

SOUTH AFRICA / JUDGMENT

Vleissentraal Bosveld (Pty) Ltd v PHJ Prinsloo Farming (Pty) Ltd and Another (7257/2015) [2016] ZAGPPHC 764 (30 August 2016)

[2016] ZAGPPHC 764

COURT

North Gauteng High Court, Pretoria

BEFORE

C Pretorius

CASE / FILE NUMBER

7257/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

number: 7257/2015

Date:

30 August 2016

In the

matter between:

VLEISSENTRAAAL

BOSVELD (PTY) LTD

PLAINTIFF

And

PHJ

PRINSLOO FARMING (PTY) LTD

FIRST DEFENDANT

V

VIVIER NO

SECOND

DEFENDANT

JUDGMENT

PRETORIUS J,

- (1) This claim is premised on a written contract concluded between the plaintiff and the first defendant on 30 September 2013. The plaintiff is Vleissentraal Bosveld (Pty) Ltd. The second defendant is cited in his capacity as the duly appointed executor in the deceased estate of the late PHJ Prinsloo, who passed away on 7 December 2013. At the outset the case against the second

defendant was separated in terms of Rule 33(4) of the Uniform Rules of Court.

- (2) The main claim against the defendants is based on a written credit agreement entered into by the first defendant, represented by the deceased and the plaintiff was represented by Mr Vosser.
- (3) The plaintiff granted the first defendant credit facilities to a maximum amount of R1.6 million to enable the first defendant to purchase livestock at auctions held by the plaintiff.
- (4) The plaintiff would issue an invoice to the first defendant recording the details and amounts for which the first defendant had purchased livestock and the invoice would, in terms of clause 3.2 of the agreement, be prima facie evidence of the livestock purchased at auction. The amount would be due and payable to the plaintiff within fourteen days from the date of the sale and the issue of the invoice.
- (5) A further term of the credit agreement was that a certificate issued by a director or manager of the plaintiff will serve as prima facie evidence of the amount owed by the first defendant in terms of the agreement.
- (6) The plaintiff's alternative claim is based upon the *condictio sine causa* or alternatively the *condictio indebitii*, alternatively a general enrichment claim.
- (7) The first defendant pleaded that it did not purchase the livestock at the auctions as set out in the plaintiff's particulars of claim.

FACTUAL BACKGROUND:

- (8) Plaintiff alleges that the first defendant had purchased livestock during the period commencing on 13 November 2013 until 13 December 2013 at auctions held by the plaintiff. The plaintiff had complied with all the plaintiff's obligations in terms of the agreement, whilst, according to the plaintiff, the first defendant had breached the agreement by failing to pay the plaintiff within the agreed fourteen days after auction or at all.
- (9) On 27 January 2015 the plaintiff issued a certificate in that it was certified that the first defendant owes the plaintiff:

"13.1 The capital amount of R1 260 713.94.

13.2 Payment of interest at a rate of 15.5% per annum on R157 891.74 calculated from 27 November 2013 to date of payment, both dates inclusive.

13.3 Payment of interest at a rate of 15.5% per annum on R428 260.88 calculated from 4 December 2013 to date of payment, both dates inclusive.

13.4 Payment of interest at a rate of 15.5% per annum on R107 585.93 calculated from 5 December 2013 to date of payment, both dates inclusive.

13.5 Payment of interest at a rate of 15.5% per annum on R273 391.34 calculated from 11 December 2013 to date of payment, both dates inclusive.

13.6 Payment of interest at a rate of 15.5% per annum on R100 373.73 calculated from 12 December 2013 to date of payment, both dates inclusive.

13.7 Payment of interest at a rate of 15.5% per annum on R193 210.32 calculated from 12 December 2013 to date of payment, both dates inclusive.”

The correctness of the contents of this certificate is not in dispute.

- (10) The evidence of Mr Bornman, on behalf of the plaintiff, was that he was an auctioneer and that he had been working for the plaintiff from 2012 until 2014. He was employed as an auctioneer to conduct auctions throughout the bushveld, which included Bela-Bela and Onderstepoort.
- (11) He had known Mr Prinsloo Junior, the deceased, well as a director of the first defendant. According to his evidence the first defendant operated a feeding lot in the vicinity of Hekpoort. Mr Bornman knew that the first defendant had a credit facility with the plaintiff as he was present when the written agreement was concluded. He knew the deceased very well as the deceased had bought a lot of stock regularly at auction from the plaintiff. Should the deceased not be able to attend a certain auction, there would be a representative bidding on behalf of the first defendant, who was a certain Mr Johan Kotzè, accompanied by his son.
- (12) Mr Bornman's evidence was that the deceased, Mr Prinsloo Junior was not always able to attend the auctions and had authorised both Mr Bornman on 30 September 2013 and a certain Mr Johan Kotze, in writing, to purchase livestock at public auctions.
- (13) It is so that Mr Bornman has no independent factual recollection of the six public auctions at which the first defendant had purchased

livestock, but relied in his evidence on the relevant invoices of the six auctions held between 13 November 2013 and 13 December 2013 at Bela-Bela and Onderstepoort respectively. Five of these invoices had been signed by him on the date of the relevant auction, as being correct.

