8-9-70

G.P.-S.33967—1968-69—1,000.

J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(Provincial Division.)
(Afdeling. Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

HESEKIAH MOTHIBE PITJE *Appellant,*

versus

GALLO AFRICA LTD. *Respondent*

Appellant's Attorney Cooper & Sons
Prokureur vir Appellant

Respondent's Attorney Lewis Bloch, Wyn & C
Prokureur vir Respondent

Appellant's Advocate W. J. van der Merwe
Advokaat vir Appellant

Respondent's Advocate N. F. Feldman
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op 2 — 3 — 1971

2 — 4 — 6 — 7 — 9

CORAM: VAN BREDA, TRUTER, J.J.A., DIAMOND, MILLER, et KOTZÉ, W.J.A.

APPELLANT: 9.47 AM - 1.55 PM.

RESPONDENT: 2.04 PM - 2.40 PM
2.52 PM - 4.04 PM
4.22 PM - 5.15 PM

(T.P.A.)

HEARING: 5.15 PM - 5.46 PM

C.A.V.

Kotzé W.J.A. Die appèl word toegestaan en die uitspraak van die Hof a quo word verander na een ten gunste van die eiser vir 'n bedrag van R500-00.

Van Breda A.R. Die kostebevel wat in hierdie appèl gemaak word, is dat die respondent die koste van die verhoor in die hof a quo, asook die koste van die appèl, moet betaal met uitsondering van een helfte van die uitbetalings en honoraria ten opsigte van die voorbereidings en maak van die stukke van appèl, en van die ondersoek en nasien daarvan. Dit word ook beveel dat die prokureur van appellant die helfte van die uitbetalings en honoraria onder genoemde hoofde nie van die appellant, sy kliënt, mag verhaal nie; dit volg dat vir sover betaling aan hom reeds geskied het die nodige verrekening gedoen sal word.

GRIFFIER.
22.3.1971

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HESEKIAH MOTHIBE PITJE Appellant

and

GALLO AFRICA LIMITED Respondent

CORAM: VAN BLERK, JANSEN, JJ.A., DIEMONT, MILLER et KOTZÉ, A.JJ.A.

Heard: 2.3.1971. DELIVERED: 22.3.1971.

J U D G M E N T

KOTZÉ, A.J.A. : -

This is an appeal from a judgment of Trengrove, J., in the Transvaal Provincial Division in which he decreed absolution from the instance at the conclusion of the case of the defendant, now the respondent, to whom I shall refer as the defendant. The plaintiff (now the appellant) to whom I shall refer as the plaintiff, instituted action against the defendant for damages for breach of contract.

The plaintiff conducts business inter alia

as/.....

as a theatre owner under the style of Thebu Cinema in the bantu township of Mamelodi near Pretoria. The defendant is a company which manufactures and distributes gramophone records, musical instruments and electrical appliances. The plaintiff alleged in his particulars of claim that during September, 1967, and at its business premises at 33 Kerk Street, Johannesburg, the defendant represented by one Evans or one Bopape or one Sam Alcock verbally agreed to arrange for a group of entertainers, known as the Mahotella Queens and Mahlatheni (hereinafter referred to as "the group") to conduct two performances at his theatre against payment of R100-00 for each performance. The dates which I shall call the "disputed dates" were 25th October, 1967 and 26th November, 1967. The plaintiff further alleges that the defendant breached the agreement by failing to provide the performances and that as a result he suffered damages in the sum of R5,000-00.

The defendant in its plea denied the conclusion of the agreement, that Evans, Bopape or Alcock acted on its behalf and denied that the plaintiff sustained any damage. To these denials the defendant coupled an explanation that

Alcock negotiated on his own account for the conclusion of an agreement more or less as pleaded by the plaintiff. In the alternative the defendant pleaded that in the event of it being held that Alcock did act as its agent, negotiations did take place between Alcock and the plaintiff for the holding of two performances by the group, that Alcock required the payment of a deposit, that he further required that the agreement be reduced to writing before it became binding, that the plaintiff rejected the last-mentioned two requirements and accordingly that no agreement ensued.

