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

**CASE NO. A193/2021**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

17 NOVEMBER 2022

_____ _____

DATE SIGNATURE

In the matter between:

**UNDERBERG DAIRY (PTY) LTD** **APPELLANT**

And

**THE DAIRY BOYS (PTY) LTD** **1ST RESPONDENT**

**BRONWEN KILLIAN** **2ND RESPONDENT**

**STUART GALLOWAY** **3RD RESPONDENT**

**JUDGMENT**

*Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 November 2022.*

**MOTHA AJ**

## INTRODUCTION

1. The appeal before us emanates from Justice Khumalo's judgment, which was handed down on 25 May 2020. Having been refused leave to appeal and following the petitioning of the Supreme Court of Appeal, on 19 May 2021, the Appellant was granted leave to appeal to the full Court of the Gauteng Division of the High Court, Pretoria.

2. Stripped to its bare bones, this appeal is about two issues, namely:

(a)Whether the Court *a quo* arrived at the correct decision in concluding in paragraph [26] of the judgment that "the Plaintiff also closed its case without leading any evidence in rebuttal."

(b) Whether the Court *a quo* arrived at a correct decision in concluding in paragraph [62] of the judgment that the Respondents had "*refuted on a balance of probabilities that any amounts can still be owing to the plaintiff*";

*a fortiori* the Appellant was not entitled to a judgment in its favour.

**THE FACTS**

3. The facts are elucidated in the Court *a quo's* judgment. In brief, the Appellant is a private company duly incorporated in accordance with the Laws of the Republic of South Africa. It supplied mozzarella cheese to the First Respondent. The First Respondent is also a private company duly incorporated in terms of the Laws of the Republic of South Africa. The Second Respondent is a major female and director of the First Respondent. She indicated that the First Respondent repurposed bulk cheese into smaller packaging and then sold it to the public or consumers. Finally, the Third Respondent is a major male and former director of the First Respondent, and also happens to be the father of the Second Respondent.

4. The court *a quo* summarised the Appellant's claims as follows:

4.1 The Appellant's "*…claim is for the payment of R493 000 plus interest for goods it alleges to have supplied to the 1st Defendant, the Dairy Boys Pty Ltd ("Dairy Boys"), at the latter's special instance and request during the period July 2016 to August 2016 ("the debt period") for which Dairy Boys together with the 2nd and 3rd Defendants as guarantors are jointly and severally liable and have refused to pay notwithstanding demand."*

4.2 The Appellant "*…,a KwaZulu Natal company, is a supplier of cheese. Underberg commenced supplying cheese to Dairy Boys, a Gauteng based*

*business, on credit in terms of a verbal agreement it concluded with Dairy Boys' sole shareholder and Director, Bronwen Kilian (Kilian), the 2nd Defendant during July 2016. The amount Underberg is claiming is constituted of a number of invoices that it alleges Dairy Boys failed to settle in full. Underberg alleges that the terms and conditions of their verbal agreement were on 5 September 2016 reduced to writing in the form of a written credit facility agreement it concluded with Dairy Boys."*

**THE ISSUES**

5. The *fons et origo* of the issue identified under paragraph 2(a) is that by agreement between the parties the Defendant bore the duty to begin. It is common cause that the Second and Third Respondents appended their signatures to the agreements between the parties that were before the court *a quo*. Therefore, they carried the burden to refute or disprove their consent to be bound by the terms of the agreements. Consequently, they assumed the duty to begin and prove their defence.

6. In his opening address in the court *a quo*, Counsel for the Appellant stated the following:

"But it seems now that the defendants in fact signed these documents so the parties initially agreed that the duty to begin should be on the plaintiff, but in an instance…and it is trite that where a contract was signed by parties and then there is a confession… an avoidance that the duty to begin would then rest on the person who tries to avoid the consequences of this contract, and that is why we have agreed that my learned friend will start."

