REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE: A5051/2015

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

09/03/18
Date

ML TWALA

In the matter between:

MDWABA: MTHUNZI **APPELLANT**

AND

NONXUBA: ZUKO **RESPONDENT**

JUDGMENT

THE COURT

[1] The "*audi alteram partem*" rule is a fundamental principle of our law which is enshrined under the bill of rights in the Constitution of the Republic of South Africa, Act 108 of 1996. Every litigant is therefore entitled to be afforded a fair public hearing before a Court if such a litigant has a dispute which can be resolved by the application of the law.

[2] Central to this appeal, is the issue whether the Court a quo infringed the right of the appellant to a fair hearing by not giving him an opportunity to address the Court in argument on the merits of the case after a point in limine was argued and decided upon.

[3] It is apposite at this stage to mention that, before the hearing of this appeal, the Court issued a directive to the appellant to file heads of argument with regard to the merits of the case since the respondent had addressed the issue of the merits in his heads of argument but the appellant had not.

[4] At the commencement of the hearing, the Court had to deal with an application to declare the appeal to have lapsed and an application for its re-instatement. The Court considered it to be in the interests of justice to entertain the appeal and proceeded on such basis.

[5] The Court engaged both counsel for the litigants that they should argue both the issue raised in the appeal (whether the appellant was afforded an opportunity to

be heard on the merits) and the merits of the case. Counsel for the appellant agreed with the Court that it is empowered in terms of section 19(d) of the Superior Courts Act, Act 10 of 2013 to hear the appeal on the merits as well rather than to remit the matter back to the Court a quo for rehearing.

[6] It is common cause that the respondent issued summons against the appellant and applied for summary judgment after the appellant filed its notice of intention to defend the action. The appellant then filed his affidavit resisting summary judgment raising a point in limine and a number of defences as to why summary judgment should not be granted. Further, it is not in dispute that, in the Court a quo, the parties argued the point in limine and thereafter the Court delivered a judgment dismissing the point in limine. After dismissing the point in limine, the Court gave an order on the merits in favour of the respondent without affording the appellant an opportunity to submit his heads of argument and argue the merits of the case.

[7] Counsel for the appellant contended that he only argued the point in limine at the hearing of the case and was expecting, as is usually the procedure, that after a decision is made on the point in limine, the Court would invite the parties to argue on the merits. This did not happen. Instead the Court a quo dismissed the point in limine and gave judgment in favour of the respondent without giving the appellant an opportunity to hand up his heads of argument and to argue the merits of the case. The rights of the appellant to a fair hearing, so the argument goes, have therefore been trampled upon and he has been prejudiced in the conduct of his case.

[8] The point in limine argued by the appellant was that the respondent is relying on two causes of action for his claim yet he has verified only one cause of action in his affidavit in support of the summary judgment. In respect of the merits the

appellant contended that the respondent is *ex lege* a shareholder of 30% in the business since he has paid the full amount agreed upon. Transfer of rights has taken place since payment has been made even if the share certificate has not been issued and delivered. It was argued that it is trite that a plaintiff who claims restitution is obliged to tender return of whatever he received and this did not happen in this case. He further relied on a breach of the principles of good faith and ubuntu by the respondent.

[9] The respondent's first cause of action, it is contended, is based on fraud but the respondent did not substantiate his claim in this regard. The respondent did not make the necessary averments in his particulars to sustain his claim of fraud. The second ground of the respondent's claim is based on breach of contract. The respondent cancelled the contract by a letter in December 2014 whereas the final payment of the purchase price was made on the 1st of September 2014 and the share certificates and transfer forms were signed on the 1st October 2014.

[10] We find ourselves in disagreement with counsel for the appellant that the respondent's claim is based upon two causes of action and only one was verified in the affidavit in support of the summary judgment application. The respondent's cause of action is breach of the agreement based on failure to deliver the share certificate and transfer form. It is not in dispute that the appellant was in terms of the agreement to deliver documents within 5 business days from the date of final payment. He did not do so – hence the respondent cancelled the agreement. We therefore hold the view that the Court a quo was correct in its dismissal of the point in limine.