It was contended in argument on behalf of the plaintiff that on a strict interpretation of the plea the authority of Evans, Alcock and Bopape was not placed in issue. It is not necessary to deal with this contention since the trial Judge records in his judgment that it was agreed between the parties that the authority of Evans and Alcock certainly was in issue. It follows that the appeal must be dealt with on the same basis. The learned Judge summarised the issues at the end of the evidence as being:

(a) Whether Evans or Alcock had authority to contract on behalf of defendant;

(b) Assuming that either Evans or Alcock had such authority whether a contract was concluded as alleged by the plaintiff;

(c) Whether a breach of contract was committed and, if so, whether the damages claimed were in the contemplation of the parties and amounted to the sum claimed.

The learned Judge held that the plaintiff failed to establish on a preponderance of probability that Evans or Alcock had authority to contract on behalf of the plaintiff and that the contract relied upon had been concluded. The learned Judge did not deal with the issues set out under (c) of the preceding paragraph.

At the trial the plaintiff testified on his own behalf whilst Evans and Alcock testified on behalf of the defendant. Evans as at the date of the trial had served the defendant company for a period of 24 years. At all times relevant to the dispute he was the sales manager of the records division of the defendant. It is part of the defendant's business to record musical performances by musicians and to sell records. Each member of the group was at all material times

contractually bound to the defendant to attend at such places and times as the defendant might determine for the purpose of making recordings exclusively for the defendant. The agreement in no way hinders the group from providing live performances on its own account. Such activities were normally organised and arranged by its manager, Alcock - the person already referred to. As a rule a manager of a company of artists such as the group has a financial arrangement with his artists. Alcock, however, on his own evidence received no renumeration for the services which he rendered to the group. He gave his services free for the love of music and earned his living by serving the defendant as talent scout and promotor. As at the date of trial he had been in the employ of the defendant for a period of 17 years. In his capacity as promotor it was inter alia his duty to publicise and market the defendant's gramophone records.

It is not in dispute that prior to June, 1967, the plaintiff on occasions did engage the group to give performances at his theatre. On each occasion he made the necessary arrangements with Alcock and paid him for their services. The group regularly fulfilled its undertaking until

on an occasion during or just prior to June, 1967, it allegedly neglected to appear at the theatre to render an agreed performance. A discussion in which at least the plaintiff and Evans participated ensued. It was agreed that the group would make amends by providing a performance at the plaintiff's theatre without cost to the plaintiff. The free performance was held on Sunday the 30th July, 1967. It appeared in evidence at the trial that the only recompense received by the group for this gesture was "a free recording session" provided by Evans. After conclusion of the arrangement the plaintiff received a letter dated 19th June, 1967 from Evans. The letter on defendant's note paper had as heading "MAHOTELLA QUEENS" and reads as follows:

> "I have had a discussion with Rupert Bopape and Sam Alcock in connection with the Mahotella Queens appearing at the Thebu Cinema.
>
> Apparently Rupert Bopape had a conversation with you and it is agreed that the Mahotella Queens will appear at the Thebu Cinema on Sunday 30th July from 1.00 to 5.00 p.m.
>
> Posters will be run off by Gallo (Africa) Limited, and delivered to you by either Sam Alcock or Rupert Bopape.
>
> To avoid any further confusion, it would be appreciated if you would make no bookings with artists except through this office, which will

ensure that artists are not double booked.

We sincerely appreciate any inconvenience caused, but we trust the reappearance of the Mahotella Queens will be to your satisfaction."

The letter terminated as follows:

"Yours sincerely,
GALLO (AFRICA) LIMITED."

Then follows the signature of Evans above the typed words: -

"R.H. EVANS.
SALES MANAGER - RECORD DIVISION."

The evidence in regard to the events which preceded the writing of the above letter is confusing. The plaintiff stated in evidence in chief that Evans wrote this letter to him after an interview on the 19th August at which he complained that the group had failed to appear for an agreed concert and at which they agreed upon a free performance in settlement. The plaintiff manifestly was mistaken about the date and upon his attention being focussed on the date of the letter the plaintiff explained that it was written after an earlier interview which took place between Evans and himself. At this interview he formed the impression that the group belonged to the defendant and, he stated, Evans at no stage indicated to him that the group did not work for him. The version given by Evans in his evidence in chief, was that he met the plaintiff

when/.....

when he called at his office at defendant's premises to complain about the failure of the group to fulfill an engagement at his cinema. He placed the event as having taken place in July, 1967. He later corrected this upon being referred to the date of his letter to the plaintiff and stated that the date must have been shortly before the 19th June. Evans continued his evidence in chief by saying that he then sent for Alcock and Bopape who arrived whilst the plaintiff (who was accompanied by his son) was still present. A dispute arose as to whether the group had in fact been booked for a concert and whether or not a deposit had been paid to ensure the appearance of the group. He (Evans) suggested to Alcock as manager of the group that a free performance should be staged at the plaintiff's cinema. Alcock after some reluctance agreed and a date was fixed. He thereafter wrote the letter of the 19th June to confirm that the discussion had taken place and that the group would appear on a definite date. He was referred to the second paragraph of the letter and he varied his evidence that a date was fixed in his presence. He then stated:

"Well/.....

