NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT. PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA-)

CASE NO: 11959/2009

DATE:09/05/2012

IN THE MATTER BETWEEN:

SUPER BLITZ TRADING (PTY) LTD PLAINTIFF

AND

CHRIS KOEN DEFENDANT

JUDGMENT

MAKGOBA. J

[1] The plaintiff instituted an action against the defendant based on an acknowledgement of debt, claiming a total amount of Rl 240 953,36 being Rl 000 000,00 as the principal debt, R40 953,36 as collection charges and R200 000,00 as additional charges (20% of the principal debt). The defendant admitted signing the acknowledgement of debt but denies liability on the ground that the document was signed under duress.

[2] The defendant filed a counter-claim for R3 million (three million rand) based on a verbal commission agreement entered into by and between him and the plaintiff. The plaintiff denies the conclusion of any agreement in respect of commission.

[3] It is common cause between the parties that on 10 June 2008 the plaintiffs attorneys, Van Gaalen Attorneys, transferred an amount of Rl,5 million to the trust account of the defendant. (The defendant is a practising attorney.) The terms and conditions upon which the Rl,5 million was transferred were set out in Van Gaalen Attorneys' correspondence, namely an e-mail dated 5 June 2008 stating the following:

"Geen gelde kan uitbetaal word van jou trust rekening tot en met finale afhandeling van die kontrak en lewering van die vereiste dokumente"

And further in a letter dated 6 June 2008 stating the following:

1. that the amount payable into the defendant's trust account will not be released/paid to any third party prior to the finalisation of the agreement between the defendant's client and the plaintiff in terms of the purchase of the chrome ore;

2. that all amounts paid into the defendant's trust account in terms of the chrome ore transaction will be returned within 24 hours after instructions from Van Gaalen Attorneys if the aforesaid agreement has not been concluded on or before 13 June 2008; and

3. receipt of the following documentation before close of business on 9 June 2008:

(a) defendant's client's title deed to the property (premises) where the product is available;

(b) Department of Mineral and Energy's official documentation to confirm defendant's client's ownership and rights in respect of the product under abovementioned agreement;

(c) necessary Land Affairs documentation to confirm that the defendant's client is the official owner of the property;

(d) proof that Hoffman Properties/Eiendomme has a general power of attorney to sign on behalf of the rightful owner of the chrome ore;

(e) confirmation from defendant's client that there is currently no sale agreement in place in respect of the property or product available on the property.

[4] The defendant accepted the terms and conditions as set out above and it is common cause that the terms and conditions as set out above were never complied with by the defendant and/or ever materialised. However the defendant paid out the sum of Rl million to his client, Hoffman Properties, without instructions from Van Gaalen Attorneys and/or the plaintiff.

[5] The agreement in respect of the purchase and sale of chrome ore was ultimately concluded and signed on 17 June 2008. Clause 6.1.4 thereof makes it plain that the payment has to be retained by the seller's attorneys (defendant in the present case) in a separate interest bearing trust account in terms of section 78(2)(A) of the Attorneys Act, 53 of 1979. Payment could only be effected against the issue of weigh bridge certificates and invoices as stipulated in the aforesaid clauses 6.1.4.1 to 6.1.4.3. The defendant did not comply with these terms of the agreement in that the monies were not put into a separate interest bearing trust account and were paid out before the issuing of weigh bridge certificates and invoices.

[6] It is further common cause that the defendant made several promises and undertakings to repay the amount to the plaintiff and ultimately he was presented with an acknowledgement of debt which he signed on 31 October 2008.

[7] On both issues, that is the acknowledgement of debt and the counter-claim, the onus is on the defendant which he has to prove on a balance of probabilities. The defendant had a duty to begin and indeed was the first to testify. Messrs Gerrie van Gaalen, Matt Barnard and Glenn Sherpherd testified on behalf of the plaintiff.