[11] The parties agreed that, so it is contended by counsel for the appellant, they will conduct themselves in a fair and reasonable manner, act in good faith towards each other and uphold the values of '*Ubuntu*' in all their dealings in this case. It is further contended that the respondent did not act in good faith when he cancelled the contract without giving the appellant more time to furnish him with the share certificate. In terms of the agreement between the parties, so the argument goes, a party who is in breach will be called upon to rectify the breach within 10 days but the respondent only gave the appellant 7 days. The respondent's summons, so contended by the appellant, is therefore premature.

[12] It is contended by counsel for the respondent that the letter dated the 3rd of December 2014 demanded payment of the purchase price to be made within 7 days. This was though not a letter demanding the appellant to rectify the breach. The letter demanding rectification of the breach in terms of the agreement was issued by the respondent on the 17th of September 2014 and gave the appellant until the 1st of October 2014 to rectify same. The cause of action the respondent is basing his claim upon is breach of contract – hence the letter of cancellation of the contract which was issued on the 3rd of December 2014.

[13] The final payment of the purchase price and interest was made on the 1st of September 2014 and the 5 days within which the appellant was to deliver the share certificate and the transfer form expired on the 8th September 2014. In terms of the agreement between the parties, so it is argued, the appellant was to deliver the share certificate and the transfer form within 5 days from the date of final payment of the purchase price. Those are the only documents which make delivery in terms of the agreement and the appellant failed to deliver these documents. The appellant was thus in breach of the contract and failed to rectify the breach when called upon to do so.

[14] On the 17th September 2014 a letter was sent to the appellant calling upon him to deliver the documents on or before the 1st of October 2014 and he failed to do so. The respondent acted in good faith and gave the appellant ample time to rectify the breach.

[15] Section 34 of the Republic of South Africa provides as follows:

> *34. Access to Courts*
>
> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

[16] It is well established that the point in limine is argued first for it may be dispositive of the whole matter. However, in summary judgment the point in limine does not dispose of the whole matter but simply prevents the granting of summary judgment. Should the point in limine be dismissed, the matter is referred to trial. Put differently, if the point in limine is upheld, leave to defend is granted to the defendant. In casu, the point in limine was not dispositive of the matter but was intended to refer the matter to trial. We are unable to disagree with counsel for the appellant that, by not giving the appellant an opportunity to present its argument on the merits of the case, the Court a quo erred and has thereby prejudiced the right of the appellant to a fair trial. On this basis the appeal should succeed.

[17] As mentioned hereinbefore, this Court has the power to remit the matter back to the Court of first instance or to hear the matter on the merits. Having called for heads of argument from the appellant on the merits of the summary judgment

and having heard extensive argument thereon, this Court decided to consider and adjudicate this feature of the case.

[18] We propose to refer to the following relevant clauses of the sale of shares agreement entered into by the parties:

A. *Clause 1.1.2*

"Business Day" means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa.

B. *Clause 1.1.4*

"Delivery Documents" means the share certificate reflecting the Purchaser's holding of the Sale Shares, together with a duly signed and currently dated share transfer form complying with the memorandum of incorporation of the Company, reflecting the Purchaser as transferee.

C. Clause 3.

3.1 The Seller hereby sells to the Purchaser, who purchases, the Sale Share on the terms and conditions of this Agreement.

3.2 Ownership of and all risk in and benefit of the Sale Shares shall pass to the Purchaser on the transfer of the Sale Shares as contemplated in clause 5

D. Clause 5

CLOSING

Within 5 (five) Business Days of the final payment being made by the Purchaser (including the payment of all interest which will have accrued on the Purchase price up to the date of final payment to the extent applicable), the Seller shall deliver the Delivery Documents to the Purchaser as well as furnish the Purchaser with written confirmation that the share register of the Company has been updated to reflect the Purchaser as the owner of the Sale Shares.