"Well, possibly what could have happened was the original discussion took place in my office and the finality of the date could have been discussed outside."

It is necessary at this point to revert to the plaintiff's evidence: -

On the 29th June, 1967 he acknowledged receipt of the letter of the 19th June in a letter marked "ATTENTION MR. H. EVANS" and addressed to the Sales Manager, Gallo (Africa) Ltd., P.O. Box 6216, Johannesburg - the correct postal address of the defendant. In answer to a leading question not objected to the plaintiff proceeded to say that on the 19th August, 1967 he was at Evans's office. Mr. Evans gave his assurance that "from now onwards there will be no difficulty with the Mahotella Queens". In the presence of Evans, Alcock, Bopape and his son he arranged a booking for the group to perform at his cinema on the disputed dates. Mr. Evans made the arrangements himself. There was no discussion in regard to the amount payable and the method of payment. On preceding occasions he paid Alcock a sum of R100-00 in cash after each performance.

Nothing of significance happened hereafter until on the 13th October, 1967 the plaintiff received an undated typed letter from the Bamahotella Entertainment Music Society, c/o Galle (Africa) (Pty.) Ltd., 33 Kerk Street, Johannesburg. Although not signed the name S. Alcock appears in type at the foot of the letter above the word "Manager". It is not disputed that the letter was sent at the instance and on behalf of Alcock. The letter reads: -

> "I am instructed by the above-mentioned society to let you know that the dates you asked for have now been given away, ie. 25th Oct., and 26th Nov., 1967.
>
> Since our last discussion with you, you never responded in any way. We have been waiting for the deposit to secure the artists but all in vain. As these artists are public entertainers, we have been bound to let other people have the dates."

According to the plaintiff he reacted to this letter by telephoning Evans on the day of receipt and by addressing and posting letters to Alcock and Evans on the 16th and 17th October, 1967 respectively. In the telephone conversation he expressed his surprise to Evans at having received Alcock's letter, reminded him of the dates and requested his

comments mentioning to him that he held him responsible. In reply Evans assured him that he would communicate with Alcock and see to it "that he puts the whole thing straight".

The letter dated 16th October, was addressed to -

THE MANAGER MR. S. Alcock,
MAMAHOTELLA ENTERTAINMENT MUSIC SOCIETY,
c/o GALLO AFRICA (PTY.) LTD.
33 KERK STREET,
J O H A N N E S B U R G .

It reads: -

"Dear Mr. Alcock,

I have received your unsigned and undated letter.

I have made arrangements with you personally, as the Manager of the "Mahotella Queens and Mahlathini". I hereby wish to inform you that due to the arrangement between you and I for the dates Twenty-fifth Oct., and Twenty-sixth November, 1967, I have already printed Posters and stills and have started advertising for the said shows.

I do not understand what you are talking about when you mention responded. In the past I have always paid you cash without deposit. If on the other hand you have changed your terms which terms was in the past simple cash after the show, then do inform me by return of post what do you want me to do!

Please note that I am continuing to advertise the shows of which you and your group are for sure expected to turn up on the dates arranged."

The letter dated 17th October, marked "ATTENTION: MR. R.H. EVANS", was addressed to -

THE SALES MANAGER,
GALLO AFRICA (PTY.) LTD.,
P.O. BOX 6216,
J O H A N N E S B U R G .

It reads:

"Dear Sir,

Greetings.

RE: BOOKINGS MAHOTELLA QUEENS & MAHLATHINI
25th Oct., & 26th Nov. '67.

Following our telephonic discussion Re- the above matter on the 13/10/67, when you promised to call Mr. Alcock and find out what his problem was regards the above dates which were booked in your office on the 19/8/67.

Having not heard from you I take it for granted that everything is in order.

Thanking you.
Yours faithfully.
(sgd.) ....
.....
H.M. PITJE."

