Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No: CA 283/2014
Date Heard: 15/05/2015
Date Delivered: 14/10/15

In the matter between:

WALTON BRUINTJIES First Appellant

EVELINE BRUINTJIES Second Appellant

and

SONJAR ETHWAR Respondent

JUDGMENT

MALUSI, AJ

[1] This is an appeal against the judgment granted by the Magistrate's Court for the district of Albany, held at Grahamstown in terms of which the appellants were ordered to pay the respondent a sum of R48 500.00 resulting from a breach of contract.

[2] The facts that gave rise to the dispute are largely not in dispute. The first appellant and the respondent concluded an oral partnership agreement.

They agreed to conduct a tavern business on an immovable property owned by the second appellant.

[3] The respondent financed the renovation of the immovable property and provided some fixtures and fittings. For reasons that are immaterial in this appeal, the relationship between the first appellant and the respondent soured. They agreed to dissolve the partnership and approached an attorney to draw an agreement with terms of the dissolution.

[4] The material terms of the signed dissolution agreement were that:

4.1 The finance provided by the respondent was valued in the sum of R50 000.00.

4.2 The first appellant would repay the sum of R50 000.00 by way of monthly instalments of R3000.00 commencing on 1 December 2009.

4.3 The second appellant provided her immovable property as security for fulfilment of the first appellant's obligations to the respondent.

4.4 In the event of breach by the first appellant, the respondent would first exhaust his remedies against the first appellant and the second appellant would be liable for any shortfall.

[5] The first appellant was in breach of the agreement as he only paid R1500.00 at the end of December 2009. The respondent issued summons against both appellants for breach of contract.

[6] The appellants' plea contended that the agreement was signed under duress. The defence to the material terms of the agreement was a denial that the renovations amounted to R50 000.00. It was alleged they amounted to R1240.00. It was further contended the respondent was over compensated when he removed property of the appellants valued at R15 630.00. It was pleaded the security by the second appellant was provided as a result of a misrepresentation by the respondent. It was denied that the appellants were in breach or in default of the agreement.

[7] During the trial, the respondent testified regarding the background to the agreement. He gave evidence regarding the circumstances at the time the agreement was signed. He gave a detailed account how he had come up with the value of R50 000.00. He was cross-examined at length about the value of the renovations and the interpretation of the agreement at the time of signing.

[8] The attorney who drew the agreement, Mr Wolmarans also testified. He gave evidence regarding what he ordinarily would do when clients sign an agreement as he could not recall specific details. He denied any duress on

the appellants by anyone. Under cross-examination only the alleged failure to explain the agreement and duress prior to signing was dealt with.

[9] The first appellant testified regarding the background to the agreement. He testified that he signed the agreement believing it provided that the value of the renovations was R3000.00 payable in monthly instalments of R1500.00. The belief was based on what the respondent said the agreement provided before the parties attended at Wolmaran's office. He never read the agreement nor did Wolmarans explain it to him. Under cross-examination the first appellant disavowed his founding affidavit in the application for rescission which gave a version contrary to his evidence in the court *a quo.*

[10] The second appellant gave evidence that she is illiterate. She was unwell on the day of signing the agreement and it was not explained to her. She testified that she was ignorant about the agreement. Under cross-examination she testified the first appellant, the respondent and Wolmarans were talking amongst themselves and she was not involved in the discussion.

[11] On appeal, it was submitted on behalf of both appellants that there was a unilateral error or mistake on the part of the first appellant. It was

further submitted that the second appellant was not liable at this stage as she signed what was termed a conditional surety.

[12] It is trite that the purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It has been held that it is not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case. The only exception is where the issue in question has been canvassed fully by both sides at the trial.[1]

[13] Ms Watt, on behalf of both appellants, correctly conceded that the defence of unilateral error or mistake was not raised in the plea. She submitted that the defence was fully canvassed at the trial and in those circumstances the failure to raise it in the plea was not fatal.