E. Clause 7

BREACH

Should either party commit a breach of any of the provisions of this Agreement ("Defaulting Party"), then the other Party ("Aggrieved Party") shall be obliged to give the Defaulting Party 10 (ten) Business Days' written notice, or such longer period as may be reasonable required in the circumstances, to remedy the breach. If the Defaulting Party fails to comply with such notice, the Aggrieved Party shall be entitled to cancel this Agreement or to claim immediate payment and/or specific performance by the Defaulting Party of all the Defaulting Party's obligations whether or not the due date for payment and/or performance shall have arrived, in either event without prejudice to the Aggrieved Party's rights to claim damages.

F. Clause 9.4

Implementation and Good Faith: The Parties undertake to do all such things, perform all such acts and take all steps to procure the doing of all such things and the performance of all such acts, as may be necessary or incidental to give or be conducive to the giving of effect to

the terms, conditions and import of this Agreement. The Parties shall at all times during the continuance of this Agreement observe the principles of good faith towards one another in the performance of the obligations in accordance with the terms of this Agreement. This implies that they shall (i) at all times during the term of this Agreement act reasonably, honestly and in good faith; (ii) perform their obligatios arising from this Agreement diligently and with reasonable care; and (iii) make full disclosure to each other of any matter that may affect the execution of this Agreement.

G *Clause 9.5*

Payment and interest: All payments in accordance with the terms of or arising out of this Agreement shall be made fee of bank exchange. commission and all other deductions to the Party entitled thereto. No Party shall have the right to defer, adjust or withhold any payment due to the other in accordance with the terms of or arising out of this Agreement or to obtain deferment of judgment for such amount or any execution of the judgment by reason of any set-off or counterclaim. All amounts due by one Party to another, including damages, in accordance with the terms of or arising out of this Agreement shall, unless paid on due date, bear interest from the due date to date of payment. Interest shall be:- (i) calculated at 2% (two per cent) per month; (ii) capitalised monthly in arrears on the balance due.

H. *Clause 9.18*

Costs: The Purchaser shall be liable for the legal costs associated with the preparation of this Agreement, including those costs necessary and incidental to drafting, negotiating and settling this Agreement. Any costs, including legal costs on a full indemnification basis (failing which, the

highest permissible legal tariff), incurred by a Party arising out of a breach by any other Party of any of the provisions of this Agreement, shall be borne by the Party in breach.

[19] Counsel for the appellant referred this Court to the case of **Botha v Fick 1995 (2) SA 750 (A)** wherein the Court held that delivery of the documents transferring rights is not essential to transfer a right as long as consensus has been reached between the parties to transfer the right. Counsel's submission in this regard was that the respondent became the owner of 30% of the shares in the company by making the final payment although no delivery of the share certificate and transfer form took place.

[20] Although we agree with the principle enunciated in such case, it is distinguishable from the present case. Clause 3 of the Sale of Shares agreement states clearly that ownership of and all risk in and benefit of the sale of shares shall pass to the purchaser on the transfer of the shares as contemplated in clause 5. Clause 5 required the appellant to deliver the share certificate and transfer form within 5 business days of final payment being made to the respondent. He failed to do so. The transfer of the right in this case is regulated by the agreement entered into between the parties.

[21] We agree with counsel for the respondent that the letter of the 17th September 2014 complied with clause 7 of the agreement between the parties and gave the appellant 10 days within which to rectify the breach of clause 5. It is the letter of cancellation which gave the appellant 7 days within which to make payment

of the purchase price. We are therefore satisfied that the Court a quo correctly found that there is no merit in the argument that the summons was premature.

[22] We are not persuaded by the appellant's contention that the respondent did not deal with him fairly, reasonably and in good faith. We hold the view that, if anyone of the parties acted unreasonably and not in good-faith, it is the appellant. The respondent started addressing correspondence demanding performance in terms of clause 5 of the agreement as early as the 17th of September 2014 until the contract was cancelled on the 3rd of December 2014 without success. The appellant never delivered the delivery documents in compliance with clause 5 of the agreement.