7. As a result of this agreement, at the close of the Respondents' (defendants') case the Appellant was confident to ask for judgment. At paragraph 26 of the Judgment, the Court *a quo* held the following:

> *"The Plaintiff also closed its case without leading any evidence in rebuttal. Mr Vorster argued that the evidence of the Defendant is of such poor quality that a judgment must be entered in favour of the Plaintiff. On the question of the agreements he argued that both agreements are signed by Kilian and Galloway, who have failed to convince the Court why they are not to be bound by them. Following the text of the heading in the credit facility agreement there is a name which binds all directors to the subtext. It is not only Annexure A that is a guarantee, but the whole document is a guarantee; see clause 3 of the terms and condition of credit facility. The Defendants being bound by the contract, they have failed to rebut the prima facie proof of their indebtedness which is accordance with the contract is proven by a certificate of indebtedness."*

8. The Appellant vehemently denied that it closed its case. Counsel for the Appellant submitted that a Court cannot close a party's case nor compel it to close it. He insisted that the Appellant only sought a judgment on a specific issue being whether the Respondents discharged the onus, at least *prima facie*, of putting up a defence. At paragraph 1.7 of the Appellant's leave to appeal the following is stated:

"The Court should either have granted judgment after the defendants closed

their case, or the Court should have refused the application for judgment, and allowed the plaintiff to adduce evidence in rebuttal of the defendants' defence."

That passage was the basis of the appeal before us.

9. I pause to point out that a distinction needed to have been drawn between the Respondents' (Defendants') onus to disavow the agreements, despite having signed them and the onus on the Appellant (Plaintiff) to prove the Defendants' indebtedness. In as far as the agreements are concerned it was correct to place the duty to begin on the Defendants. However, on the issue of the Respondents' indebtedness the Appellant (Plaintiff) still bore the onus to prove its case. The conflation of the two resulted in this undesirable outcome. The issue of the indebtedness could not be disposed of by simply relying on the contested certificate of balance.

**THE LAW**

10. It is trite that the standard of proof in civil cases is on a balance of probabilities. The burden of proof in its primary sense was referred to in *Pillay v Krishna and Another,*[1] where the Court held:

> "…*The duty which is cast on a particular litigant, in order to be successful, of finally satisfying the court, that he is entitled to succeed on his claim, or defence, as the case may be, and not in*

[1] 1946 AD 946

*the sense merely of his duty to adduce evidence to combat a prima facie case of his opponent.*[2]

11. Referring to Schuster v Geuter 1993 SWA 114 with approval, the Court in *Scheepers v Video & Telecom Services*[3] held the following:

> *"In case where the onus rests upon the plaintiff a defendant is entitled to ask for absolution from the instance at the close of plaintiff's case on the ground that he has failed to make out a prima facie case. Such a decree, if granted, will not be in the nature of a final judgment between the parties, and the plaintiff will be able to institute fresh proceedings on the same cause of action. Where, however, the onus is on the defendant, there is no room for a decree of absolution from the instance, and any judgment given must be a final judgment as between the parties. The distinction between the two is obvious and in Schuster v Geuter 1933 SWA 114 Van Heerden J held that it was not competent for a plaintiff in a matter where the onus was on the defendant to move for judgment at the end of the defendant's case without closing his own case."*[4]

12. To the extent that the Appellant insisted on its position being analogous to the position of a Defendant applying for an absolution from the instance at the close of a Plaintiff's case, it is incorrect.

[2] Supra at 952-953
[3] 1981(2) SA 490 (ECD)
[4] Supra at 491

13. To further clarify the legal position, I can do no better than to refer to the Court *a quo's* judgment on leave to appeal, in paragraph 3 thereof, where it was stated:

> *"It is of utmost importance to point out that if the Defendant adduces evidence first, either because he bears the burden of proof or because by reason of an admission or presumption like in casu, the duty to adduce evidence is on him, there can be no question of absolution from the instance being granted. See Scheepers v Video & Telecommunications Services 1981 (2) SA 49OE at491H-492A; Arter v Burt 1922 AD 303 at 306 and Hirschfeld v Espoch 1937 TPD 19. Therefore, absolution from the instance when the burden is on the Defendant is an unviable proposition."*