[14] I do not agree. I have summarised the evidence in the preceding paragraphs in greater detail than I would ordinarily. The purpose is to show that the error or mistake defence arose only when the first appellant testified. It was never put to the respondent nor to Wolmarans. It was dealt with fleetingly in cross-examination and not in any detail. The reason appears in the respondent's attorney address wherein she submits that it is one of "ancillary defences". At no stage did the first appellant's attorney

[1] *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 11 and 12.

pertinently draw his opponents and the court *a quo's* attention that this was the first appellant's main defence. Nor was an amendment of the pleadings sought.

[15] It has been held it is impermissible to plead one particular issue and to then seek to pursue another at the trial.[2] I am of the view that it will prejudice the respondent to allow the defence of unilateral error or mistake. The appellants should be held to their pleadings. It is clear that the first appellant has to fail as he has disavowed the defence in his plea. His appeal ought to be dismissed.

[16] Even if I were wrong in my conclusion above, I am of the view that there is no merit in the first appellant's appeal. Before a court may adjudicate on a defence proffered it must decide whether to accept the evidence supporting such a defence or not. The court *a quo* was faced with two mutually destructive versions regarding the circumstances leading to the signing of the agreement and other ancillary issues. The Magistrate did not follow the long standing approach of our courts in resolving these factual disputes as encapsulated in *Stellenbosch Farmers Winery* case.[3] He concentrated almost exclusively on the probabilities.

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[2] *Minister of Agriculture and Land Affairs v De Klerk* 2014 (1) SA 212 para 39.
[3] *SFW Group Ltd and Another v Martell et cie and Others* 2003 (1) SA 11 para 5.

[17] It is manifest on the reading of the record that the respondent was a far more credible witness than the first appellant. He appeared to be candid and honest with the court on various aspects. He gave his evidence in convincing detail. There were no apparent contradictions in his evidence. His version of events was cogent. He was reliable as his evidence on signing was corroborated by the general approach which Wolmarans says he normally follows. He did not waiver at any stage under cross-examination. The Magistrate correctly found that the probabilities heavily favoured the version of the respondent.

[18] The first appellant's version contradicted his plea wherein it was alleged there was duress. He could not recall various pertinent aspects giving the impression he was not candid with the court. He contradicted his earlier affidavit on material aspects. I gained the distinct impression that his version about the unilateral error was a recent fabrication. His version ought to have been rejected as false by the Magistrate. In these circumstances there would be no basis to consider a defence of unilateral mistake or error by the first appellant.

[19] The situation is quite different with the second appellant as different considerations are applicable. It is manifest on para 4.3 and 4.4 above that the agreement provided for an indemnity surety by the second appellant.

[20] An indemnity surety has been identified as a special kind of surety wherein the surety by the terms of the contract with the creditor undertakes to do no more than indemnify the latter against the shortfall or loss which she or he may sustain through the inability of the debtor to perform his or her obligations.[4] The liability of the surety is only for a shortfall which is to be calculated after the creditor has exhausted his or her remedies against the debtor.

[21] It is clear on the evidence that the respondent had not exhausted his remedies against the first appellant. He prematurely initiated the action against the second appellant at the same time as the first appellant. His course of action against the second appellant has not yet matured as no shortfall has arisen in the uncompleted action against the first appellant. There is no merit in the submission by Mr Voultsos on behalf of the respondent that this court should have regard to what transpired after the default judgment was earlier granted by the court *a quo*. No evidence is before us and the default judgment was rescinded.

[22] It appears to me to be fair and just that the costs should follow the result. No submissions to the contrary have been made by counsel.

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[4] *Fedbond Nominees (Pty) Ltd v Meier* 2008 (1) SA 458 (C) at 467 B.

[23] In the circumstances and for the above reasons, the following order issues:

23.1 The appeal by the first appellant is dismissed with costs.

23.2 The appeal by the second appellant is upheld with costs.

23.3 The order by the court below with regard to the second appellant is set aside and replaced with an order in the following terms:

"The plaintiff's claim against the second defendant is dismissed with costs".

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T MALUSI
Acting Judge of the High Court

Tshiki J: I agree.

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PW TSHIKI
Judge of the High Court

Appearances:

Counsel for the appellant's, Adv KL Watt, instructed by Neville Borman & Botha

Counsel for the respondent, Adv L Voultsos, instructed by Leon Keyter Attorneys.

Date Heard: 15 May 2015

Date Delivered: 14 October 2015