The plaintiff was cross-examined at length during the course of which he stated that he met Evans on two occasions and he repeated that arrangements for the performances on the disputed dates were made on 19th August, 1967. After continued cross-examination the witness became thoroughly confused and eventually stated that the meeting of 19th August was the first he ever had with Evans. In fact he was led to suggest at one stage that there was only one meeting. The learned Judge

interposed a reference to the letter of the 19th June and suggested that the first meeting must have been somewhere in June. The plaintiff referred to a possible telephone conversation with Evans but eventually said: "As far as the date is concerned I am not sure, I couldn't tell at this stage." At the end of the cross-examination the learned Judge in questioning the plaintiff returned to the question of the date. The plaintiff reiterated that the arrangements for the October and November performances were made at a meeting on the 19th August. The questioning proceeded as follows: -

> "Yes, but how did that meeting come about?
> That meeting of the 19th of August?
> Yes. --- It was - I can't remember quite well.
> I just want to refresh your memory. You have had your disappointment and you have had your free show to compensate you for the loss of the disappointment at the end of July. What I want to know is how did it come about that the arrangements were made for the meetings of the 25th October and the beginning of November. You say that was at a meeting on the 19th of August. --- In that meeting that we met with Mr. Evans there was a diary book which already then in that meeting the dates were chosen in advance.
> So this discussion then relating to the October and November meetings, that must have been held as far back as June, 1967? --- If I revive my memory now, that

> is the position. Now I must have been confused because for the date, but I remember now very well that the diary was on the table and these dates were booked right through all the dates that we booked that day we booked right through up to possibly the end of the year.
>
> Two shows? — Not 2 shows. If I could produce my diary I had booked them up to December.
>
> There were more shows than the two? — There were more shows than the two. In other cases there were 2 shows a month, in other cases there was one show a month, depending entirely on their bookings which dates were available. I would grab any available date from this troupe.
>
> Now those arrangements you made with Mr. Evans? — That is right.
>
> Not with Alcock or Bopape? — Together with them. Together with them? — Together with them."

The question which I have underlined in the above passage was an unfortunate question inasmuch as unintentionally it served to add to the plaintiff's confusion as it was wrong to infer from the immediately preceding answer that the discussion must have been held as far back as June, 1967. The plaintiff stressed that at the meeting in question there was a diary. That diary, according to Evans, he opened as a result of his request in his letter of 19th June that bookings be made through his office. (Later - it was not explained when - it was taken over by the group).

It follows then that the plaintiff clearly was speaking of a discussion subsequent to the one which preceded the letter of the 19th June.

To revert now to the evidence in chief of Evans: - He testified that the defendant is not connected with show business at all, does not hire or arrange for the hire of groups of musicians to perform at concerts and neither he nor Alcock has or had authority to conclude contracts of that nature. He stressed that although Alcock is the manager of the group he is not such in his capacity as an employee of the defendant. He was asked about a meeting at his office on the 19th August, 1967. His reply was: -

> "I don't recollect the meeting and I certainly could not make any bookings, because the movements of the artists I wouldn't know; I wouldn't know where they would be on a particular date."

In reply to a question how many times he had met the plaintiff, Evans said: - "I do not recollect whether it was once or twice". Evans was equally uncertain about a telephone conversation on the 13th October, 1967 as testified to by the plaintiff. He said he could not remember such a conversation. The trial Judge put the following question: -

"When/....

"When you say you don't remember having this discussion, do you mean that it might have happened, but you have forgotten? Or as far as you are concerned, did this never take place?"

The answer was: -

"I do not recollect the conversation at all."

Counsel then asked: - "Could it have happened?" The reply was: - "It is difficult to say, but all I can say is I do not recollect the conversation having taken place."

Alcock corroborated Evans in regard to the nature of his employment, his relationship with the group and the relationship of the group with the defendant. The first two performances at the Thebu Cinema was on a "fifty-fifty basis". Thereafter the ill-fated occasion when the group failed to appear arose. Subsequent to that, in accordance with what was his normal practice, he called at Evans' office on a particular day The plaintiff and his son happened to be there. The plaintiff enquired why the group failed to turn up. He (Alcock) told him the group was booked. Evans then summoned Rupert Bopape "to come to sort out this case that we did not turn up". Bopape was at

that time defendant's recording manager and a member of the group. It is by no means clear why he was summoned. Be that as it may, Alcock states that Evans pleaded that they should give the plaintiff a free show "because he was a nice man and did not want us to clash with a man that we had previous work with". After some time he reluctantly allowed himself to be persuaded. A date was fixed and in due course the free show was given. The following passage in Alcock's evidence then appears: -