[8] The defendant testified that he is a practising attorney admitted as such during 1995. He acted on behalf of Hoffman Properties, represented by MrEvre Hoffman. Hoffman acted as an agent for
Bakoni Ba-Manyaka Tribal Authority ("Bakoni") and Pulama Maroga Tribe ("Pulama"). Hoffman Properties entered into a purchase and sale agreement in terms of which the plaintiff would buy chrome from Bakoni. The amount of Rl,5 million was already transferred to defendant's trust account on 10 June 2008 and before the written contract was signed on 17 June 2008. It was agreed that the amount of Rl,5 million would be paid to Bakoni only upon receipt of certain documentation from the Department of Minerals and Energy ("DME").

[9] The defendant stated that Hoffman and plaintiff amended the terms and conditions of the agreement in the sense that: seeing that they realised that Bakoni only owned two million tons of chrome, the plaintiff would buy two million tons of chrome from Pulama; the amount of Rl,5 million was then kept in the defendant's trust account on behalf of the plaintiff in respect of a verbal agreement with Pulama.

[10] On Friday 4 July 2008 the defendant received telephonic instructions from Hoffman to transfer an amount of Rl 70 000,00 to the account of Hoffman Properties. His instructions were that this request was to the knowledge of Mr Matt Barnard, a representative of plaintiff, and that Barnard will be present at a meeting on Saturday 5 July 2008 when the R170 000,00 will be paid to a certain representative of Pulama. The defendant then transferred an amount of Rl 70 000,00 to the account of Hoffman Properties on Friday 4 July 2008. The defendant received instructions from Hoffman late afternoon on Saturday 5 July 2008 that the amount of R150 000,00 was paid to Kgoshi Maroga as partial payment of the purchase price and that the amount of R20 000,00 was paid to one Philemon in respect of commission on the

purchase agreement. He was informed that these payments were done in the presence of Mr Barnard. A further meeting was scheduled for Tuesday, 8 July 2008 for exchange of documents from the DME and payment of the amount of R830 000,00 to Pulama.

[11] On Monday 7 July 2008 the defendant transferred an amount of R830 000,00 to the account of Hoffman Properties upon Mr Hoffman's request. On Tuesday 8 July 2008 at the scheduled meeting place Hoffman and a friend Ricus van Zyl were murdered and robbed of the amount of R830 000,00. On Wednesday 9 July 2008 the defendant was informed telephonically by an employee of Hoffman Properties of the tragic events which occurred the previous day. The defendant testified that he investigated the agreement between the plaintiff and Pulama by meeting with the DME Polokwane on 23 July 2008 when it was confirmed that the deal was a scam by people purporting to be Kgoshi Maroga of Pulama.

[12] After the failure of the Pulama deal the plaintiffs representative, Mr Barnard, asked the defendant to find another supplier of chrome. The defendant found such supplier, namely Maruwa Investments. The defendant and one Mr Kal Rofail, an agent of Maruwa Investments, held a meeting with plaintiffs representatives, Messrs Sherpherd, Van Gaalen and Barnard at Brooklyn Coffee Shop in Montana, Pretoria on 1 September 2008. The defendant testified in respect of the meeting held on 1 September 2008 that upon his request as to how much commission he will earn, Barnard told him that the plaintiff will pay commission to him of R3 per ton, that is a total amount of R3 million.
That the commission was payable on the signing of the agreement between the plaintiff and Maruwa Investments.

[13] It is common cause that arising from the meeting held on 1 September 2008 the plaintiff

and Maruwa Investments signed an agreement for the purchase of one million tons of chrome on 10 September 2008.

[14] The discussion between the defendant and Mr Barnard in respect of the commission was to the exclusion of all the other parties at the meeting. According to the defendant the two of them discussed and agreed on the commission of R3 million during a smoking break.