- (14) Mr Bornman conceded that the invoice dated 27 November 2013 was not signed, but that he had signed the remaining invoices dated 13 November 2013; 4 December 2013; 5 December 2013; 11 December 2013 and 13 December 2013. The invoice of 27 November 2013 may, according to him, not have been signed due to an oversight.
- (15) I do not attach any weight to the one invoice not being signed, as the defendants introduced a bundle of invoices dated 3 October 2013; 9 October 2013 and 10 October 2013 of which the invoice of 10 October 2013 had not been signed. These invoices, introduced by the defendants during cross-examination of Mr Bornman, were also for livestock bought at auction on the same basis as the invoices which had been compiled in November and December 2013. It is clear that at all six auctions in issue the first defendant was registered as a buyer. The fact that some invoices were not signed can take the matter no further.
- (16) Mr Bornman's evidence was that he had signed on behalf of the first defendant as he had written authorisation to buy on the first defendant's behalf and if Mr Kotze or Mr Prinsloo Junior had left, he signed the invoices on their behalf after the auction had been concluded.
- (17) His further evidence was that he would have a telephone conversation with Mr Prinsloo Junior before the auction to discuss the intended

purchases by the first defendant, as well as the prices the first defendant was prepared to pay for the livestock on the specific day. After the auction another telephone discussion would take place informing Mr Prinsloo Junior, as to which livestock had been bought and at what price. The third conversation would take place after delivery of the livestock in which Mr Prinsloo Junior would express his satisfaction or dissatisfaction with the livestock that had been bought. His evidence was that he did not bid on any livestock during November 2013 on behalf of the first defendant.

- (18) There had previously never been any complaint by Mr Prinsloo Junior that the livestock had not been delivered. It had happened in the past that Mr Prinsloo called him to enquire why the delivery of the livestock was late, but there was no occasion that the livestock was not delivered. Mr Bornman was not involved in the transport arrangements from the auction to the first defendant's

property.

- (19) Mr Vosser, the managing director of the plaintiff, testified that on 24 January 2014 a letter of demand was despatched to the first

respondent. No reply was forthcoming from the respondents. On 20 February 2014 a notice in terms of section 129(1) of the National Credit Act[1] was sent to the first defendant at his postal address by the plaintiff's attorneys. A further letter of demand was

sent to the executor of Mr Prinsloo Junior's deceased estate.

- (20) On 19 June 2014, almost four months after the section 129 letter had been dispatched, the attorney for the first defendant requested

information in respect of the buying of livestock during the period 1 October 2013 to 3 December 2013. This information was supplied to the first defendant's attorney on 11 July 2014. On 4 August 2014 the executor of the estate of the late PJ Prinsloo Junior informed the plaintiff's attorney that the claim against the deceased's estate had been rejected.

(21) This evidence concluded the plaintiff's case and the defendant chose not to call any witnesses and closed its case.

(22) It is common cause that the plaintiff and defendants entered into a credit agreement on 30 September 2013 and that Mr Prinsloo Junior

signed a suretyship on the same date. Mr Bornman's evidence was that he was present when both these documents were

completed and signed. His further evidence was that at the start of each auction he read out the conditions and rules of

auction. In any event the rules of auction was kept in the office on the site where the auction would take place. In

Slabbert, Verster & Malherbe (Noord Vrystaat) (Edms) Bpk v Gellie Slaghuise (Edms) Bpk en 'n Ander[2] Malherbe AJ found:

“Die vraag is dan of eiser redelikerwyse voldoende stappe geneem het om die verkoopsvoorwaardes by die onderhawige ooreenkoms te inkorporeer deurdat die afslaer bloot daarna verwys en dit beskikbaar maak aan voornemende kopers en verkopers. Na my mening was sodanige stappe voldoende. ‘n Lid van die publiek wat so ‘n veiling bywoon sal besef dat die voorwaardes op sy aankoop of verkoping betrekking het en is daaraan gebonde of hy dit lees of nie. Versuim hy om dit te lees, het hy net himself te blameer.

Hierdie bevinding het tot gevolg dat elke verkoping deur eiser aan tweede verweerder onderworpe is aan genoemde verkoopsvoorwaardes...

