REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 11202/2010

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

24/07/2013
DATE

SIGNATURE

In the matter between:

Logwin Air and Ocean Simesonke — Plaintiff

and

JNB Ceramica CC — Defendant

J U D G M E N T

Modiba AJ:

[1] The plaintiff instituted a claim against the defendant for specific performance for the payment of an amount of R491, 820.83 reduced to R128, 820.83 by payments made since summons were issued, mora interest, and legal costs.

[2] This payment is for forwarding and clearing services rendered by the plaintiff to the defendant at the latter's instance between 2009 and 2010. After summons was served, the defendant filed a special plea of compromise. This matter came before me for the sole purpose of determining the defendant's special plea.

[3] The following admissions and/ or agreements between the parties were submitted and admitted at the commencement of the trial:

3.1 the onus to prove the special plea rests with the defendant. Therefore the defendant bears the duty to begin;

3.2 the plaintiff's claim will turn on the defendant's special plea. If the special plea is dismissed, the Plaintiff is entitled to judgment in the amount of R128, 205.55, mora interest at the prime overdraft rate plus 2% per annum on the capital amounts outstanding from time to time and legal costs on the attorney and client scale;

3.3 if the special plea is upheld, the Plaintiff's claim will be dismissed with costs.

[4] At the commencement of the trial, the defendant brought an application to amend its special plea. The plaintiff consented to the amendment. This application was granted. After the plaintiff closed its case and with consent from the plaintiff the defendant brought a second application to amend its special plea. The second amendment sought to bring the defendant's special plea in line with the plaintiff's version of the terms of the agreement allegedly entered into between the parties at a meeting held on 12 May 2010. The second amendment application was also granted.

[5] The version of the plaintiff and the defendant differ in respect of the payment schedule, waiver of interest, commission and legal costs. These differences were not resolved by the amendments to the defendant's special plea. Furthermore, the second amendment to the defendant's plea contradicts the evidence of the defendant's sole witness Leornardo Biccari (Biccari) in a number of respects. In his evidence, Biccari insisted that:

5.1 no rigid payment plan was agreed upon between him, Mr Cyril Pillay (Pillay) and Ms Aneline Herbst (Herbst);

5.2 the first payment in respect of the oldest invoice was payable at the end of August 2010;

5.3 there was an agreement to waive interest, legal costs and commission.

[6] These allegations were denied by the plaintiff's witnesses.

[7] I am therefore of the view that the defendant's second amended special plea will stand or fall on the evidence of its only witness Biccari.

[8] The cardinal question to be determined is whether a valid agreement was concluded between the parties at the meeting held on 12 May 2010. If this question is answered in the negative, the defendant's special plea stands to fail. The plaintiff will therefore be entitled to judgement in the terms set out in para 3.2 above. If the question is answered in the affirmative, the second question arises whether the said agreement is an agreement of compromise. If the second question is answered in the affirmative, then the defendant's special plea stands to be upheld and the plaintiff's claim stands to be dismissed.

[9] The following issues are common cause between the parties:

9.1 the plaintiff provided clearing and forwarding services to the defendant between 2009 and 2010 pursuant to a written credit agreement entered into during 2009;

9.2 the plaintiff's claim is based on the said credit agreement;

9.3 the plaintiff rendered invoices to the defendant in the aggregate sum of R491, 820.83 comprising of capital invoices in the aggregate sum of R462, 820.83 and interest invoices in the aggregate sum of R29, 364.62

9.4 a meeting was held on 12 May 2010 between the plaintiff represented by Pillay and Herbst and the respondent represented by its sole member Biccari.

9.5 At the said meeting, an agreement was purportedly reached regarding the settlement of the debt owing by the defendant to the plaintiff.

[10] The terms and nature of the agreement reached at the meeting of 12 May 2010 is the subject of the current dispute between the parties.