[15] On 5 September 2008 the defendant transferred the balance of the initial Rl,5 million, ie R500 000,00 in his trust account, to the trust account of Van Gaalen Attorneys. Since 16 September the defendant made several undertakings to pay back the amount of Rl million to the plaintiff. In a letter to Van Gaalen Attorneys dated 16 September 2008 the defendant referred to the commission in the amount of R3 million due to him by the plaintiff and made a proposal for the parties to both write off their respective claims. Van Gaalen Attorneys rejected the defendant's offer on the same date.

[16] On 29 October 2008 Van Gaalen Attorneys sent a letter to the defendant and requested the defendant to sign an acknowledgement of debt attached to their letter and return the signed acknowledgement of debt before 17:00 on 29 October 2008. According to the defendant he ignored this letter and/or request seeing that he was not prepared to sign the acknowledgement of debt.

[17] The defendant testified that on 31 October 2008 Mr Sherpherd called him and shouted and cursed him, threatened the defendant's family, said he will send people to the defendant to break his legs and/or bones ("omjou bene te breek") and said he will make life very difficult for the defendant and his family if the defendant does not sign and send back the

acknowledgement of debt within ten minutes. The defendant then signed the acknowledgement of debt and sent it back to Sherpherd knowing that he may challenge the legality later seeing that the acknowledgement of debt was signed under duress. The defendant stated that since the signing of the acknowledgement of debt he made several undertakings to pay back the Rl million seeing that he regarded the threats as serious and that he just wanted to get this unfortunate incident behind him and still believed the plaintiff owed him R3 million.

[18] Mr Genie van Gaalen, the plaintiffs attorney, testified that he drafted the purchase and sale agreement which was signed by the plaintiff and Hoffman Properties on 17 June 2008. He confirmed that the advance amount of Rl,5 million paid into the defendant's trust account was to be held in the interest bearing account in terms of section 78(2)(A) of the Attorneys Act, 1979 by the defendant pending further instructions. That he did not instruct the defendant to pay out any monies out of his trust account before the conditions stipulated in the purchase and sale agreement were complied with. That the required documentation from DME were never received.

[19] According to Mr Van Gaalen the defendant told him that "Ek het die grootste fout vir julle gemaak" and promised to repay the amount. Van Gaalen drew up the acknowledgement of debt and sent same to the defendant for signature on 29 October 2008. The defendant never contacted him to inform him that he signed the acknowledgement of debt under duress.

[20] Mr Van Gaalen testified further that he drew up the purchase and sale agreement between the plaintiff and Maruwa Investments. He was present at a meeting held on 1 September 2008 at Montana, Pretoria, when the negotiations were held with representatives

of Maruwa Investments and the defendant. The issue regarding commission payable to the defendant was never discussed and that he received no instructions to stipulate any commission payable in this deal. He confirmed that Messrs Barnard and Sherpherd were present at that meeting.

[21] The evidence of Mr Van Gaalen is clear and straight-forward. He was not seriously attacked under cross-examination and his explanation as to the basis on which the monies were transferred and that it was paid out without the necessary instructions is accepted. Mr Van Gaalen's evidence as to the confession made to him by the defendant that the defendant admitted that he made a big mistake is accepted. Furthermore Mr Van Gaalen's evidence that the monies had to be paid into a separate trust account for investment purposes to carry interest is accepted. All in all he was a credible witness and his evidence is wholly accepted.

[22] Mr Matt Barnard was at all material times hereto the operations manager of the plaintiff. He was involved in some negotiations of the plaintiffs transactions, in particular the contract which was ultimately signed on 17 June 2008. He testified that he was aware of the terms and conditions that the monies held in trust by the defendant could only be paid out upon receipt of documentation from DME. No such documents were ever received by the plaintiff. He did not give any instructions to the defendant to pay out the monies to Hoffman Properties or Pulama. After the murder and robbery of Mr Hoffman the defendant confessed to him that he had made a big mistake by paying out the monies.

