IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 13697/2012

Date: 6/12/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

6-12-2016 _____
DATE SIGNATURE

In the matter between:

LUCAS FERREIRA **PLAINTIFF**

Versus

ZTE SOUTH AFRICA (PTY) LTD **RESPONDENT**

REASONS FOR ORDER GRANTING ABSOLUTION FROM THE INSTANCE

TOLMAY, J:

[1] In this matter I granted absolution from the instance at the close of Plaintiff's case and ordered the Plaintiff to pay the costs. I stated that I will provide reasons in due course. These are my reasons for doing so.

[2] Plaintiff instituted action against the Defendant for payment of US$985 000-00. This claim, according to the amended particulars of claim, is based on an oral agreement.

[3] In the particulars of claim the terms of the agreement are set out as follows:

"3.1 The relevant express, alternatively implied, alternatively tacit terms of the agreement were as follows:

3.1.1 The Plaintiff would supply the defendant with information relating to the existing cell phone tower infrastructure in South Africa to assist the Defendant with the building of its own infrastructure. This information included the following:

3.1.1.1 The location of sites where existing cell phone towers were situated ("the site")'

3.1.1.2 The site ID;

3.1.1.3 The owner of the site;

3.1.1.4 The name of the site.

3.1.2 The Plaintiff would supply the information to the Defendant in less than fourteen days;

3.1.3 The Defendant would effect payment to the Plaintiff in the amount of US$20 000-00 before the plaintiff supplies the Defendant with the information.

3.2 On or about 25 July 2011 the parties, represented as aforesaid amended the terms of the oral agreement at Johannesburg, as follows:

3.2.1 The Defendant would effect payment to the Plaintiff in the amount of US$20 000-00 as deposit;

3.2.2 The Plaintiff would first supply the Defendant with the information, where after the Defendant would immediately effect payment of the balance of the amount of US$1 000 000-00

[4] Plaintiff testified and during his evidence he said that the agreement was concluded towards the end of May 2011 and all that was discussed was that he would supply data to the Defendant at an agreed price of US$1 000 000-00.

[5] The date of the agreement given during evidence contradicts his pleadings including his answer to the particulars of claim which stated that the date was 20 July 2011.

[6] The evidence revealed more contradictions. In an email dated 23 August 2011 in which Plaintiff resigned and which he sent to Mr Haishi and Mr Fuentes, he made it clear that the agreement was never

intended to be between himself and Defendant but between two companies that still had to be formed. He acknowledged, in fact, that Defendant did not have the power to conclude the very contract that he pleads. Moreover, his email makes the point that an agreement still had to be concluded after it had been reduced to writing. It emerged from cross-examination that no agreement had ever been reduced to writing nor had the two companies been formed with a view to concluding the agreement as anticipated in the aforesaid email.

[7] Plaintiff tried to clear this up under cross-examination saying that the version given in his email was the contract that the parties had finally agreed upon after it had undergone an evolution process. The version in his 23 August 2011 email however bears absolutely no resemblance to the pleaded contract.

[8] The date of the meeting in the Chinese restaurant where the contract was supposedly concluded is not as pleaded ie. 20 July 2011. In the 23 August 2011 email it was said to have happened during May 2011. In a letter of demand dated 17 November 2011, sent by his attorneys, it was said to have happened a month later on 20 June 2011. In the particulars of claim the date was a month after that, ie. 20 July 2011. During evidence Plaintiff reverted to the May/June 2011 version which is not his pleaded case.

[9] Plaintiff's pleaded case is that Defendant was personally represented in the Chinese restaurant by three people, namely Mr Haishi, Mr Fuentes and Mr Song. The evidence however was that there were only three people in the restaurant, namely Mr Haishi, Mr Fuentes, and himself. Mr Song was not at the restaurant.

[10] Plaintiff's pleaded case is that he *sold* and *delivered* information to Defendant for US$1 million which information included the location of cellphone towers and details of the owners of those towers. In evidence he conceded that the information would only be useful to Defendant or Cell C if it contained details of the owner of the tower because it was with the *owner* that a co-location lease agreement needed to be concluded.

[11] The documents discovered by Plaintiff under Rule 35(3) purporting to be the data that he provided to Mr Haishi and Mr Fuentes provides absolutely no detail at all about who the owners of the cellphone towers are. If that was indeed the information that he was obliged to supply and did supply, it did not meet the pleaded terms of the contract which Plaintiff himself alleged needed to be met.

[12] Plaintiff's pleaded case is that he supplied this information on 29 July 2011. The evidence however is that on 10 June 2011, Plaintiff

apparently asked Mr Haishi for a down payment because he had already delivered the required information. It is irreconcilable that he could have delivered the information on 29 July 2011 if he was already asking for down payment pursuant to delivery on 10 June 2011.