> "Then it is when we had a clash there in his office. I said in future when you want us to come to your cinema, please make an application or write us a letter with a deposit of half of the money at least 14 days before, then we will be sure and you will be sure with dates in that cinema.
>
> Now this is what you said to Mr. Pitje at this meeting with Mr. Evans? —— No, no this was after the free show.
>
> Oh, after the free show? —— After the free show.
>
> And where was this said exactly? —— At his office.
>
> Whose office? —— Mr. Pitje.
>
> Mr. Pitje's office. And where is that? At the cinema? —— At the cinema.
>
> Was there any discussion, do you remember, of deposits at the first meeting at Mr. Evans' office? —— In connection with?

With Pitje not having - or anything about a deposit. —— Well, that was not fulfilled. I was telling Mr. Evans that our groups go out if they are put in a deposit, because, I was refusing to give Pitje a free show.

So a deposit arose in that way. —— That is when I told them, I says well I wasn't given a deposit and I says please don't ask no deposit because he has lost, go and give him that free show."

The above passage in the evidence is clarified by a further passage from the record. Defendant's counsel asked: -

"Had you asked for deposits for him for the previous shows that you had done?"

The answer reads: -

"I didn't, because we arranged with his manager a fifty basis, so I was involved in those shows."

Alcock proceeded to say that after the free show in June he again saw the plaintiff. The venue was the main door to the defendant's premises in Johannesburg. The plaintiff, accompanied by his son, enquired about dates. The ensuing evidence is recorded as follows: -

"I said yes, you can have the dates provided you pay a deposit.

Now, what dates did he mention that he wanted then? —— If I remember, the dates are still in my brain is the 26th.

Of? —— Of November, because it was a Sunday.

Was there any date in October? --- Well, he mentioned to say that he will try to put in mid-week.

In mid-week in October? --- Yes.

Was there any firm fixing of the date? --- No, well, we just met at the door. So I told him I says the moment he gives me a deposit for the Queens then I will book him.

And did he..... I have never see him since.

Did he agree to give you a deposit? Or what was his attitude about a deposit? --- Well, to me it seems he was not prepared, although he says well, he will let me know when he gets back to his office."

Alcock testified further that apart from a telephone conversation during which he told the plaintiff that as a deposit had not been paid the group would not be available, he heard nothing further from the plaintiff. He arranged for the letter, which the plaintiff received on the 13th October, to be written on his behalf.

The correspondence which passed between the parties is of considerable importance. Portions of the correspondence have already been referred to above. It is necessary, however, to refer more fully thereto, to the correspondence not yet mentioned and to the circumstances surrounding all the correspondence: -

1. Plaintiff's letter dated the 29th June, 1967 in acknowledgement of the defendant's letter of the 19th June signed by Evans was posted to defendant's Sales Manager and addressed to the postal address of the defendant. Evans stated in evidence that he did not remember receiving the letter and that if he did he would automatically have referred it to Alcock as there was a question of making a slight alteration to the time of the appearance of the group. There was no suggestion by Alcock that he received this letter or that he saw it.

2. Plaintiff's letter of the 16th October was posted to Alcock care of the defendant at the address where its business premises are situated. Alcock stated in evidence that he never saw the letter. The plaintiff received no reply to it whatsoever.

3. Plaintiff's letter of the 17th October to the defendant's Sales Manager was addressed to its correct postal address. The original letter was discovered in a discovery affidavit ~~shown~~ sworn to by one Delmont, a director of the defendant, and was produced at the trial. No reply to this letter was received by the plaintiff. Evans stated in evidence that he never saw this letter and offered as explanation that during 1967 he was "possibly out of Johannesburg for 90% of the working year". In his absence the letter would automatically have been referred to Alcock. During the cross-examination of plaintiff it was foreshadowed that Alcock would

say/...

say that he saw the plaintiff about the letter. Alcock did not say so and stated in evidence: - "This letter I wouldn't have seen it, because it went to Mr. Evans. Perhaps they never sent me that down".