[23] We are mindful of the decision of the Constitutional Court in the case of **Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)** wherein the Court held that the principles of good-faith and ubuntu be imported into our law of contract and to develop it by the infusion of these principles. Counsel for the appellant submitted that the Court should apply these principles in the present case. However, the Constitutional Court stated clearly that a case for applying these principles has to be properly pleaded. This principle was not squarely relied upon in the affidavit resisting summary judgment. But assuming the court is entitled to look at the spirit of the agreement and the other facts set out in the affidavit, the contrary inference is to be drawn. The limited facts at our disposal suggests that the appellant himself did not conduct himself in accordance with the principles of good-faith and ubuntu which facts of course also have a bearing on the bona fides of the defence.

[24] The appellant attached the share certificate and transfer form to his affidavit resisting summary judgment which share certificate is purported to have been signed by the appellant on the 1st of October 2014. The respondent's letter of the 17th September 2014 gave the appellant 10 days within which to deliver the documents. The 10 days were to expire on the 1st of October 2014. Now, there is no plausible explanation why he could not deliver these documents until the contract was cancelled in December 2014. The only explanation given by the appellant is that he relied on service providers to produce these documents.

[25] Clause 7 of the agreement provides for '*the defaulting party to be given 10 day notice or such longer period as may be required in the circumstances.*' There is nothing before this Court to suggest that the appellant ever requested an extension of time to attempt compliance with clause 5 of the agreement or explained the difficulties he was encountering.

[26] It is trite that, for a defendant against whom summary judgment has been sought, to succeed in resisting same, he must satisfy the Court that he has a bona fide defence by disclosing fully the nature of the grounds of the defence and the material facts relied upon for such defence.

[27] In the case of **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)**, the Court stated the following:

"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at

appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425 G-426E, Corbett JA, was keen to ensure first, an examination of whether here has been sufficient disclosure by the defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of the defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor."

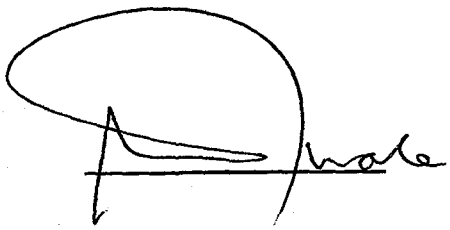
[28] We are satisfied that the appellant has failed to satisfy the Court that he has a bona fide defence to the claim of the respondent which is good in law. We therefore conclude that the appellant has failed to disclose a bona fide defence to respondent's claim. The appeal therefore falls to be dismissed.

[29] Clause 9.18 of the agreement between the parties provides for the legal costs incurred by a party arising out of the agreement to be paid by the defaulting party at the highest permissible legal tariff. The appellant is the defaulting party in this case and therefore is liable to pay the costs of the respondent on the scale as between attorney and client.

[30] In the circumstances, the following order is made:

I. The appeal is dismissed.

II. The appellant is ordered to pay the costs of the respondent including the costs of the 27th of February 2017 and 7th of February 2018 on the scale as between attorney and client.

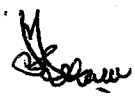


TWALA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree,

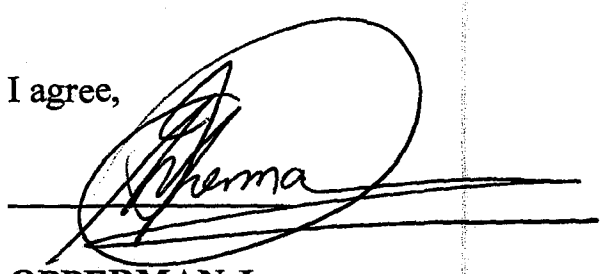


TSOKA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree,



OPPERMAN J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing:	**07 AND 9 FEBRUAY 2018**
Date of Judgment:	**9 March 2018**
For the Appellant:	**Advocate: GH MEYER**
Instructed by:	**KEKANE HLATSHWAYO RADEBE INC** **Tel No: 011 484 4114**
For the Respondent:	**Advocate: FG BARRIE SC**
Instructed by:	**NONXUBA INC** **Tel: 011 234 119**