

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

CASE NO: 206205/2013

15 NOVEMBER 2023

FHD VAN OOSTEN

In the matter between

NGUBANE ZEELIE INC

PLAINTIFF

and

LABAT AFRICA LTD

FIRST DEFENDANT

**SOUTH AFRICAN MICRO ELECTRONIC
SYSTEMS (PTY) LTD**

SECOND DEFENDANT

SAMES PROPERTIES (PTY) LTD

THIRD DEFENDANT

BRIAN VAN ROOYEN

FOURTH DEFENDANT

J U D G M E N T
(LEAVE TO APPEAL)

VAN OOSTEN J:

[1] The unsuccessful defendants now seek to leave to appeal against the whole of my judgment and order in favour of the plaintiff. For the sake of ease of reference, the nomenclature of the parties as in the action is retained.

[2] The application for leave to appeal, in essence, is premised on 3 grounds, first that the amount of the judgment is incorrect, second, that I erred in not 'simply' granting judgment in the sum of 'no more' than R227 853,53, interest thereon at the rate of 18% per annum from 30 April 2013 until date of final payment, and costs on the Magistrate's Court scale, and third, that I erred in holding that the defendants admitted liability in any amount (the first, second and third grounds of appeal).

[3] For a better understanding of the context in which I propose to consider the grounds of appeal, it is first necessary to refer to some background events relating to the involvement of counsel during the course of the trial, prior to and subsequent to the delivery of judgment.

[4] The point of departure is the defendants' application for absolution from the instance, which in a separate judgment, was dismissed with costs reserved. In the judgment I mentioned (para 2) that it was contended by counsel for the plaintiff 'that it was undisputed that the amount of R577 081.89, plus interest, was due and owing to the plaintiff by the defendants'. Upon the hearing resuming, counsel for the defendants indicated that no witnesses would be called to testify and the case for the defendant was closed. I requested both counsel to file heads of argument, and I was given to understand that the time limits for delivery thereof, would be arranged by mutual agreement between counsel. Counsel for the plaintiff duly filed heads of argument. For present purposes, it is necessary to refer to the argument raised in the plaintiff's heads of argument concerning the amount judgment was sought for. It was submitted that 'it is undisputed that the amount of R577 081.89, plus interest at a rate of 18% per annum, calculated from 30 April 2013 to date of final payment', is payable in terms of the acknowledgement of debt of the indebtedness made by the defendants as pleaded in paragraphs 24 to 31 of the amended particulars of claim. The aforesaid amount being calculated by utilising the claim in the amount of R890 168.20 and deducting the amount of R313 086.27'.

[5] No heads of argument however, were forthcoming from defendants' counsel, and I accordingly directed that the matter be enrolled for oral argument. Upon resumption of the hearing, counsel for the defendants confirmed that no heads of argument had been filed and further, without prior notice, informed the court, that no argument would be presented on behalf of the defendants. Moreover, no notice was given

thereof prior to the hearing. Counsel for the plaintiff was called on to present argument but elected to stand by the heads of argument which had been filed. The nett effect hereof was that no oral argument was presented, and that counsels' assistance to the court in preparing for and delivering judgment, consisted of only the plaintiff's heads of argument.

[6] Judgment was delivered and the application for leave to appeal thereafter filed. Surprisingly, the grounds relied upon in support of the application for leave to appeal, included grounds of appeal 1 and 2: both uniquely novel. This was the very first occasion during the course of the trial, having run on-and-off for some 14 months, for these contentions to be raised. Moreover, I was not at any time requested by counsel for the defendants to grant judgment for a lesser amount.

[7] On my request both counsel prepared and uploaded heads of argument in respect of the application for leave to appeal. Upon consideration of the plaintiff's heads of argument, I noted that the contentions in defendant's heads of argument, regarding the second ground of appeal (Cf para 8.2 of defendants' heads of argument and the reference thereto in para 4 of the plaintiff's heads of argument) were not responded to at all. I accordingly requested counsel for the plaintiff to prepare supplementary heads of argument on the defendants' reliance on the second ground of appeal. In the plaintiff's supplementary heads of argument which were subsequently filed, counsel for the plaintiff set out in detail, the computation of the amount claimed by the plaintiff. Counsel then proceeded to state:

'15. It is respectfully submitted that the submissions made to the Honourable Court in the heads of argument by the Plaintiff at the closing of the action wherein it was alleged that the amount due as at 30 April 2013 was the amount of R 577 081.89 was unfortunately incorrect as the amount was calculated utilizing the full claim amount and subtracting the invoices that were issued after 31 December 2011, ignoring the fact that the interest calculations in respect thereof also had to be reversed.

16. It is respectfully submitted that these submissions were not intentionally and/or mala fide presented to the Honourable Court and were not intended to mislead the Honourable Court but was in fact an oversight in the calculations by the Plaintiff for purposes of the argument.'

[8] For the reasons set forth in my judgment (para 42), an order was made in favour of the plaintiff, for payment of an amount of R577 081.89, interest thereon, and costs on the attorney and client scale.

[9] In argument before me, I engaged defendants' counsel on the absence of any arguments tendered on the amount set out in the plaintiff's heads of argument for which judgment was sought, which of course included the ground of appeal that I 'simply' should have granted judgment in a lesser amount. Counsel attempted to explain the absence of arguments on counsel's belief, bravely optimistic I am constrained to add, that the defendants would eventually be the successful parties. The less said about this unbecoming contention, the better. Counsel then sought to shift the total responsibility for identifying and proving and deciding the issues squarely on the plaintiff and the court respectively. The argument is fallacious in over-simplifying, if not totally ignoring, the duties of counsel in pursuing the interests of his clients, and at all times rendering assistance to the court.

[10] Counsel for the plaintiff sought a correction by the court of the erroneous amount, in terms of Rule 42(1)(b). The error in calculation was not that of the court but exclusively made by counsel for the plaintiff. The rule, accordingly, does not apply. The fact of the matter is that it is common cause that the judgment amount is incorrect. The judgment amount remains in dispute. Although much can be said and has been said above concerning counsel for the defendants' lack of contributing to what has now belatedly been raised as a dispute, at a time when it was eminently opportune to do so, I consider it in the interests of justice that leave to appeal ought to be granted, in regard to the judgment amount.

[11] It remains to consider the third ground of appeal, which in essence directs the focus on the merits of the matter. I have fully dealt with the merits of the plaintiff's main and alternative claims in my judgment. I am not persuaded that reasonable prospects of a successful appeal exist. Counsel for the defendants submitted that in the event of leave to appeal on the amount being granted, the matter as a whole ought to be re-considered by the court adjudicating the appeal. I do not agree. The absence of reasonable prospects of a successful appeal on the third ground of appeal, in my view, determines the fate of the application for leave to appeal on the third ground of appeal.

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

1. Leave to appeal to the Full Court of the Gauteng Local Division of the High Court is granted against only the judgment amount reflected in para 1 of the order.
2. The costs of the application for leave to appeal shall be costs in the appeal.

**FHD VAN OOSTEN
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION**

COUNSEL FOR PLAINTIFF

PLAINTIFF'S ATTORNEYS

ADV AR VAN DER MERWE

GERARD CULHANE ATTORNEYS

COUNSEL FOR DEFENDANTS

DEFENDANTS' ATTORNEYS

ADV HB MARAIS SC

DOUGLAS BENNETT INC

***DATE OF HEARING
DATE OF JUDGMENT***

***13 NOVEMBER 2023
15 NOVEMBER 2023***