



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A23/2015

DATE OF HEARING: 19/10/2016

DATE OF JUDGMENT: 21/10/2016

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

SIGNATURE

DATE

In the matter between:

INSULATION THERMAL ACOUSTIC SECURITY

COMPANY (PTY) LTD

FIRST APPELLANT

STRITAS (PTY) LTD

SECOND APPELLANT

and

SOUTH AFRICAN POST OFFICE LIMITED

RESPONDENT

JUDGMENT

BAM AJ

- [1] This Court has been called upon to answer the question whether the court *a quo* was correct in granting absolution from the instance upon application by the defendant at the close of the appellants' case.
- [2] In this case, the court *a quo* had granted absolution from the instance on the grounds that the appellants had failed to prove the existence of a contract between themselves and the respondent. The judge specifically states that: "*Now from the evidence it is clear that until a very late stage there is no allegation that there was ever a contract*". This cannot be because the entire case of the appellants is based on what they allege is the existence of a contract. In fact the appellants pleaded three causes of action in the alternative, these being a written contract, an oral agreement and the application of quasi-mutual assent.
- [3] In the court *a quo*'s judgment, there is no indication at all as to whether the two alternative causes of action were considered because reference is made only to the signature of the CEO. The court concluded that since there was no evidence that the CEO signed the contract, there can be none to speak of. It was on this basis that the court found for the respondent.
- [4] It is so that the primary basis for contractual liability under South African law has always been and still remains consensus *ad idem* as determined through the rules relating to offer and acceptance. It is also an accepted principle of our law

that the existence of a contract or an agreement can be proven in other ways beside the production of a written and/or signed document.

[5] In allowing the appeal to this court the judge *a quo* confirms that he did not quite deal with the issue of quasi-mutual assent and it is our view that he must be afforded the opportunity to do just that. A further reason, other than the court's concession already stated, is because upon perusal of the documents filed of record in this matter, we are of the view that the appellants have got an answerable case. It is essential that the respondent is given an opportunity to place its case or response before the court so that the causes of action, as put forward by the appellants can be addressed and a determination made in relation to them.

[6] It is not for this court to venture into the merits of the arguments between the parties and we heed the caution by Schreiner JA in *Gafoor v Unie Versekeringsadviseurs (Edms) BPK 1961 (2) SA 335* at 340 D that:

"on appeal it is generally right for the Appellate Tribunal, when allowing an appeal against an order granting absolution at the close of the plaintiff's case, to avoid, as far as possible, the expression of views that may prematurely curb the free exercise by the trial court of its judgment on the facts when the defendant's case has been closed."

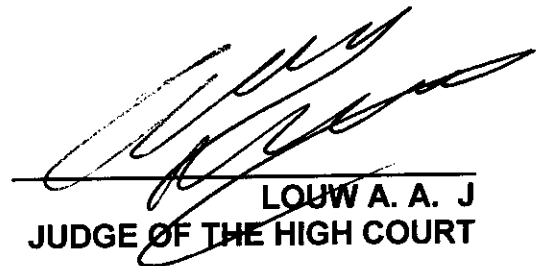
[9] In the premises, the following order is made:

- (a) The appeal ^{is}~~be~~ upheld with costs.
- (b) The order of the court *a quo* is hereby set aside and replaced with an order that absolution from the instance is refused.
- (c) The case is remitted to the trial court for finalization.



BAM AJ
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered



LOUW A. A. J
JUDGE OF THE HIGH COURT

I agree and it is so ordered



RANCHOD J
JUDGE OF THE HIGH COURT

Counsel for the Appellants : H C BOTMA
Instructed by : MICHAEL SALOMON ATTORNEYS

Counsel for Respondent : H F JACOBS SC
Instructed by : MAHLANGU INC.

Date of Hearing : 19 October 2016
Date of Judgment : 21 October 2016