REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

16/10/2015
DATE

SIGNATURE

CASE NUMBER: A3048/2015

In the matter between:

BAEDEX FINANCIAL CORPORATION (PTY) LTD — APPELLANT

and

LEPHARIWA JUSTICE SELOLO — FIRST RESPONDENT
JOHANNES SELOLO — SECOND RESPONDENT
CHRIS MATHEBULA — THIRD RESPONDENT

JUDGMENT

CHAITRAM AJ:

[1] The issue for determination in this appeal is the interpretation of a written offer of settlement and its acceptance.

[2] The appellant was the plaintiff in the court a quo, and the respondents were the defendants. I shall refer to the parties as plaintiff and defendants.

[3] The facts are the following:

[3.1] In about September 2009 the plaintiff instituted an action against the defendants, all practising attorneys, based on certain bridging-finance agreements, in the Pretoria Magistrates Court (the Pretoria action) in terms of which the plaintiff claimed payment of the following amounts from the defendants jointly and severally:

a) R36 509-04 plus interest at 36.5% per annum from 19 July 2009 to date of payment;

b) R43 233-40 plus interest at 36.5% per annum from 19 July 2009 to date of payment;

b) R35 927-10 plus interest at 36.5% per annum from 03 September 2009 to date of payment;

c) R32 744-41 plus interest at 36.5% per annum from 03 September 2009 to date of payment; and

d) costs of suit on the attorney and client scale.

[3.2] All three defendants, who were represented by an attorney at the first defendant's firm, defended the Pretoria action. The plaintiff then applied for summary judgment.

[3.3] However, prior to the hearing of the summary judgment application the defendants' attorney made a written offer to settle the plaintiff's claim. The written offer was on the first defendant's firm's letterhead and made clear reference to the Pretoria action. The full text of the offer dated 9 November 2009 reads as follows:

> '*We refer to the above matter and proposes* (sic) *the settlement your* (sic) *client's claim at the rate of R6 000.00 per month commencing on the 7th proximo and thereafter on the 7th of each and every succeeding month.*
>
> *The aforesaid offer shall be reviewable after 6 (six) months from the date hereof and the money shall be payable into your client's account and thereafter proof shall be furnished to you.*
>
> *Please communicate our offer to your client and revert to us urgently.*'

[3.4] The plaintiff's attorney accepted the offer on behalf of his client. His letter of acceptance dated 16 November 2009 reads as follows:

> '*We refer to your fax of the 09th of November 2009. It is our instructions to accept your offer.*'

[3.5] On the strength of these communications, the Pretoria action was, effectively, settled.

[3.6] The defendants, however, breached their undertaking to pay, and the plaintiff instituted action against them in August 2010 in the Randburg Magistrates court (the Randburg

action) for payment of the outstanding capital and interest on the basis of the offer and acceptance.

[4] Despite being a rather simple case on paper, the Randburg action, very quickly, metamorphosed into a relatively extensive trial.

[5] From the record of the proceedings, it appears that all that the magistrate was required to do was to interpret the meaning of the defendant's written offer, and the plaintiff's written acceptance. His task was made even simpler by the fact that the defendants had pleaded no meaningful defence.

[6] Nevertheless, the trial turned into a laborious exercise where the defendants were incorrectly allowed to introduce evidence that was not pleaded, and defences that may have been relevant in the Pretoria action, but which were of no significance in the Randburg action. The magistrate conflated the issues in the two actions and, thereby, lost sight of what the defendants were entitled to raise in the matter before him.

[7] The defendants' offer of settlement was unequivocal. The offer related to the plaintiff's claim of the Pretoria action. The plaintiff's claim in the Pretoria action consisted of the four capital amounts, the interest, and the costs.

[8] Except for recording that the offer would be reviewable after six months, the offer was not qualified or limited in any way. Nobody, at any stage of either action, took any issue with the meaning of the condition relating to the reviewability of the offer. Neither

party had attempted to review the re-payment terms after the six months had passed, and nothing turns on this condition in the offer.

[9] At the trial, the defendants' sole witness, the first defendant, suggested that the offer did not state anything about the interest, and that interest was, therefore, excluded. The magistrate seemed to agree with him. They were both wrong. On a simple reading of the offer, it included everything that constituted the plaintiff's claim in the Pretoria action. The interpretation that the reference to the word "claim" in the offer was merely a reference to the four capital amounts cannot be sustained. Even prior to the institution of the action, the plaintiff's claim against the defendants consisted of the capital and the interest. Indeed, the interest was probably the main reason, if not the only reason, for the plaintiff to have advanced the bridging finance. This is rather obvious from the rate of interest that had been agreed to.