4. On the 7th November, 1967 the plaintiff's attorneys wrote and posted a letter marked "Registered Urgent Delivery" and "For Attention Mr. R.H. Evans" to defendant's Sales Manager at defendant's correct postal address. This letter recorded that bookings for 25th October, 1967 and 26th November, 1967 of the group at the Thebu Cinema were effected at "your offices in accordance with your request as conveyed to our clients in your letter of the 19th June, 1967". Reference was made to the group's failure to appear on the 25th October, 1967 and that the plaintiff suffered damages as a result. A specific enquiry was made whether the group would appear on the 26th November. The plaintiff's attorneys received no reply to the letter. Evans gave evidence that he never saw the letter.

5. On the 11th November, 1968 the plaintiff's attorneys wrote to defendant's Sales Manager at its correct address as follows: -

"re: H.M. PITJE - MAHOTELLA QUEENS

We refer to previous correspondence and telephonic communications in terms of which we understood that you would approach us again in regard to a settlement in the above matter. You have however not contacted us further herein and we have now been instructed by our

client/.....

client to take this matter further.

Our client has been informed that the Mahotella Queens are about to give a performance in the Mamelodi Community Hall in November 1968 and our client has indicated that he would be prepared to settle this matter, provided you would agree to the Mahotella Queens giving our client two (2) free shows on two dates to be approved by both parties.

We shall accordingly be pleased to hear from you further in this connection by return of post."

This letter was marked "Mr. R.H. Evans" and was discovered on behalf of plaintiff in the abovementioned affidavit of Delmont. This letter was never replied to. Evans gave evidence that he never saw it.

In regard to the two issues which he did decide the trial Judge preferred the evidence of Evans and Alcock to that of the plaintiff. He accepted that Evans told the plaintiff exactly what the relationship between the defendant and the group was and also believed the evidence of Evans and Alcock that they had no authority to bind the defendant in regard to performances by the group. With reference to the issue relating to the conclusion of the contract he rejected the plaintiff's testimony and accepted that of Evans and Alcock. It was contended on appeal that the learned Judge erred in so deciding

between the witnesses.

The trial Judge gave his impressions of the three witnesses as follows: -

> "The plaintiff was not a very satisfactory or reliable witness. His evidence as to the meetings at which the various arrangements were made is vague and confusing. As I have already pointed out, he stated, in his evidence in chief, that he had two discussions with Evans at the latter's office; the first discussion was during June when the free performance was arranged and, according to his evidence, he had a further discussion with Evans in August when they specifically agreed upon the further performances in October and November. In cross-examination, he said that he only met Evans once in connection with the appearance of the Mahotella Queens at his theatre namely in June, 1967, and on this occasion they made arrangements not only for the free showing but also for the two showings in October and November. I quote that as an example of the somewhat vague and confused recollection that the plaintiff seems to have of these negotiations with Evans and Alcock. What the reason for this confusion is I cannot say. I should add, however, that although I find the plaintiff to be an unreliable witness, I cannot say that I gained the impression that he was deliberately falsifying his evidence.
>
> Evans, the defendant's sales manager, made a good impression upon me. I have no reason to doubt what he has said. In certain respects, his evidence is somewhat vague but this is probably due to the fact that, from his point of view, the defendant company was not directly interested in the precise nature of the negotiations between the plaintiff and Alcock.

I/.....

> I get the impression from Evans that he took an interest in this matter merely because he did not want the group to be involved in any adverse publicity as this could affect the defendant's sale of their records. By and large Evans appeared to me to be a fairly responsible and honest witness.
>
> Alcock I also regard as a reliable witness. Although his demeanour in the witness-box was not particularly impressive, nevertheless I gained the impression that he had a far clearer recollection of the negotiations and discussions than the plaintiff."

In assessing the evidence and in accepting the testimony of Evans and Alcock in preference to that of the plaintiff the trial Judge, as the passage from the judgment quoted above reveals, was largely influenced by the vague and confusing nature of the plaintiff's account in regard to the meetings at which the various arrangements were made. Attention has already been directed to the circumstance that the plaintiff's confusion was partly induced by the erroneous suggestion made to him that the disputed dates were decided upon as far back as the 19th June, 1967 or earlier when it should have been clear that the plaintiff's reference to an occasion when the reservation diary was already in existence clearly indicated that he had a later occasion in mind. There is no indication in the

judgment that in evaluating his testimony this circumstance was present to the mind of the trial Judge. Of perhaps greater significance is the apparent failure of the learned Judge to assign to the plaintiff's letter of the 17th October and the treatment accorded to it by Evans, Alcock and the defendant the importance that it warranted. I shall deal first with the importance of the letter and thereafter with the manner in which it was treated by the defendant and it witnesses.

