REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 2/9/2016
CASE NO: A158/16
REPORTABLE
OF INTEREST TO OTHER JUDGES

In the matter between:

FOCUS MINING SERIVICES CC

APPELLANT

and

JOUBERT HERMAN BENJAMIN

RESPONDENT

J U D G M E N T

MALI J and DAVIS AJ, concurring

[1] This appeal came before us from the Tshwane Central - Pretoria Magistrate's Court. The appellant had sued the defendant for payment in the amount of R100 000.00.

[2] The respondent was an erstwhile member of the appellant. In terms of a written agreement between the parties, the appellant was to pay certain monies to the respondent for the latter's loan account and membership.

[3] In paragraphs 7 to 11 of the respondent's particulars of claim the following is pleaded:

"7 The plaintiff received the last payment in terms of clause 2 of the agreement on

the 9th of December 2013. The abovementioned amount excluded the Plaintiff's 10% share of the R1, 000,000.00 (One Million Rand) as referred to in paragraph 5.

8 In terms of clause 4 of the Agreement the Plaintiff's exposure to the R1,000,000.00 (One Million Rand) constituted 10% of the share which amounts to R100, 000.00 (One Hundred Thousand Rand) that was retained in anticipation of possible civil claims against the Defendant referred to in clause 5.

9 All monies have been received from Atlas Copco as per clause 4. The agreement stipulates that the money in the shell company should be retained for a 3 (three) year period. The 3 (three) year period lapsed on 16 March 2014.

10 The matter under case number: 45569/09 referred to in paragraph 3 of the agreement has been finalised, alternatively should have reasonably been finalised, alternatively, is dormant and the parties thereto have no intention to finalise the dispute.

11 The amount of R100 000.00 is due by the Defendant plus interest from 16 March 2014 to date of payment."

[4] The appellant (defendant in the trial court) pleaded hereto as follows:

"6 AD PARAGRAPHS 7

The contents of this paragraph are denied as if specifically traversed, and the Plaintiff is put to the proof thereof.

7 AD PARAGRAPH 8

The contents of this paragraph are denied as if specifically traversed, and the Plaintiff is put to the proof thereof."

[5] In respect of paragraphs 9 and 10 of the particulars of claim the appellant has pleaded the same as in "Ad paragraph 8" above.

[6]The appellant's in respect to paragraph 11 of the respondent's plea is as follows:

10 AD PARAGRAPH 11

The contents of this paragraph are denied as if specifically traversed, and the Plaintiff is put to the proof thereof. The Defendant further pleads that on or about 18 December 2012, the Plaintiff signed a letter acknowledging and agreeing that neither party would have any further claims against one another nor would any monies be owed by one party to another. The Plaintiff simultaneously resigned from his positions and interests in the Defendant. A copy of this letter is attached hereto as annexure "PL1".

[7] It is common cause that the R 100 000 in question has been paid into the appellant's attorneys' trust account and has been retained therein since. In issue therefore was the respondent's entitlement to repayment.

[8] In **Mobil Oil Southern Africa (Pty) Ltd v Mechin 1965 (2) SA 706**

(A) the following was held:

"….. In the realm of contract this means that a plaintiff, relying on an agreement, bears the onus of alleging and establishing that it is binding and enforceable one and that what he claims is due (see para 633 of Wessels Law of Contract in South Africa 2nd end vol 1 and its quotation with approval in Serobe v Koppies Bantu Community School Board 1958 (2) SA 265 (O)at 271).

[9] In **NEW ZEALAND CONSTRUCTION (PTY) LTD V CARPET CRAFT 1976(1) SA,** Leon J stated at page 349:

" If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence 'calls for an answer' then, in such case, he has produced prima facie proof, and in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof If

a doubtful or unsatisfactory answer is given it is equivalent to no answer and the prima facie proof being undestroyed, again amounts to full proof '

One of the dangers in this approach is that it may in some cases come perilously close to placing an onus upon a defendant.

It is clear, however, that the modern tendency has been to move away from this piecemeal form of reasoning. In R. v. Sacco, 1958(2) SA 349 (N) at p. 352, HOLMES, J. (as he then was), suggested that the proper approach is to look at all the facts at the end of the case, including, if it be one of the facts, the absence of an explanation. But the fundamental question is still whether the party who bears the onus has discharged it, the absence of an explanation being no more than a circumstance to be taken into account in arriving at a conclusion. Sacco's case has been followed in a number of cases including some in the Appellate Division. Among these may be cited: Arthur v. Bezuidenhout and Mieny, 1962(2) SA 566 (AD) at p. 574A; S. v. Sigwahla, 1967(4) SA 566 (AD) at p. 569H; Norwich Union Fire Insurance Society Ltd. v. Tutt (2), 1962(3) SA 996 (AD); S. v. Snyman, 1968(2) SA 582 (AD) at p. 589H, and Levy, N. 0. v. Randalia Assurance Corporation of South Africa Ltd., 1971(2) SA 598 (AD) at p. 600H.