[11] The defendant's version of what transpired at the said meeting is based on the evidence of its only witness Biccari, who testified that at the 12 May 2010 meeting a verbal settlement agreement was reached between the parties. According to Biccari, the terms of the agreement were as follows:

11.1 the defendant would settle the amount of R462, 456.21 owing to the plaintiff starting with the first three oldest invoices payable at the end of August, September and October 2010 respectively;

11.2 subsequent payments would be made as and when trading conditions permitted;

11.3 the plaintiff would waive interest in the amount of R29, 346.62 owing by the defendant in exchange for the defendant waiving credits due to it for invoice discrepancies as well as commission payable by the plaintiff to the defendant.

11.4 the defendant would have a flexible payment schedule in discharging the debt owing to the plaintiff for the following reasons:

11.4.1 the defendant had been undergoing financial difficulties, could not service the debt owing to the plaintiff and was facing possible liquidation;

11.4.2 the plaintiff had no personal surety against the debt owing by the defendant and faced a real risk of not recovering the debt if the defendant was liquidated.

[12] According to Herbst and Pillay, who testified on behalf of the plaintiff, the plaintiff's version is different. The 12 May 2010 meeting was convened at the instance of Biccari who made a proposal for settlement in the amount of R462, 456.21 as well as interest in the amount of R29, 364.62 owing by the defendant to the plaintiff. At the said meeting, a statement of outstanding capital and interest invoices reflecting a total outstanding amount of R491, 820.83 comprising the capital debt and interest was handed to Biccari who accepted it without any protestation.

[13] Both Herbst and Pillay further testified that the plaintiff would have considered writing off the interest owed by the defendant if the defendant had settled the capital amount owing in full. However, the defendant offered to settle the amount owing in instalments. For that reason, waiving interest was completely out of the question. They also

denied that the defendant was entitled to credit notes due to invoice discrepancies. According to Pillay, there was no discussion about invoice discrepancies at the said meeting. Pillay further testified that invoice queries are normally raised in writing and sent to him by an aggrieved client. He would then send the query to the plaintiff's credit department where a credit note in favour of the aggrieved client would be passed once the query is verified. No written query was received from Biccari. Regarding the commission purportedly payable to the defendant, Pillay testified that he is aware of an offer of commission made to Biccari by a certain Ferdinando Gelli but denies that such offer was made on behalf of the plaintiff and that the plaintiff was bound thereby.

[14] For a valid agreement to come into being, consensus must be reached between the contracting parties.[1] The consensus must relate to (a) the fact that obligations are to be created, (b) the persons between whom obligations are to be created; and (c) the content of the obligations i.e., the performances to be rendered by parties to the agreement.[2] Whether the parties entered into a valid agreement at the meeting on 12 May 2010, must be determined on the facts.

[15] The court is faced with two conflicting versions regarding what was discussed and agreed upon at the 12 May 2012 meeting. The conflicting versions facing the court indicate lack of consensus and

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[1] van der Merwe et al, *Contract General Principles* 4th ed (1993) 17
[2] LAWSA 2nd ed vol.5 (1) at para 371. See also ibid 20 footnote 1

therefore the absence of a valid agreement. However, the determination of consensus is not a simplistic exercise.

[16] Two alternative approaches to determining whether the parties have reached consensus have become part of our law.[3] The first approach is based on the so called will theory. This theory requires an examination of the subjective minds of the parties as reflected in the content of the agreement. The second approach is the reliance theory (also known as the doctrine of quasi-mutual consent).[4] This theory is based on the recognition that one cannot always read the subjective minds of the parties. In cases where actual consensus is not present, contractual liability may arise on the basis that one party, (the contract denier) led the other party (the contract asserter) into reasonable belief that consensus had been reached. The theory is based on *Smith v Hughes [1871] LR 6 QB 597 at 607* where Blackburn J stated as follows:

> 'I apprehend that if one of the parties intends to make a contract on one set of terms and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in Freeman v Cooke. If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other parties' terms.' [5]

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[3] van der Merwe (note 1 above)

[4] Hutchison et al, *The Law of Contract in South Africa* (2009) 465

[5] This dictum was cited with approval in a number of South African cases, including *Pillay v Shaik 2009 4 SA 74 (SCA).* See also *Ridon v van der Spuy & Partners Inc, 2002 (2) SA 121(C),and South African Railways & Habours v National Bank of South Africa Ltd 1924 AD 704.'*