Net soos 'n voornemende koper, is die voornemende verkoper ook aan die verkoopvoorwaardes gebonde waar hy uitgenooi word om dit te lees maar hom nie die moeite troos om dit te doen nie.” (Court emphasis)

It is clear that the first defendant was a regular buyer at the auctions held by the plaintiff and there can be no doubt that he was informed of the rules of auction. There is no evidence that the rules of auction had not been displayed in the office as testified by Mr Bornman and that the first defendant was not aware of these rules.

(23) Mr Bornman made an excellent impression as a witness. He answered questions truthfully and conceded facts that were put to him where necessary. Mr Vossers' evidence did not take the matter much further.

THE LEGAL POSITION:

- (24) I was addressed by the defendants' counsel at length, as to the burden of proof in civil trials. In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[3] the court held:

"As was pointed out by Davis AJA in Pillay v Krishna...the word onus has often been used to denote, inter alia, two distinct concepts; (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In Brand v Minister of Justice 1959(4) SA 712 (A) at 715 Ogilvy-Thompson JA called it 'the overall onus'. In this sense the onus can never shift on the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other..." (Court emphasis)

- (25) I fully confirm the principles set out in this dictum and will be mindful of this when considering the facts, evidence and arguments of the action before me.
- (26) A prima facie case is where there "is evidence upon which a reasonable court, applying its mind reasonably, could or might find for the plaintiff"[4].
- (27) The first defendant chose not to call any witnesses in this case and the case will have to be adjudicated on the evidence of the plaintiff. A prima facie case may become conclusive if the court finds, in the particular circumstances, that the defendants failed to rebut the prima facie case.
- (28) The court has to decide on a preponderance of probabilities whether the plaintiff has proved its claim. The rules of auction provide that delivery takes place the moment the auctioneer announces its completion by the fall of the hammer in terms of section 45 of the Consumer Protection Act[5]. Rule 8 of the Rules Of Auction specifies:

"All assets shall, immediately after the bid has been knocked down and accepted by the Seller, be deemed to have been delivered to the Buyer. Notwithstanding delivery, the Buyer shall not be entitled to remove any purchased assets unless the total amount reflected on the Auctioneer's invoice in respect of such assets has been paid in full." (Court emphasis)

If I have regard to the facts of the matter I find that delivery had taken place in this manner at the auctions where Mr Bornman presided as auctioneer and specifically in these six instances.

- (29) The plaintiff had addressed two letters of demand to the first defendant, and I find it strange that the first defendant chose to ignore these letters. The first letter of 24 January 2014 set out that the first defendant owed the amount of R1 286 631.48 and that it had to be paid within ten days of despatch. This is a considerable amount of money. There is no explanation

forthcoming as to why the first defendant chose to ignore this letter. The next communication was the notice sent by registered mail to the first defendant in terms of section 129(1) of the National Credit Act[6]. Once again no response was forthcoming from the first defendant and the first defendant did not comply with the notice and did not respond to the notice. The first defendant waited a further four months before making enquiries. Even then there was no indication that the livestock bought in these six instances had not been delivered. The first defendant chose not to present any evidence refuting delivery at the feeding lot of the livestock.

- (30) The invoices furnished to the court by the first defendant could take the matter no further, as no conclusion can be reached as to unsigned invoices, due to the fact that the first defendant's invoices contained an unsigned invoice as well and the first defendant relied on its bundle of invoices during cross-examination.
- (31) The plea by the defendants "that the Consumer Protection Act ("Act") might not be applicable to the specific transaction but the Regulations are applicable" is untenable. In section 1 of the Act "regulation" is defined as "means a regulation made under this Act". The only inference the court can draw is that if the Act does not apply, then the Regulations will not apply.
- (32) In any event the Rules of Auction of the plaintiff sets out in Rule 3:
- "This Rules Of Auction comply with Section 45 of the Act and the Regulations of the Act and Section 45 of the Consumer Protection Act, Act 68 of 2008 ("the Act")..."*
- (33) Counsel for the first defendant argues that the correctness of the invoices are in dispute, although Mr Bornman identified five of the six invoices and declared that he had signed the invoices as correct. The sixth invoice was not signed due to an oversight, but the first defendant was registered as a buyer at the auction to which the invoice relates. His further evidence was that the auctions on the dates in question had taken place and that Mr Johan Kotzè made bids on behalf of the first defendant. This evidence has not been contradicted or countered in any way by the first defendant. It is so that the records of the auctions have been lost from which the invoices were compiled, but I have no reason to believe that these invoices are fraudulent, having regard to Mr Bornman's evidence. He was also not challenged by the first defendant's legal representative that these invoices are fraudulent.
- (34) All the invoices related to livestock sold for feeding lots, thereby strengthening the plaintiff's case as the first defendant was buying livestock for feeding lots. Mr Bornman's evidence was throughout that he had not signed the invoices in his personal capacity, but as the authorised representative of the first defendant, as he had written authorisation to do so since 30 September 2013.
- (35) In Ex parte Minister of Justice: In re R v Jacobson and Levy[7], Stratford JA said:

“Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.” (Court emphasis)

- (36) In *Ocean Accident and Guarantee Corporation Ltd v Koch*[8] the decision by Lord Benning in *Miller v Minister of Pensions*[9] was adopted by the Appellate Division where he had stated:

“It must carry a reasonable degree or probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘he think it more probable than not’, the burden is discharged, but if the probabilities are equal, it is not.”