[23] Mr Barnard testified further that the defendant introduced Maruwa Investments to the plaintiff. He was also present at the meeting held at Montana, Pretoria, on 1 September 2008. According to him there might have been a discussion between him and the defendant

regarding payment of a commission but he did not conclude any agreement with the defendant in that regard. According to him he did not even have any authority to agree to a commission on behalf of the plaintiff.

[24] Mr Barnard stated that he was contacted by the defendant who informed him that he received an acknowledgement of debt from Mr Sherpherd and was called upon to sign same. He then advised the defendant to sign and said to him it is the right thing to do. He denied that the defendant told him of the threats made on the defendant by Mr Sherpherd.

[25] The evidence of Mr Barnard does not detract from the plaintiffs version. It is so that he could negotiate but not conclude agreements on behalf of the plaintiff. He could not have authorised the transfer of the monies out of the trust account. His version as to the advice that he gave to the defendant to sign the acknowledgement of debt is acceptable. His denial as to the conclusion of a commission agreement is accepted, not only for his mere say-so but due to the inherent improbabilities of the defendant's version as will be dealt with later hereunder.

[26] Mr Glenn Sherpherd, the managing director of plaintiff, testified. He confirmed the terms and conditions under which payment of the Rl,5 million had to occur with reference to the necessary clauses in the agreement. He stated that the plaintiff, as a purchaser, would never pay commission and that it is unlikely to agree to such commission when negotiating a fixed price. That Mr Barnard was never authorised to agree to a commission with the defendant. No commission was discussed at the meeting of 1 September 2008. Mr Sherpherd instructed his attorney, Mr Van Gaalen, to claim repayment of the amount of Rl million from the defendant. He stated that after the defendant had received the acknowledgement of debt from Van Gaalen the defendant called him to seek clarification on the collection charges and additional

charges inserted in the acknowledgement of debt.
He denied that he threatened and cursed the defendant in order to induce him to sign the acknowledgement of debt.

[27] Mr Sherpherd was an impressive witness and his version is accepted.

I proceed to deal with the version of the defendant. The defendant testified that Mr Barnard on behalf of the plaintiff was aware of the transfer of monies which is denied by Barnard. However the defendant concedes that he made a mistake by not getting direct authority from Mr Sherpherd or Mr Van Gaalen. It is common cause that Mr Barnard could negotiate but not conclude agreements, therefore he could not have authorised the transfer of the monies out of the trust account. In any event the mere awareness of Barnard could never be equated to consent and/or authorisation.

[29] Regarding the credibility of the defendant as a witness I must say that the defendant was not an impressive and credible witness. He was not straight-forward in giving evidence and was argumentative and even hostile while answering questions under cross-examination. He was so hostile towards plaintiffs counsel to an extent that the court had to now and then intervene and request him not to indulge in man-to-man confrontation with his cross-examiner. Even then he would argue with the court when the court tried to cool him down. All in all, the defendant rendered himself a poor witness on whose evidence the court will not rely.

[30] On his own version the defendant did not prove that the transfer of trust money was authorised. In fact he conceded that he made a big mistake.

[31] When it came to the acknowledgement of debt the following aspects appear and render his version improbable:

31.1 At the time when request was made by the plaintiffs attorney, Mr Van Gaalen, to have the acknowledgement of debt signed, it was clear from the correspondence and telephonic conversations that the defendant had already admitted his liability and that he had made several promises to pay the amount.

31.2 One would have expected the defendant, as an attorney of more than ten years experience, if he was not satisfied with the contents of the acknowledgement of debt, to write a letter to Van Gaalen Attorneys objecting to the signing thereof and to record his dissatisfaction with certain terms of the acknowledgement of debt.

31.3 The defendant is an attorney. He does not explain why he did not report the aspect of threats on his life to the police or launch and seek an interdict. His remarks in response are astonishing, i.e. that he thought that Mr Sherpherd would not have carried out his threats anyway.

