

THE HIGH COURT OF SWAZILAND

NEDBANK (SWAZILAND) LIMITED

Plaintiff

And

FREDERICK G.J.D. OOSTERGETEL

Defendant

Civil Case No. 164/2005

Coram: S.B. MAPHALALA - J

For the Plaintiff: Advocate H.B. MARAIS

(Instructed by Robinson Bertrams)

For the Defendant: MR. P.M. SHILUBANE

JUDGMENT

(On an exception) (12/08/2005)

[1] In this action, the Defendant has delivered an exception to the Plaintiffs Particulars of Claim (as amplified by further particulars), in which he contends that such Particulars of Claim does not disclose a cause of action. The grounds advanced thereof are the following:

(i) The contract on which the Plaintiff relies as set out in paragraph 11 of Plaintiffs Particulars of Claim is between Plaintiff

and Business Systems networks (Pty) Ltd (BNS) and not the Defendant; and

(ii) There is no valid and binding contract between Plaintiff and Defendant because Defendant's conditional settlement was not accepted by Plaintiff.

[2] The material portion of the Plaintiffs Particulars of Claim (read with its further particulars) contain the following allegations:

"11. On or about the 25th day of January 2001 a repayment arrangement was agreed upon between Mr. Southey, representing the Plaintiff and BSN, whereby the sum of E500 000-00 (Five Hundred Thousand Emalangeni) would be repaid over a six (6) year period through monthly payments of E5, 000-00 (Five Thousand Emalangeni). A copy of a letter dated 6 February 2001 from the Defendant on a letterhead of BSN is attached hereto marked annexure "F". Vide paragraph 11 on page 9 of the pleadings. Vide annexure "F" page 56 of the pleadings.

12. On the 16th day of August 2002, the Defendant accepted liability in his personal capacity for the amount of E500 000-00. A copy of the Defendant's letter is annexed hereto marked "G".

[3] The relevant portion of annexure "G" reads: "Accordingly I wish to confirm as follows:

1. I accept liability in my personal capacity for an amount not more than E500 000-00 on the understanding that the claims in respect of this debt are ceded to me personally and that no further amounts are owed by Business Systems & Networks (that is BSN) and Office Systems (Pty) Ltd to Nedbank".

[4] The Plaintiff confirmed the agreement by way of a letter dated the 3rd September 2002 attached thereto marked annexure "H" where at paragraph 1 thereof the following is stated:

"1. We accept your proposal to pay E500, 000-00 in full and final settlement of both companies indebtedness to the bank. However, we do not accede to your proposal that we discharge Business System and Networks from its obligation but agree to discharge Office Systems (Pty) Limited)".

[5] It was contended for the Defendant in support of the exception as follows:

3.1 The contract which Plaintiff relies upon appears at page 5 of the combined summons (record page 8). It is alleged therein that the contract was between "Plaintiff and 1st Defendant" where in fact there is no 1st Defendant.

3.2 The alleged agreement set out in paragraph 9 is between Plaintiff and Business Systems and Networks (Pty) Ltd (see record page 54) and the reply to Plaintiffs request for further particulars at page 83 - 84 of the record.

4.1 As regards the alleged agreement in paragraph 11, the correspondence is on BSN letterhead and the writer thereof states clearly that the agreement was still to be formalized (record page 56)

4.2 The Plaintiff agrees that the agreement was between Plaintiff and BSN (record page 84) which is a contradiction between what is alleged in the further particulars and the Particulars of Claim...

5. Defendant makes an offer to pay the amount due to Plaintiff (record page 58). However, this offer was not acceptable to the bank (record page 60).

6. The parties were never at ad idem as to who was liable for the amount claimed by Plaintiff (record page 61). In the premises, it will be submitted that the Plaintiffs exception be upheld with costs.

[6] Advocate Marais advanced au contraire arguments the essence of which is that the Defendant's arguments ignore the contents of paragraph 14 of the Plaintiffs Particulars of Claim as well as that of annexure "I" annexed thereto. The import of the said paragraph is that the Defendant initially implemented the agreement referred to in paragraphs 12 and 13 of the Plaintiffs Particulars of Claim ("the Defendant's agreement") by making payments in terms thereof. The Defendant subsequently renegades on the Defendant's agreement by failing and/or refusing and/or neglecting "to pay any further instalments as per the agreement The Defendant has effected as many as nine payments to the Plaintiff totalling E57, 886-70 pursuant to the Defendant's agreement ("the nine payments").

