REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT
PRETORIA

13/11/2012

CASE NO: A668/07

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

13 Nov 2012
DATE

SIGNATURE

In the matter between:

J C VAN DER MERWE Appellant

and

ANASTACI PROJECTS Respondent

J U D G M E N T

TEFFO, J:

INTRODUCTION

[1] This appeal emanates from a judgment that was handed down in the Magistrate's Court, Pretoria by Mr B L Swart.

[2] For the sake of convenience I will refer to the parties as referred to in the court *a quo*. The appellant was the defendant in the court *a quo* and the respondent was the plaintiff.

[3] The plaintiff sued the defendant in the court *a quo* for payment of an amount of R39 307,56 which was allegedly paid twice in the mistaken and reasonable belief that the debt in the aforesaid amount was not settled by it.

[4] Judgment was therefore granted in favour of the plaintiff.

[5] The defendant has now lodged an appeal against this judgment on the following grounds:

5.1 "*Die agbare landdros gefouteer het deur te bevind dat die blote feit dat dit gemeensaak is dat die eiser sekere betalings aan verweerder gemaak het, terwyl die eiser met 'n ander entiteit gekontrakteer het, afdoende bewys van onverskuldigde betaling is.*

5.2 *Die agbare landdros gefouteer het deur te bevind dat die eiser se pleit op die verweerder se teeneis en meer spesifiek die feit dat eiser pleit dat hy versoek is om sekere betalings aan verweerder te maak nie moontlik 'n basis vir die betalings aan die verweerder daar kan stel nie.*

5.3 *Die agbare landdros gefouteer het deur te bevind dat die appellant nie prima facie geregtig was om betalings van eiser te ontvang nie.*

5.4 *Die agbare landdros het gefouteer deur te bevind dat eiser op die pleitstukke alleen geregtig was op vonnis.*"

[6] The following facts are common cause between the parties:

6.1 On or about 31 January 2003 the plaintiff effected payment of the amount of R39 307,56 (thirty nine thousand three hundred and seven rand fifty six cents) to the defendant for services rendered to it.

6.2 On or about 4 February 2003 in the mistaken belief that the debt was not yet settled, the plaintiff effected another payment of R39 307,56 (thirty nine thousand three hundred and seven rand fifty six cents) to the defendant.

6.3 A letter of demand dated 16 October 2003 was addressed to the defendant claiming the amount paid on 4 February 2003 back but despite all this, the defendant refused to repay the aforesaid amount to the plaintiff.

6.4 The defendant traded as a sole proprietor, namely, Panorama Construction, which he refers to as J C van der Merwe trading as Panorama Construction and a close corporation, namely, Panorama Earth Movers and Civil Construction CC.

6.5 All these entities did hiring and letting out of machines and construction work.

6.6 They operated from the same premises. They used the same address and telephone number.

6.7 The defendant was the only member of the close corporation and the only member of Panorama Construction. He dealt with the day-to-day activities of both entities.

6.8 Only the defendant testified at the trial court.

6.9 Panorama Earth Movers and Civil Construction CC (the close corporation) had a different VAT number from Panorama Construction (the sole proprietor).

[7] After the plaintiff had issued summons the defendant brought a counterclaim whereby he disputed the plaintiff's claim and alleged that the plaintiff owed him an amount of R93 916,95 (ninety three thousand nine hundred and sixteen rand ninety five cents) for services rendered at its instance and request. The defendant pleaded as follows in the counterclaim:

7.1 "*Gedurende die tydperk Januarie 2002 tot April 2003, het die verweerder grondverskuiwingswerke vir en ten behoewe aan die Eiser gedoen en masjiene aan die Eiser beskikbaar gestel, op die Eiser se uitsluitlike aandrag en versoek.*

7.2 *Die totale bedrag wat deur die Eiser aan die Verweerder verskuldig is, beloop R693 496,39, waarvan die uitstaande balans R93 916,95 beloop.*

7.3 *Die balans van R93 916,95 wat die Eiser aan die Verweerder verskuldig is, is reeds opeisbaar en betaalbaar.*"

[8] In its plea to the defendant's counterclaim the plaintiff pleaded as follows:

8.1 "*Die Eiser ontken dat die Verweerder gedurende die tydperk Januarie 2002 tot April 2003 grondverskuiwingswerke vir en ten behoewe van die Eiser gedoen en masjiene aan die Eiser beskikbaar gestel het.*

8.2 *Die Eiser voer aan dat daar met Panorama Earth Movers and Civil Construction CC, Registrasienommer 1996/004416/23, ooreengekom is vir grondverskuiwingswerke wat ten behoewe van die Eiser gedoen moes word en masjiene wat aan die Eiser beskikbaar gestel moes word.*

8.3 *Die Eiser voer verder aan dat sekere betalings aan Panorama Earth Movers and Civil Construction CC op versoek van laasgenoemde gedeponeer is in die rekening van die Verweerder handeldrywende as Panorama Construction.*

8.4 *Eiser pleit verder dat daar met Panorama Earth Movers and Civil Construction CC ooreengekom is dat die vergoeding vir die dienste en toerusting deur laasgenoemde beskikbaar gestel, bereken sou word teen 'n ooreengekome uurtarief bereken op die aantal ure wat die dienste en toerusting beskikbaar gestel is.*

8.5 *Eiser pleit verder dat die fakture wat deur Panorama Earth Movers and Civil Construction CC and deur die Verweerder namens Panorama Earth Movers and Civil Construction CC gelewer is nie korrek is nie met betrekking tot die ure waarvoor die dienste en toerusting beskikbaar gestel is.*

8.6 *Van die toerusting wat deur of namens Panorama Earth Movers and Civil Construction CC beskikbaar gestel is, was van tyd tot tyd buitewerking en die Eiser volgens ooreenkoms tussen die partye nie aanspreeklik vir betaling vir die huur van daardie toerusting, solank dit buitewerking was nie.*

8.7 *Die Eiser en Panorama Earth Movers and Civil Construction CC het die fakture rekonsilieer en laasgenoemde is ten volle betaal vir die dienste en toerusting wat beskikbaar gestel is.*"

[9] The plaintiff maintained throughout the pleadings that the defendant is not entitled to payment of the amount of R39 307,56 that was erroneously

paid to him and neither is he entitled to set it off against other payments that he allegedly contend are due and payable to him.

[10] It clearly points out in its plea to the defendant's counterclaim that it cannot be held liable in these proceedings between it and the defendant in his personal capacity as it never entered into a contract for services rendered as alleged by the defendant with the defendant in his personal capacity. According to the plaintiff the contract referred to by the defendant in the counterclaim was entered into between the plaintiff and the close corporation.

[11] On the other hand the defendant contends that he is entitled to keep the amount paid by the plaintiff to him because the plaintiff still owes him an amount of R93 916,95 which is in excess of what the plaintiff is re-claiming and that he is entitled to set it off against the amount that is due and payable to him by the plaintiff.

[12] The court *a quo* had to decide with whom did the plaintiff contract with regard to the allegations raised in the counterclaim.

[13] At the commencement of the trial the parties agreed that the abovementioned issue was the issue for determination by the trial court and that should the court find that the plaintiff contracted with the close corporation with regard to the allegations made in the counterclaim, the counterclaim would then fall to be dismissed and the plaintiff would succeed with its claim.

The parties further agreed that the defendant bore the *onus* of establishing his relationship with the plaintiff in respect of the counterclaim.

[14] The defendant adduced evidence to the effect that the plaintiff knew when it contracted with him that it was contracting with Mr J C van der Merwe trading as Panorama Construction. He started this business in the 1980's and traded as J C van der Merwe Panorama Construction. This business owns land sliding machines which it rents out to other people. He is also the only member of the close corporation. This close corporation also performed construction work and rented out its machines to other people. Initially he had a partner in the close corporation. The business did not do well and in a short space of time the partner left him in the business. The close corporation went down slowly and he concentrated more in Panorama Construction. In 2002 all the work went to Panorama Construction.

[15] He maintained that at the time he traded with the plaintiff he operated under the name Panorama Construction. He did land sliding work and rented the machines to the plaintiff.