[13] It is apparent that Plaintiff sought payment pursuant to giving the information to Defendant from the affidavit that he deposed to in the rescission application coupled with the transcript of the SMS exchanges between himself and Mr Haishi.

[14] When these discrepancies and other discrepancies around Plaintiff's muddled chronology were probed, his answer was "I am not good with dates" and "these are details that are irrelevant to me".

[15] Plaintiff's pleaded case is that on 25 July 2011 the agreement concluded in the Chinese restaurant was amended to the extent that Defendant had agreed to pay him a deposit of US$20,000.

[16] In his email of 23 August 2011, Plaintiff states that Defendant agreed to give him a down payment of R1,5 million upon the production of the information and the balance (in today's terms approximately R13 million) would be provided if the data proved to be correct after being tested on

a cluster of sites. In his attorney's letter of demand dated 17 November 2011, the terms had changed to a US$150,000 down payment but there was no longer any mention of testing on a cluster of sites as a prerequisite for the payment of the balance. Finally, and after three attempts at particulars of claim, it is pleaded that the agreed deposit was US$20,000.

[17] Apart from the inconsistency in versions, it became apparent from Plaintiff's own Rule 35(3) discovery that the US$20,000 was never a down payment for the information sold. It was a personal loan made by Mr Haishi to the Plaintiff. In the SMS's exchanged between Plaintiff and Mr Haishi, he informs Mr Haishi on 6 August 2011 that he will repay the money as soon as the ZTE deal is concluded. He reaffirms this by saying "I made it very clear... I will pay you back". He also says in a different SMS "...I will pay you back as promised". Interspersed between the SMS's is Mr Haishi confirming that he gave money to Plaintiff as a "personal loan" from his "personal funds" and that he wanted to be repaid.

[18] Under cross-examination Plaintiff was unable to explain why he agreed to repay the money if it was a down payment or deposit because down payments do not, by definition, need to be repaid. When it was put to him that only loans get repaid, he could not provide an answer.

[19] The test for absolution was set out in the following terms:

> *"When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff."*[1]

[20] Harms JA, added to the ***Claude Neon* test** in ***Gordon Lloyd Page & Associates vs. Rivera & Another*** by saying about the test that:

> *"This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff... As far as inferences from the evidence are concerned, the inferences relied upon by the plaintiff must be a reasonable one, not the only reasonable one... Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice".*[2]

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[1] *Claude Neon Lights (SA) Ltd vs. Daniel* 1976 (4) SA 403 (AD) at 409G-H
[2] 2000(4) SA 241 (A) at 243B

[21] The issue in this case is thus whether Plaintiff has placed sufficient evidence before the trial court relating to all the elements of his pleaded case to reasonably justify concluding that a court could or might find for him.

[22] I am of the view that the Plaintiff has dismally failed the *Claude Neon* test as amplified by Harms JA. It is necessary to look at the case that he pleaded and then evaluate his evidence against the pleaded case. The question is whether Plaintiff has done enough to persuade a court that he might or could get a judgment in his favour. I am of the view that he did not succeed in doing so. No court could find that he proved the agreement between him and the Defendant. The different versions made it impossible to find for him.

[23] Questions of credibility are not normally investigated at this stage of the proceedings, except, as the case law tells us "where the witness has palpably broken down, or where it is clear that what they have stated is not true".[3]

[24] I am of the view that in this case it was appropriate to investigate the question of credibility. The Plaintiff did not impress as an honest

[3] *Leo vs. Geldenhuys* 1910 TPD 980 and *Gaffoor vs. Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340D-E; *Ruto Flour Mills (Pty) Ltd vs. Adelson* 1958 (4) SA SA 307 (T); *South Coast Furnishers CC vs. Secprop 30 Investments (Pty) Ltd* 2012 (3) SA 431 (KZN) at 439D-E.

witness. Not only did he give totally different versions about the terms of the alleged agreement, but he was unable to satisfactorily explain these contradictory versions. The data that he pleaded he had to provide was not the data he testified that he did supply, nor did it contain the information that he pleaded it did.

[25] For all the above reasons I was of the view that there is no possibility that a Court could find for the Plaintiff.

R G TOLMAY
JUDGE OF THE HIGH COURT

DATE OF HEARING:	18 NOVEMBER 2016
DATE OF JUDGMENT:	6 DECEMBER 2016
ATTORNEY FOR PLAINTIFF:	VAN DER MERWE & ASSOCIATES
ADVOCATE FOR PLAINTIFF:	AND C M RIP
ATTORNEY FOR DEFENDANT:	BOWMAN GILFILLAN INC
ADVOCATE FOR DEFENDANT:	DV K HOPKINS