In Arthur v. Bezuidenhout and Mieny, supra, OGILVIE-THOMPSON, J.A., dealt with this question as follows:

'But assuming that the defendant has in evidence tendered an explanation, it is, in my judgment, inappropriate to split up the enquiry regarding the proof of negligence into two stages. In my view there is no need to resort to what HOLMES, J. in R. v. Sacco, 1958(2) SA 349 (NJ at p. 352, called 'piecemeal processes of reasoning. '

There is, in my opinion, only one enquiry, namely: has the plaintiff, having regard to all the evidence in the case, discharged the onus of proving, on a balance of

probabilities, the negligence he has averred against the defendant?'

I am of the opinion that the principle to which I have referred in Goosen v. Stevenson, supra, must be taken to be qualified by the modern approach to this subject. The Court must have regard to the totality of the evidence in deciding whether the plaintiff has discharged the onus which rests upon it. One of the factors to which regard may be had is that the defendant has not given evidence. Another factor to which regard may be had is that the question in issue, i.e. Constable's authority, is a matter peculiarly within the knowledge of the defendant. Finally it must be borne in mind that this case depends entirely upon circumstantial evidence. The inference to be drawn from a defendant's failure to give evidence where the case depends upon circumstantial evidence will depend upon all the circumstances of the case including the strength or weakness of the plaintiff's case and the ease with which the defendant could meet it. (Cf. S. v. Mthetwa,1972(3) SA 766 (AD) at p. 769C)."

[10] The argument on behalf of the appellant is that the trial court misdirected itself in finding that the plaintiff/respondent had successfully proven that the amount of R100.000.00 was due.

[11] It is not in dispute that the respondent would be entitled to the repayment of the amount of R100 000.00 if it had not been utilised in the litigation for which it was intended,

[12] The trial court found as follows:

"I therefore believe that partial integration has taken place and the Plaintiff has not waived his right to claim the R100 000.00 The next issue which has to be considered is whether the amount is payable. Plaintiff in his particulars allege that the matter under case number 45569/09 referred to in paragraph 3 of the agreement has been finalized, alternatively should have reasonably been finalized,

alternatively, is dormant and the parties thereto have no intention to finalize the dispute.

Plaintiff testified that he was not aware of the outcome of the matter and was not in a position to find the outcome as he was not a party to the matter. Plaintiff further confirmed that he did not enquire from the defendant as to the status of the matter.

It is clear that Plaintiff would not be in a position to testify to the status of the matter and it is for the defendant to allege that the amount is not payable, which was never done.

This court can only conclude that the full R100 000.00 is payable as no evidence to the contrary has been provided. "

[13] As indicated in the trial court's judgment above the appellant closed its case without tendering any evidence. The argument submitted on behalf of the appellant is that the respondent was provided with a case number he could have followed up the matter on his own. I do not think so, if the appellant was of the view that it had no obligation to explain in at least on one sentence to the respondent, that litigation was still ongoing, then the plaintiff should not be expected to follow up the litigation which was between the defendant and a third party.

[14] The respondent contended that the litigation had become dormant and was not proceeded with. In view of the effluxion of a period of three years, this is an ultimately reasonable inference. In view of the absence of an explanation by the appellant with clear knowledge of the status of the litigation, this inference becomes the only reasonable one on a balance of probabilities.

[15] In respect of the other defence relied on by the appellant, namely the letter referred to in paragraph 10 of its plea, the respondent stated that this letter was only in respect of other or future profits of the appellant and was not a waiver of his existing claims. This

contention appears to be correct as the appellant had, almost a year after the letter, calculated the portion of the proceeds of the Atlas Copco matter to which the respondent was entitled and paid it to him. In an explanatory e-mail the appellant had stated that this payment "was due" despite the existence of the letter.

[16] Having regard to the above and the totality of the evidence tendered in the trial court, I find that the Magistrate did not misdirect herself in finding that the respondent had discharged the onus that the payment was due.

[17] In the result I make the following order:

15.1 The appeal is dismissed with costs.

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N.P. MALI
JUDGE OF THE HIGH COURT

_____

N.DAVIS
ACTING JUDGE OF THE HIGH COURT
I agree and it is so ordered.

Attorneys for the Appellant:	Adv J. C. BOTHA
Instructed by:	YAMMIN HAMMOND INC
Counsel for the Respondent:	Adv J. J. HATTINGH & R. A. ARCANGELI
Instructed by:	TIAAN JOUBERT ATTORNEYS
Date of Hearing:	29 August 2016
Date of Judgment:	02 September 2016