[16] He referred to a purchase order from the plaintiff addressed to "*Panorama Attention Johan van der Merwe*" and emphasised that it was not addressed to the close corporation but to Panorama Johan van der Merwe. The plaintiff contacted him for work. Before he did business with the plaintiff, he knew Mr Vaugh Sanders who worked for the plaintiff. Mr Saunders knew him as Panorama Construction and not as the close corporation.

[17] Under cross-examination he testified that he hired out machines to the plaintiff for construction work. He also conceded that he did earthwork and construction work for the plaintiff. When people call his business, they do not only speak of Panorama but also J C van der Merwe. Him and Panorama is one and the same thing. He ran both businesses, namely, the sole proprietor and the close corporation interchangeably. The close corporation had a number of directors in the business but at the time he did business or work for the plaintiff those directors had already left.

[18] He conceded that the purchase order from the plaintiff was not addressed to Panorama trading as J C van der Merwe but to Panorama attention J C van der Merwe. After the plaintiff had sent out a purchase order referred to above to Panorama, invoices were issued by the close corporation to the plaintiff with the close corporation's VAT number. When the defendant was shown all the five invoices he could not comment on what was written on the invoices and the fact that all of them were issued by the close corporation. He maintained that he did not issue them. When asked whether he remembered the VAT number of the close corporation his response was that it is not possible for him to remember it. Although he testified that he started the close corporation in 1996, he could not say when did its directors resign.

[19] It became clear from the evidence that the close corporation only operated for 6 years and all its work went to the sole proprietor. It also became clear that both businesses did the renting out of the equipments and

construction work simultaneously and the defendant was the only member behind all these. The close corporation hired out equipments for construction work from the sole proprietor and in turn sub-let them to other clients where necessary. In that case the close corporation would issue an invoice to the client with its own VAT number and in exchange thereof the sole proprietor would also give an invoice to the close corporation. The close corporation would then claim VAT on the invoice that the sole proprietor had issued to it. He could not tell how that worked as all this was done by the auditors of the business and not him.

[20] The defendant had problems with SARS with regard to the payment of VAT and this resulted in him opening another bank account where the plaintiff was requested to pay amounts due and payable to the defendant at the time SARS was looking at the matter.

[21] A purchase order from the plaintiff was sent to Panorama Attention J C van der Merwe in 2002. The defendant conceded that Panorama can either be the sole proprietor or the close corporation. Invoices were issued, viz, No. 30/35, 30/32, 30/39, 30/38 to name a few, by the close corporation to the plaintiff. The defendant did not comment when he was told that the fact that the purchase order was issued by the plaintiff to Panorama in February 2002 and followed by a number of invoices referred to above issued by the close corporation with its VAT number for the work the close corporation performed at the request of the plaintiff, shows that the plaintiff and the close corporation contracted with each other. All what he said was that he suspects that there

could have been mistakes on the invoices. He was also not aware of an account number that belongs to the close corporation.

[22] In *Levin v Drieprok Properties (Pty) Ltd* 1975 (2) SA 397 the appellant had through the instrumentality of a member of a firm of estate agents, one D, signed a written offer to purchase certain immovable property which had been placed before him by D. The appellant also signed a deed of sale in blank. At the time when these documents were signed by the appellant, D was uncertain as to whether the property was owned by W personally or by a company in which he had interest. D discussed the possibility of a company being the owner and it was agreed between him and the appellant that in that event the property would be purchased by a company to be formed, and a suitable clause had been inserted in the offer to purchase to make provision therefor. D then inserted W's name in the offer to purchase as the owner and it was in that form that the appellant had signed it. In actual fact the registered owner was the respondent company in which W had a 50% interest and of which he was a director. On discovering the true position, D took the offer to purchase to W after adding after his name the words "*as director of respondent company*", and W signed it in that form. D then telephoned the appellant to inform him that the seller was a company. At the time the appellant had signed the offer he had also handed a cheque of R2 000,00 as a deposit provided for in the offer to purchase. This cheque was handed to W and paid out. After some time the agreement alleged to exist between the appellant and the respondent was cancelled on the ground of the appellant's default. Appellant thereupon demanded repayment of the R2 000,00. This

was refused and in an action for payment thereof, absolution from the instance had been granted in a local division the reason being that the offer to purchase read as a whole meant and was intended to mean that the offer might effectively be accepted by the owner, whether or not he be W. In an appeal the appellant raised the following issues:

1. that the offer had been made to W personally;

2. that this offer had not been accepted by W in his personal capacity;

3. that neither D nor anyone else had authority to alter the offer and convert it into one made to the respondent company;

4. that the offer was not made to, and therefore not acceptable by the respondent;

5. that consequently the respondent's purported acceptance of the offer had not brought the contract into existence; and

6. that accordingly, no valid excuse existed for the payment of the deposit or for its retention by the respondent.

The Appeal Court held that the offer as originally subscribed by the appellant had not been open for acceptance by the respondent company. It also held

that the alterations made to the offer which converted it into one apparently open for acceptance by the respondent, could not be said to have been authorised by the appellant nor had the appellant been shown to have subsequently ratified the alterations. The court further held that insofar as the respondent sought to rely on any tacit acceptance by the appellant of what really amounted to an offer by respondent in the light of the alterations made, that any resulting contract would offend against section 1 of Act 68 of 1957 and be null and void in that acceptance by the appellant was not in writing and signed by the appellant. The court then came to the conclusion that no valid contract of sale upon the basis of the offer of purchase and the deed of sale, was ever concluded by the parties and that there was no *causa* for the payment of the deposit and the appellant became entitled to repayment.

[23] Corbett JA in *Levin v Drieprok Properties (Pty) Ltd* said the following:

> "*It is a cardinal principle of the law of contract that a simple contractual offer made to a specific person can be accepted only by that person; and that consequently, a purported acceptance by some other person is ineffective and does not bring about the conclusion of the contract.*"

[24] Schreiner JA in *Hersch v Nel* 1948 (3) SA 686 (A) at 692 made the following remarks:

> "*In the majority of cases an offer made by A to B is intended by A to be open to acceptance by B and by no-one else, but there is no notional or juristic obstacle to an offer addressed to B being acceptable by C, it is simply a matter of interpretation of the offer.*" (*Bird v Summerville* 1961 (3) SA 194 (A) 202-203, *Baker v Crowie* 1962 (2) SA 48 (N) 52-53, *Hill v Faiga* 1964 (4) SA 594 (W) 596.

[25] It is clear from the evidence that at the time the defendant did business with the plaintiff he operated as the close corporation and the sole proprietor. All these two businesses were referred to as Panorama. For an example the close corporation was referred to as Panorama Earth Movers and Civil Construction CC and the sole proprietor was referred to as Panorama Construction. In his evidence the defendant testified that him and Panorama are one and the same thing. The evidence also revealed that the two businesses, namely, the close corporation and the sole proprietor performed construction work and rented machines at the same time. The defendant conceded that he did construction work and rented machines to the plaintiff.

[26] This contract that the defendant alleges was entered into with the plaintiff was not reduced to writing. The court *a quo* relied upon the documents, correspondence exchanged between the parties and the defendant's evidence to make its findings.

[27] The defendant ran the two entities alone. He was the only member of the close corporation. He was also the sole owner of Panorama Construction. These businesses were operating at the same premises and were using the same addresses and telephone numbers. When orders were placed, the defendant was the only person to be contacted.

[28] The purchase order that was made by the plaintiff was addressed to Panorama "*Attention Mr Van der Merwe*". The defendant conceded under cross-examination that the purchase order was not addressed to J C van der

Merwe trading as Panorama. After this purchase order was sent to Panorama, invoices were issued. It is clear from the evidence that all the five invoices referred to were issued by the close corporation to the plaintiff. They were not issued by the sole proprietor. If indeed the plaintiff or its representative knew that it was trading with the defendant in his personal capacity, why would they sent the purchase order to Panorama "*Attention Mr Van der Merwe*" and not to Mr Van der Merwe trading as Panorama Construction.

[29] The plaintiff received invoices from the close corporation and according to it payments were due and payable to the close corporation.