- (37) In *Titus v Shield Insurance Co Ltd*[10] Miller JA held:

“It is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon “the particular circumstances of the litigation” in which the question arises. And one of the circumstances that must be taken into account and given due weight, is the strength or weakness of the case which faces the party who refrains from calling the witness.” (Court emphasis)

In this instance the plaintiff presented a strong case.

- (38) I cannot agree with the defendants that the plaintiff had failed to present direct evidence. Mr Bornman’s evidence was clear and concise. He had no doubt that the relevant auctions had taken place, that the livestock, as set out in the six invoices was sold to the first defendant and that he had signed five of the six invoices on behalf of the first defendant, as had been the practice all along.
- (39) I cannot find, in the facts presented to court that the first defendant was an unregistered buyer. He was not only a registered buyer, but had entered into a credit agreement with the plaintiff to enable him to have fourteen days in which to settle his account with the plaintiff.
- (40) Both Mr Bornman and Mr Kotzè had written authority from the first defendant to bid at auction on behalf of the first defendant.

An important consideration is that at a pre-trial conference held on 11 July 2016 the following was decided:

“The Defendants are of the view that documents or copies thereof may without further proof serve as evidence of what they purport to be and that extracts may be proved without proving the whole document, but that the contents of a document(s) which a party intends to utilize during the trial of this action will have to be proved by such party.”

The relevant invoices are thus what they purport to be. A further consideration relating to the correctness of the invoices is that the deceased was in telephonic conversation with Mr Bornman at each auction, before and after the auction, as well as after delivery. If these invoices were incorrect Mr Bornman would have been informed thereof, which, according to him, never happened. I accept his evidence in this regard.

(41) If I have regard to the Ocean Accident case[11] and the Titus case[12] I find that in the circumstances of this trial that the first defendant had to rebut the prima facie evidence of the plaintiff.

(42) I have considered all the evidence, facts and arguments. I find that the plaintiff presented prima facie evidence, which in consideration of all the facts, had become conclusive as no evidence was presented by the first defendant in

circumstances which the first defendant should have lead evidence as it had the onus to refute the plaintiff's evidence. It is so that Mr Prinsloo Junior had passed away, but any representative or employee of the first defendant would have been able to refute the evidence of the plaintiff by testifying that the livestock to which the six invoices relate, was never received.

(43) In these circumstances I find that the plaintiff had proved its claim on a preponderance of probabilities.

(44) I will not deal with the alternative claims, due to my findings as set out above.

(45) In the result I make the following order:

1. Payment of the amount of R1 260 713.64;

2. Interest as follows:

2.1 Payment of interest at a rate of 9% per annum on R157 891.74 calculated from 27 November 2013 to date of payment, both dates inclusive;

2.2 Payment of interest at a rate of 9% per annum on R428 260.88 calculated from 4 December 2013 to date of payment, both dates inclusive;

2.3 Payment of interest at a rate of 9% per annum on R107 585.93 calculated from 6 December 2013 to date of payment, both dates inclusive;

2.4 Payment of interest at a rate of 9% per annum on R273 391.34 calculated from 11 December 2013 to date of payment, both dates inclusive;

2.5 Payment of interest at a rate of 9% per annum on R100 373.73 calculated from 12 December 2013 to date of payment, both dates inclusive;

2.6 Payment of interest at a rate of 9% per annum on R193 210.32 calculated from 12 December 2013 to date of payment, both dates inclusive;

3. Costs on an attorney and client scale.

Judge C Pretorius

Case number : 7257/2015

Matter heard on : 27 & 28 July 2016

For the Plaintiff : Adv MP van der Merwe (SC)

Instructed by : Bornman Snyman & Barnard Inc.

For the Defendants : Adv PA Swanepoel

Instructed by : Prinsloo Incorporated

Date of Judgment : 30 August 2016

[1] Act 34 of 2005

[2] 1984(1) SA 491 (O) at page 498

[3] 1977(3) SA 534 (AD) at page 548

[4] Masibuko v Santam Insurance and Another 1982(3) SA 125 (A) at page 133

[5] Act 68 of 2008

[6] Supra

[7] 1931 AD 466 at 478

[8] 1963(4) SA 147 (A)

[9] 1947(2) All ER 372 at 374

[10] 1980(3) SA 119 (A) at 133E

[11] Supra

[12] Supra

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Prepared on 11 October 2026 · Esheria