[17] Biccari testified that at the 12 May 2010 meeting, he made an offer to pay the capital amount and interest owing to the plaintiff following a flexible payment schedule. An analysis of Biccari's evidence indicates that he left the 12 May 2010 meeting believing that Herbst and Pillay agreed to a flexible payment schedule. The reason he gave for so believing is that the defendant was going through financial difficulties. Herbst and Pillay were willing to allow it to trade out of its illiquid situation because if they did not, the plaintiff's prospects of recovering its money were bleak. He further believed that they agreed that he would pay the first three instalments at the end of Aug, September and October 2010 respectively; and the balance as and when trading conditions permitted. He also left the meeting believing that Herbst and Pillay agreed to waive interest and commission in return for the defendant waiving credits payable to the defendant by the plaintiff for invoice discrepancies and commission.

[18] There are contradictions between the defendant's pleadings and the evidence of its sole witness regarding what the terms of the agreement were. Under cross-examination Biccari could not explain the following contradictions between the original and the second amended special plea and the testimony he gave during his evidence in chief:

18.1 according to the original special plea, the meeting during which the alleged settlement agreement was reached took place in October 2010 and not in May 2010 as testified by Biccari;

18.2 contrary to Biccari's evidence, in the original plea, the defendant alleged that it agreed to pay R462, 456.21 to the plaintiff without admitting liability. The defendant also alleged that it would pay R64, 353.79 immediately, R58, 094.49 on or before 30 October 2010 and would make further payments on a monthly basis alternatively, as and when trading conditions improved and/ or permitted. The defendant's second amended special plea does not resolve these contradictions because Biccari vehemently denied the plaintiff's version of the terms agreed upon at the meeting of 12 May 2010.

[19] An analysis of Herbst and Pillay's evidence indicates that they both left the meeting believing that Biccari made a fixed arrangement to start repaying the debt the defendant owed to the plaintiff in monthly instalments, commencing in July 2010. The defendant would start with the oldest capital invoice until the latest interest invoice had been paid. The defendant would be liable for interest and legal costs. The terms of the agreement excluded waiver of credits for invoice discrepancies, commission, interest and legal costs.

[20] In my view, the evidence presented on behalf of the parties indicates an absence of actual consensus. The defendant's case is wrought with contradictions regarding what the terms of the agreement were. The evidence presented on behalf of the parties indicates that although the parties left the 12 May 2010 meeting somewhat believing that an

agreement was reached, an analysis of the evidence of Biccari on the one hand and Herbst and Pillay on the other indicates that they left that meeting being of different minds as to the amount to be paid, the payment schedule, plaintiff's liability for commission and credits for invoice discrepancies and defendant's liability for interest and legal costs.

[21] I therefore find that there was no actual consensus between the parties on the terms of the agreement purportedly entered into on 12 May 2010.

[22] I next consider whether consensus may be found to have been reached on the basis of the reliance theory or put differently, whether quasi mutual consent was reached between the parties. This theory, outlined in para 16 of this judgement, was recently applied by the Supreme Court of Appeal in *Pillay v Shaik* 2009 4 SA 74 (SCA).[6] In the Pillay judgement the Supreme Court of Appeal per Farlam J formulated a threefold enquiry to determine whether consent could be found based on the reliance theory. The Supreme Court of Appeal per Farlam J stated as follows:

> 'In my view, therefore the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? ... To answer this question, a threefold enquiry is usually necessary, namely firstly, was there a misrepresentation as to one party's intention; secondly, who made that misrepresentation; and was the other party misled thereby? ... The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled thereby?'