[30] According to the defendant at the time he did work for the plaintiff, the close corporation was no longer in existence. If that was the case why would the plaintiff receive invoices from the close corporation? The defendant maintained that he did not do the books of the business himself. They were done by the auditors and that the issue of the invoices to the plaintiff by the close corporation was a mistake.

[31] It is common cause between the parties that at some stage in the process because of the problems that the defendant had with SARS a new account was opened and the plaintiff was requested by the defendant to deposit money for the work done into that account.

[32] It is also common cause between the parties that there was a double payment of an amount of R39 307,56 to the defendant made by the plaintiff.

[33] According to the defendant the plaintiff is not entitled to a refund of the amount erroneously paid to him because it owes him an amount in excess of that amount. The plaintiff contends that the defendant is not entitled to keep that amount because the work that the defendant alleges that he has done to the plaintiff in respect of which he claims that the plaintiff owes him more money, was not done by the defendant in his personal capacity. It contends that for that work referred to above it concluded a contract with the close corporation and not with the defendant in his personal capacity.

[34] When the purchase order was sent to Panorama "*Attention Mr Van der Merwe*", it was addressed to Panorama as a business and not to the defendant in his personal capacity. It is confusing and misleading for the defendant who knew that he was running the two entities interchangeably to say him and Panorama are one and the same person. It is common cause that Panorama refers to the two entities, viz, the close corporation and the sole proprietor. When this purchase order was sent to Panorama it was open for acceptance by either the close corporation or the sole proprietor (*Levin v Dieprok Properties (Pty) Ltd).*The defendant as the only member of both business entities chose to accept the offer on behalf of the close corporation because the invoices which were issued as a result of the purchase order were issued in the name of the close corporation. The defendant knew how his business operations were conducted. If indeed the close corporation had

ceased to exist at the time, he should have told the plaintiff to send the correct purchase order in his own name. As he regards himself and Panorama as one and the same thing, how would entities like the plaintiff know that they are trading with him as a sole proprietor, or him in a personal capacity and/or as a close corporation if he himself does not inform them. All the invoices that were sent to the plaintiff came from the business, the close corporation, that was run by the defendant himself. The auditors worked for him and took instructions from him. He cannot run away from his responsibility and say they made a mistake. Sight should not be lost that he conceded under cross-examination that his books and transactions were mixed at the time he did business with the plaintiff.

[35] I agree with the court *a quo's* finding that the fact that the plaintiff deposited monies for the services rendered into an account number furnished by the defendant at his request, does not change the fact that the plaintiff entered into a contract with the close corporation.

[36] An issue was raised during argument that the plaintiff should have testified to explain to the court with whom did it contract. Further that the evidence of the defendant was not challenged and that the court *a quo* made a finding that the defendant was an honest and sincere witness.

[37] From a reading of the record I find that the evidence of the defendant was destroyed during cross-examination. After the plaintiff had sued the defendant for repayment of the amount paid erroneously to him, the

defendant brought a counterclaim. The plaintiff pleaded to the defendant's counterclaim that it contracted with the close corporation. The *onus* was therefore on the defendant to prove the agreement on which he relies upon with regard to the counterclaim. I have already dealt with the evidence and it is my view that the defendant's evidence was not supported by the documents filed and relied upon at the court *a quo*, viz, the invoices and the purchase order from the plaintiff. His contention that he contracted with the plaintiff himself was not supported at all by the evidence led and that is why he ended up saying that it was a mistake to send the invoices to the plaintiff in the name of close corporation. Even though the court *a quo* found that the defendant was honest and that there was nothing wrong with his evidence, the defendant failed to discharge his *onus* on a balance of probabilities.

[38] I therefore do not find any reasons to interfere with the decision of the court *a quo*.

[39] In the result I make the following orders:

39.1 The appeal is dismissed with costs.

M J TEFFO
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

I agree:

K E MATOJANE
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

FOR THE APPELLANT	J C VAN DER BERG
INSTRUCTED BY	MARIUS COERTZE ATTORNEYS
FOR THE RESPONDENT	J C SMIT
INSTRUCTED BY	VAN DER MERWE DU TOIT INC
DATE OF HEARING	22 MAY 2012
DATE OF JUDGMENT	13 NOVEMBER 2012