[7] The argument further continues that, notwithstanding demand by the Plaintiff to the Defendant of which annexure "I" to the Plaintiffs Particulars of Claim, was one example, the Defendant has only made the nine

payments and failed to make any further payments, which allegations have the effect that the Defendant accepted the limited acceptance by the Plaintiff of the conditional settlement and implemented the agreement in terms whereof he had undertaken to pay the sum of E500, 000-00 to the Plaintiff in instalment.

[8] To support the Plaintiffs case the court was referred to the following decided cases Net & others NNO vs McArthur and others 2003 (4) S.A. 142 (T) at 149 E - G; Collen Vs Rietfontein Engineering Works 1948 (1) S.A. 413 (A) at 429 - 430; Seeff Commercial and Industrial Properties (Pty) Ltd vs Silberman 2001 (3) S.A. 955 (SCA) at 958 A -1; Commaile vs Steyn 1914 C.P.D. 1100 at 1103 and Timoney and King vs King 1920 A.D. 133 at 141.

[9] Advocate Marais further submitted that in the event the court rules in favour of the exception, he urged the court to thereafter grant the Plaintiff leave to amend its Particulars of Claim.

[10] After considering the pleadings filed of record and all the arguments advanced for and against the exception, it appears to me that the position adopted by the Defendant is the correct one. I say so for a number of reasons. Firstly, in the contract which Plaintiff relies upon at page 5 of the combined summons (record page 8) it is alleged therein that the contract was between "Plaintiff and 1st Defendant" where in fact there is no 1st Defendant. Secondly, the alleged agreement set out in paragraph 9 is between Plaintiff and Business System and Networks (Pty) Ltd and the reply to Plaintiff request for Further Particulars at pages 83 - 84 of the record. Further as regards the alleged agreement in paragraph 11, the correspondence is on Business System and Networks letterhead and the writer thereof stated. Clearly that agreement was still to be formalized. Thirdly, Plaintiff agrees that the agreement was between Plaintiff and Business System and Networks (Pty) Ltd which is a contradiction between what is alleged in the Further Particulars and the Particulars of Claim. Fourthly, Defendant makes an offer to pay the amount due to Plaintiff. However, this offer was not acceptable to the Plaintiff which replied in annexure "H" as follows:

(i) We accept your proposal to pay E500, 000-00 in full and final settlement of the (sic) both companies indebtedness to the bank.

However we do not accede to your proposal that we discharge Business Systems and Networks from its obligations but agree to discharge Office Systems (Pty) Limited

[11] Clearly, from the above excerpt the parties were never at ad idem as to who was liable for the amount claimed by Plaintiff. The argument by the Plaintiff that Defendant conditional accepted the agreement by paying the nine monthly instalments cannot be sustained on two grounds. First, the argument is premised on an assumption that it was the Defendant who physically made these payments on his own account where there is no evidence to suggest that. In fact the evidence gleaned from the pleadings suggests otherwise. Annexure "H" and "I" attest to this state of affairs. In the former at paragraph 3 thereof it is stated as follows:

"The payment amounts mentioned in 2 above total of £400, 000-00 over 60 months, the balance of E100, 000-00 is required to be settled within 12 months thereafter. Please make all payments into the account of Business System and Networks (Pty) Limited

[12] Secondly, nowhere in the Plaintiffs pleadings is it averred that Defendant's liability is based on his conduct in paying the nine instalments.

[13] For the above reasons therefore, the exception taken ought to succeed. However, before making a final determination in regard thereto it behoves me to examine the Plaintiffs final argument that in the event that I rule against it, I ought to grant Plaintiff leave to amend its papers. It would appear to me that if I were to accede to this request Plaintiff would have a "second bite at the cherry", as it were. Further particulars were sought by the Defendant for such clarification. The Plaintiff then filed a reply, which as it has been shown above has not clarified the confusion. In this regard I decline Plaintiffs plea to be granted leave to amend its summons.

[14] In the result, the exception is upheld with costs.

S.B. MAPHALALA

JUDGE