14. In paragraph 5 of the leave to appeal judgment of the court *a quo*, the Court further stated the following:

> *"If the Defendant fails to discharge the burden of proof or the duty to adduce evidence, the proper order would be judgment for the Plaintiff. Arter supra at 306. Earlier cases where such absolution was granted were to be regarded as incorrect; see Erasmus Superior Court Practice D1-534.*

*Furthermore, where the onus is on the Defendant, the court cannot, after the Defendant has led evidence, give judgment for the Plaintiff, unless and until the Plaintiff has closed its case. See Schuster v Geuther 1933 SWA 114."*

15. Counsel for the Appellant argued that this matter is distinguishable in that a concession was made on the pleadings, however, the Respondents wanted to avoid the consequences of such a concession by stating that there was a different agreement, which was never produced.

**ANALYSIS**

16. During his opening remarks in the court *a quo*, Counsel for the Appellant submitted the following:

"I might just also indicate to Your Ladyship that if Your Ladyship finds that the contract was in fact entered into between the parties and that they are bound by the terms of that contract then the matter might take a completely different …the nature of the dispute might change because there is also a certificate of balance which was signed by the representative of the plaintiff, which in terms of that agreement serves as *prima facie* proof of the indebtedness, and that would then obviously, M'Lady, influence the incidents of onus because the parties also agreed that the plaintiff bears the onus. But if Your Ladyship finds that there is a valid contract between the parties and there is a certificate of balance then obviously the onus would

not be on the plaintiff, that is a factual inquiry, it would in fact be on the defendant M'Lady."

17. A proper analysis of this opening address leads to an ineluctable conclusion that the onus to prove the indebtedness remained with the Appellant (Plaintiff), save where the certificate of balance was accepted as a *prima facie* proof. Underscoring this point was Counsel for the Appellant's submissions that witnesses would be called to testify on the creation of pro forma tax invoices and the delivery. In short, to prove the indebtedness.

18. Under cross-examination Counsel for the Appellant put to the Second Respondent the following:

"And there will be evidence on behalf of the plaintiff that this is in fact the orders that you have placed. You have placed these orders, not anyone else. You have placed these orders and that is why these pro-forma tax invoices were generated. Do you deny that? When the witness comes and testifies that you have placed these orders for which these invoices were generated, the person who is going to testify is Deborah Lee, is it…and Steve as well. They are both going to testify that you placed these orders.

MS KILLIAN: Okay."

19. As a further indication that the Appellant intended to call witnesses, he put the following:

"MR VORSTER: Yes, but that was never communicated to the plaintiff. Now I put it to you that the evidence would be that for each and every invoice which is claimed an order was placed by your company and goods were delivered to your company. All of those goods were delivered. That will be the evidence from the plaintiff's witnesses and if you respectively signed for it. Your company did receive it. Do you want to respond to that? Do you want to comment on that?
MS KILLIAN: No."

20. Finally, he put to the witness the following:

"MR VORSTER: Now the evidence from the plaintiff's witness would be that we have made ten payments in total. Would you dispute that? Would you want to go and verify because I am sure you have access to your bank account, you can see how many payments.

MS KILLIAN: To that specific …no, I do not have access to that Nedbank account anymore.

MR VORSTER: But if they are going to testify that it is ten payments would you place that in dispute? Would you say they are wrong?

MS KILLIAN: I cannot say, I cannot say no. I genuinely do not know and I

genuinely cannot remember, it was three years ago."

21. Based on these submissions it could not have been the intention of the Appellant to close its case. In fact the issue was never canvassed nor dealt with. A final judgment could not have been given without making a ruling on the admissibility of some of the evidence. To illustrate this point it would be prudent to refer to the interaction between the Court and the Appellant.

22. During re-examination of the Second Respondent a disagreement emerged on the admissibility of a question put to the witness. Failing to resolve the issue on the spot, the Court and the parties stated the following:

"MR VORSTER: Yes, that question was put. M'Lady, can I propose that we resolve it in this manner. I would argue the admissibility of this evidence whether you should consider this at the end of the case then perhaps proceed and I will not entertain Your Ladyship with interlocutory matters.