[6] At 85 D

[23] I am of the view that in the light of the dictum in *Smith v Hughes,* the appropriate formulation of questions to ask when determining quasi mutual consent is as follows: (a) whether the consenting party (who in this case is the plaintiff) conducted itself in a manner that would lead a reasonable man in the position of the proposing party (who in this case is the defendant) to believe that the consenting party has consented to the terms proposed by the proposing party, (b) whether the proposing party believed that the consenting party has consented to the proposed terms of the agreement; and (c) whether the proposing party was led by such belief to conclude that a valid contract had been concluded between the parties.[7]

[24] I proceed to determine whether the plaintiff conducted itself in a manner that would lead a reasonable man in the position of the defendant to believe that the plaintiff has consented to the terms proposed by the defendant. An analysis of the evidence presented on behalf of the plaintiff including correspondence exchanged between the parties prior to and after the meeting of 12 May 2010 indicates that the plaintiff was consistent in holding the defendant to a fixed monthly payment schedule with the first payment due at the end of July 2010. When it became apparent to the plaintiff that the defendant was not honouring its undertaking to make monthly payments the plaintiff served summons on the defendant in September 2010. Herbst and Pillay testified that had the defendant honoured the plaintiff's version of

[7] Pillay v Shaik 2009 4 SA 74 (SCA) 85C

the terms of the agreement, the plaintiff would not have issued summons.

[25] An analysis of Biccari's evidence indicates that after the 12 May 2010 meeting, the defendant endeavoured to honour its obligations to the plaintiff in terms of its version of the terms of the agreement. Under cross-examination Biccari admitted having paid R70, 827.89 in respect of the oldest capital invoice on 31 August 2010, R64, 353.79 in respect of the second oldest capital invoice on 5 October 2010 and R58, 094.49 in respect of the third capital invoice on 22 November 2010. Biccari further testified that when the plaintiff issued summons in September 2010, he was taken aback because that resort was completely contrary to what he believed were the terms of the agreement.

[26] It is clear from an analysis of the conduct of the parties' witnesses that they left the 12 May 2010 meeting without a common understanding of what the terms of the agreement were. After the meeting, the defendant proceeded to perform in accordance with its version of the terms of the agreement. When it became apparent to the plaintiff that the defendant was failing to comply with the plaintiff's version of the terms, the plaintiff proceeded with legal action.

[27] The evidence presented on behalf of the parties do not lend itself to any suggestion that the plaintiff represented by Herbst and Pillay

conducted itself in a manner that would lead a reasonable man in the defendant's position represented by Biccari to believe that the plaintiff consented to defendant's version of the terms of the agreement. What the evidence in fact suggests is that after the meeting of 12 May 2010, the defendant itself was uncertain as to what the terms of the agreement were. On the other hand the plaintiff consistently insisted on performance by the defendant according to the plaintiff's version of the terms.

[28] Even after the 12 May 2010 meeting, nothing in the evidence presented on behalf of the parties suggests that the plaintiff acquiesced to the defendant's version of the terms. There is no basis for finding that the defendant was misled by the plaintiff's intentions.

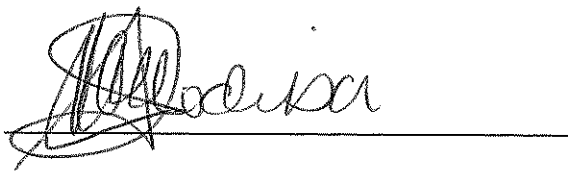
[29] I am of the view that the conduct of the parties during and after the 12 May 2010 meeting does not indicate quasi mutual consent.

[30] The defendant has therefore failed to prove on a preponderance of probabilities that an agreement was entered into between the parties. Having found that an agreement was not reached between the parties, it is not necessary to determine whether the agreement was tantamount to a compromise. Therefore the defendant's special plea stands to fail.

ORDER

1. The defendant's special plea is dismissed;

2. The plaintiff's claim against the defendant for specific performance for the payment of an amount of R491,820.83 reduced to R128, 820.83 by payments made since summons were issued including mora interest is upheld;
3. The defendant is to pay the costs of suit on the attorney and client scale.



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ACTING JUDGE OF THE HIGH COURT

Counsel for the Plaintiff	Mr WG Pretorius instructed by van Velden Pike Inc
Attorney for the Defendant	Mr F Biccari of Frank Biccari Attorneys
Dates of Hearing:	22 – 24 April 2013
Date of Judgment:	24 July 2013