31.4 The defendant states as one of the reasons why he signed the acknowledgement of debt that he knew that he could dispute the acknowledgement of debt later due to the threats. This does not make sense. Why would he at the time of signing harbor the intention of disputing it later because of the threat if he signed it under so-called duress in the first place? Why would he not feel threatened at a later stage? It is not clear as to at what stage he will become not threatened so as to raise this defence.

31.5 What we see is that even after the signing of the acknowledgement of debt he still continues to make promises to pay. Why not record the threats and convey same to the attorney of plaintiff or even the police?

31.6 In his letter to the Law Society dated 18 February 2009 wherein he responded to the

complaint lodged against him by the plaintiff the defendant does not initially mention the fact that he signed an acknowledgement of debt under duress. Only in his letter to the Law Society dated 25 March 2009 does he raise the allegations of duress for the first time. Furthermore the defendant was prepared to negotiate with Mr Sherpherd to have the charges at the Law Society withdrawn against him against payment.

[32] In the light of the above facts the defendant failed dismally to discharge the onus in respect of the allegations of duress pertaining to the signing of the acknowledgement of debt.

[33] It is noteworthy that the defendant made further promises to pay even after the signing of the acknowledgement of debt and even after the so-called threats on his life had ceased.
A J Kerr: The Principles of the Law of Contract, 6th edition on page 319 makes the following observation:
"If after the fear has been removed a person voluntarily performs what he promised under pressure or otherwise ratifies the transaction he is regarded as having given fresh consent and the transaction stands."

[34] In my view it does not matter whether the defendant signed the acknowledgement of debt under duress. He conceded that the payment of monies out of his trust account was unauthorised and as such the amount is due and payable to the plaintiff in any event. On pages 325 to 326 of the same authority Kerr refers to the English case of Barton v Amstrong & Others 1975(2) All ER (PC) 465 where it was held that a defence of duress will not prevail where the predominant reason for signing an acknowledgement of debt relates to an amount which was due in any event and for which the person signing accepted a liability.

[35] As to the defendant's testimony as to the alleged commission forming the subject-matter of his counter-claim I am of the view that the defendant also failed to discharge the onus on a balance of probabilities. It is clear that there is a denial of the actual conclusion of the commission agreement by all witnesses for the plaintiff.

[36] The following also point to the falseness and inherent improbabilities of the defendant's version of a commission agreement:

36.1 The failure of the defendant as an attorney to record the commission agreement in writing. This should be measured against the testimony of Mr Sherpherd that it was the policy of the plaintiff to record any such agreement in writing.

36.2 The defendant's version is that the discussion of commission with Mr Barnard was held during a smoke break away from the other parties present at the meeting. One asks oneself as to why the defendant would have discussed the commission during a smoke break and agree upon it away from the principal parties such as the plaintiff who was represented by the managing director (Sherpherd) and an attorney (Van Gaalen).

36.3 The failure by the defendant thereafter to inform the principal role-players and to record the conclusion of a commission agreement in an assertive manner. One would have expected him to record the full terms and conditions of payment, and how and where the agreement was concluded given the fact that the amount involved was a huge sum of R3 million.

[37] Having regard to the aforesaid I make a finding that the issue of commission was a trumped-up claim by the defendant in an attempt to avoid paying the claim of the plaintiff which he promised to pay right throughout. His version is inherently improbable and is rejected.

[38] I accordingly grant the following order:

(a) Judgment is granted in favour of the plaintiff and the defendant is ordered to pay the sum of Rl 240 953,36 plus interest at 8,7% per annum from 31 October 2008 to date of payment.

(b) The defendant's counter-claim is dismissed with costs.

(c) The defendant to pay the costs of the action on attorney and client scale as provided for in the acknowledgement of debt.

E M MAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH COURT

11959-2009

HEARD ON: 12, 13, 16 AND 23 APRIL 2012

FOR PLAINTIFF: ADVGM YOUNG

INSTRUCTED BY: VAN GAALEN ATTORNEYS

c/o McINTOSH CROSS & FARQUHARSON, PRETORIA

FOR THE DEFENDANT: IN PERSON