COURT: I agree with that.

MS RAYMOND:May it please you M'Lady. M'Lady I do not know whether my witness has answered her question fully.

COURT: But the indication is …[intervenes]

MS RAYMOND: I understand M'Lady, at the end we will have to argue the admissibility."

23. The admissibility of this evidence was never argued nor ruled upon. After the closure of the Defendants' case and during the address by the Appellant, the Court *a quo* hit the nail on the head when it made the following apt remarks:

"COURT: Whilst you are still on that note. The defendant had the onus to discharge on this point of the contract. Let us say we agree that they failed to discharge this onus, now that was not the only issue that was between the parties, however that point was the main issue, that is why they had the duty to begin.

Now with the other issued of indebtedness where the onus now was on the plaintiff, are you saying that must be decided in favour of the plaintiff on the basis of the evidence that has been given and with submissions that are made that it cannot be relied upon?"

24. This was a clear acknowledgement that the Appellant had not closed its case and consequently still needed to adduce evidence to prove the Respondents' indebtedness. The failure to address and argue the admissibility of the evidence concerning the re-examination as stated, supra, is a further indication that the Appellant had not closed its case. Accordingly, the Court *a quo* misdirected itself in concluding that the Appellant had closed its case.

25. The Court *a quo's* conclusion in paragraph [61] of the main judgment that "*It is therefore cannot be found that an enforceable guarantee agreement came to pass between the parties notwithstanding the error*" was not dispositive of the matter. The issue of indebtedness could not be dealt with without hearing the Appellant's evidence, if it chose to present any. Accordingly, the Court misdirected itself in concluding in paragraph [62] of the main judgment that:

> "*With no evidence to counter Killian's evidence which was without any material contradictions or inconsistences and from which it is apparent that no amount could still be owing to Underberg, her version must stand. She has refuted on a balance of probabilities that any amounts can still be owing to the Plaintiff."*

26. In terms of Section 19 of the Superior Courts Act 10 of 2013 this Court is empowered to remit this matter back to the Court of the first instance for further hearing of the matter.

27. Accordingly, this matter is not complete as was pointed out by the Court *a quo,* at the end of the proceedings, by stating in discussions before the court *a quo* adjourned the following:

"I indicated that I would need to consider the arguments that have been made by counsel. Now I understand that it might not be the end of the

matter, or it might be the end of the matter and as a result it will be treated as such that it is sort of pending or not pending and the parties then will be informed as soon as I am ready with the judgment."

**COSTS**

28. On the issue of costs, it is trite that a Court's discretion is a wide and unfettered one. The following must be kept in mind when dealing with the issue of costs:

> *"The basic rule is that, statutory limitations apart, all costs awards*
>
> *are in the discretion of the court (Kruger Bros & Wasserman v Ruskin **1918 AD 63** at 69, a decision which has consistently been followed). The court's discretion is a wide, unfettered and equitable*
>
> *one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives)."*[5]

[5] Intercontinental Exports (Pty) Ltd v Fowles (85/98) [1999] ZASCA 15; [1999] 2 All SA 304 (A) (23 March 1999) para 25

**ORDER**

In the result, the following order is made:

1. The appeal is upheld;

2. The matter is remitted to the Court *a quo* for further evidence;

3. Costs are to be costs in the cause.

_____

**MOTHA AJ**

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Date of hearing: 19 October 2022

Date of judgment: 17 November 2022

I agree

_____

M. LUKHAIMANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered

_____

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

**Appearances:**

For the Appellant: Adv. A. Vorster

(Instructed by: Savage Jooste & Adams Inc.)

Email:magdelvb@savage.co.za

Tel: (012) 452-8200

For the Respondents: Adv. A.A. Raymond

(Instructed by: Phosa Loots Inc. Attorneys)

Email: helen@phosalootsatt.co.za

Tel:(012) 991-3122