[10] Besides, the attorney who had drafted the offer did not testify at the trial, and his intentions when he had made the offer on behalf of the defendants are unknown. In his evidence, the first defendant was vague about this and his co-defendants' instructions to the attorney who had drafted the offer. The first defendant merely speculated about the attorney's intentions, and the magistrate was, incorrectly, persuaded by this in concluding that the parties were not ad idem in relation to the offer and acceptance.

[11] In any event, it matters less what the draftsperson claims his intention was, as opposed to what he actually wrote. The plaintiff was entitled to rely on his precise words. If the conclusion of a contract is to be assailed on the basis of the parties not having been ad idem on its terms, it must be able to be done on an objective assessment of the facts,

and not simply by a unilateral spurious and opportunistic assertion by one of the parties after the fact.

[12] The inescapable difficulty that the defendants have, however, is that although the trial was conducted and finalised on the basis of a defence that the defendants were not liable for the payment of interest in terms of the offer, this defence was, in fact, never properly pleaded by the defendants. As a result, the vast majority of the evidence at the trial was incorrectly received by the court.

[13] The adjudication of a civil trial is generally limited to issues identified in the pleadings. If further issues are to be introduced for adjudication, an appropriate amendment must be effected to the pleadings, with its concomitant consequences, alternatively the parties must agree on the clear terms of the further issue/s. Despite seeming to be acutely aware of this and, in fact, refusing the defendant an attempt to effect an amendment at one point in the trial, the magistrate, nevertheless, proceeded to entertain evidence of details of the defendants' defence/s that were not consistent with their plea.

[14] The court a quo ought to have simply guided the proceedings, and intervened only when necessary. The magistrate, needlessly, spent far too much time in the arena itself, even taking up the cudgels of examination-in-chief and cross-examination of each witness. In the context of the matter, the court's questioning ought to have been limited to clarification. The court went far beyond what may reasonably be described as clarification. In relation to the plaintiff's witness, the magistrate even commenced his questioning immediately after cross-examination, and before re-examination.

Indeed, according to the record of the proceedings, there is no indication that the magistrate afforded the plaintiff's attorney the opportunity of re-examining his witness at all.

[15] Plaintiff's counsel, in his heads of argument, referred to an extract of Jacob and Goldrein on *Pleadings: Principles and Practice*, at 8-9, which was endorsed by the court in *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 898 F-J, which, although somewhat lengthy, is quite apt, and instructive of a court's role:

> *'As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings....For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation....Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in the pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such agenda there is no room for an item called "any other business" in the sense that points other than those specified in the pleadings may be raised without notice.'*

[16] Whereas a trial ought to serve the purpose of addressing and elucidating the issues identified in the pleadings, the magistrate's incorrect approach to the issues and to the evidence blurred the question that he had to answer. Inevitably, he reached an incorrect conclusion.

[17] Very simply, the defendants had made the offer in the Pretoria action because they had no defence to that action, their offer to liquidate the Pretoria claim was clear, they failed to meet their obligations in terms of their undertaking without any justification, and in the Randburg action they sought, opportunistically, to cast a different interpretation on the terms of the agreement merely in an effort to evade their responsibility to pay. This is what the magistrate ought to have found.

[18] The appeal must, therefore, succeed.

[19] I make the following order:

1. The appeal is upheld with costs;
2. The order of the court a quo is set aside and substituted with the following:
   Judgment is entered in favour of the plaintiff against all three defendants, jointly and severally, the one paying the other to be absolved, for:

   i) payment of R43 233-40, plus interest thereon at 36.5% per annum with effect from 19 July 2009 to date of payment, less paid R12 000-00 on 07 May 2010;

ii) payment of R35 927-10, plus interest thereon at 36.5% per annum with effect from 03 September 2009 to date of payment;

iii) payment of R32 744-41, plus interest thereon at 36.5% per annum with effect from 03 September 2009 to date of payment, less paid R36 000-00 on 07 May 2013;

iv) Costs of suit.

A CHAITRAM
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

I agree.

M VICTOR
JUDGE OF THE HUGH COURT
GAUTENG LOCAL DIVISION

Appearances:

On behalf of the Appellant: Adv. W C Carstens
On behalf of the Respondents: No Appearance

Date Heard: 06 October 2015
Date Judgment Delivered: 16 October 2015.