adjectus: “An adjectus, according to its generally accepted definition, is an entity, other than the creditor, to whom, by agreement between the debtor and the creditor, the debtor is entitled to pay what is due to the creditor and so discharge its obligations (see eg. Susan Scott *The Law of Cession* 2 ed (1991) at 161).”
- [26] In this matter the first plaintiff as the creditor nominated the different bank accounts into which the defendants had to make payments. Those accounts included that of Bosveld Vulstasie which was not involved in any of the JVs with the defendants. That goes to say that the first plaintiff regarded the said companies as an adjectus for the debt due to him by the defendants.
- [27] The defendants’ version was that the deal with the mine did not materialise and as such there was no profits made and nothing to distribute. In addition to that, the JV agreement required the companies to issue VAT invoices and none were ever issued. This is the reason why the defendants could not have intended for any of the payments to be made towards the companies in terms of the JVs. The defendants’ version as far as the payment made into the accounts is probable and should be accepted.
- [28] In terms of the loan agreement the amount payable by the defendants is R3 501 140-00 including the interest of R176 140-00. However, Mel testified that the plaintiffs paid in an amount of R3 400 000-00 and plus interest of R176 140-00 the total amount payable to the plaintiffs is R3 576 140-00. After the amount of R2 200 000-00 was paid there was a balance of R1 376 140-00 outstanding.
- [29] It is the defendants’ version that the balance of the loan repayment was paid by means of a sale of a truck and trailer to the plaintiffs in settlement of the loan. The plaintiffs’ case is that the truck and trailer was transferred to Wimpie on behalf of Riaan’s company. This version is highly improbable. In the plaintiffs’ own version, if Wimpie’s company had already been paid an amount of R1 000 000-00 in terms of the JV, why would the defendants agree that the truck and trailer be transferred to him. The plaintiffs’ evidence that there was a family loan between Wimpie and Riaan was not disclosed to the defendants and there was no proof of such. The defendants’ version that the first plaintiff indicated to them that he no longer wanted to wait for his money and that the truck be transferred to him is more probable and should be accepted. The same goes for the transportation of the loader in the amount of R50 000-00. It was clear that the first plaintiff had to be paid first and it was the defendants’ intention at all material times to ensure that the plaintiffs are

paid in full. Every payment made by the defendants was done in settlement of the loan. The defendants in my view have succeeded to show on a balance of probabilities that there were payments made towards the loan except for the amount of R176 140-00 which was tendered and rejected by the plaintiffs.

Costs

[30] The defendants argued that costs be awarded on a punitive scale as the plaintiffs engaged them in a lengthy and costly litigation claiming an amount in excess of R2 000 000-00 when there was no basis for such. In addition, that the plaintiffs' conduct was improper and misleading to the court. In this matter the defendants had the onus to prove that payment was made and they have succeeded. The plaintiffs on the other hand were not malicious or vexatious in any way. The payments made by the defendants were conceded except the purpose thereof. There is therefore no basis for a punitive cost order.

Order

[31] Consequently, the following order is made:

J T DJAJE

DEPUTY JUDGE PRESIDENT

NORTH WEST HIGH COURT

APPEARANCES

DATE OF HEARING 2 MAY 2023

JUDGMENT

RESERVED: 2 MAY 2023 DATE OF JUDGMENT: 30 JUNE 2023 COUNSEL FOR THE PLAINTIFFS:
MR N J ESTERHUYSE COUNSEL FOR THE DEFENDANTS: ADV J C VILJOEN

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Prepared on 12 October 2026 · Esheria