The letter of the 17th October provides remarkable confirmation of the evidence given by the plaintiff, before he became confused. He stated at the outset that he and Evans met on two occasions - once before the 19th June and the second occasion on the 19th August. Evans, it will be remembered, conceded that there might have been two meetings. The letter of the 17th October was written less than two months after the date of the meeting at which, according to the plaintiff's original evidence, Evans in the presence inter alia of Alcock and Bopape allocated the disputed dates. At the time of writing the recollection of the plaintiff would in all probability have been fresh and clear. In view of the finding of the trial

Judge that the plaintiff is not the type of person who would deliberately falsify evidence any suggestion that in his letter he would set up a fictitious meeting and a fictitious date can be discarded as a remote and fanciful possibility more especially as at that stage litigation was hardly a real possibility. It follows that the plaintiff's apparently confused state of mind, which the trial Judge regarded so seriously, becomes insignificant in the light of the corroborative force of the letter of the 17th October, which justifies the conclusion that a meeting, at which Alcock and Bopape were not present, took place prior to the writing of the letter of the 19th June, 1967 by Evans to the plaintiff and that the second meeting attended by Evans, Alcock, Bopape, the plaintiff and his son took place on the 19th August. Acceptance of the plaintiff's version in preference to that of Alcock and Evans is further indicated by the consideration that in doing so, sensible meaning is given to the opening paragraph of Evans's letter of the 19th June wherein he records having had a discussion with Rupert Bopape and Sam Alcock in connection with the appearance of the group at the Thebu Cinema. It is difficult to reconcile this statement

with Evans's version that Alcock and Bopape were present at the meeting which preceded the writing of the letter. If that was so Alcock and Bopape would have known all about the free performance and there would have been no call for a discussion between Evans and the two of them. Their presence at a subsequent meeting is a stronger probability.

The letter of 17th October admittedly reached the offices of the defendant. Its director, Belmont, disclosed its existence in a discovery affidavit. Yet not a word of evidence was forthcoming at the trial as to who received it, how it was dealt with and why the allegations therein contained to the effect that plaintiff spoke to Evans by telephone on the 13th October, reminded him that the disputed dates were booked in his office on 19th August and that Evans promised to raise the issue with Alcock were not contradicted if they were untrue. Instead of an explanation being offered a strange chain of circumstances unfolded at the trial with reference to this letter: Evans said he never saw the letter. It would have been referred to Alcock. The letter said he did not see it. It would have gone to Evans. Yet someone (probably Alcock or Evans or both/.....

both of them) instructed counsel that Alcock not only had the letter but that he discussed it with the plaintiff. These circumstances cast doubt on the veracity of the defendant's witnesses and give rise to a strong probability that the letter of the 17th October was not replied to because it stated the substantial truth.

The significance of the letter of the 17th October and the unbusinesslike manner in which it was treated do not stand alone. Added to these are a number of other features which cast doubt on the complete truthfulness of Evans and Alcock. These include:

1. The absence of a satisfactory explanation why other letters, for instance, the letter dated 11th November, 1968 (admittedly received), the letters dated 16th October, 1967 and 7th November, 1967 (correctly addressed and duly posted) were not replied to by or on behalf of defendant, Evans or Alcock.

2. Evans's uncertainty as to whether a meeting might have taken place at his office on 19th August, 1967. His explanation that he certainly could not have made any bookings at such a

meeting as he would be unaware of the movements of the group is unconvincing in the light of his admission that pursuant to the request contained in the penultimate paragraph of his letter of 19th June, 1967 he did open and retain (until it was removed by the group at an undisclosed date) an appointment book.

3. The inconsistency between the evidence of Evans and Alcock in regard to the question of whether the payment of a deposit was ever discussed with the plaintiff. Evans says there was such a discussion at the June 1967 meeting in his office when a dispute arose between plaintiff and Alcock as to whether a concert had been booked and a deposit paid in respect of the unfulfilled engagement. Alcock gave a different impression viz. that prior to June, performances were staged on a fifty-fifty basis when there would have been no question of a deposit and that the question of paying a deposit only really arose at plaintiff's cinema after the free performance on the 30th July, 1967.

4. Evans in evidence stressed that he was at pains to explain to the plaintiff exactly what the relationship between the plaintiff and the group was. It is significant that this important

evidence was in no way foreshadowed during the lengthy cross-examination of the plaintiff. The possibility that this may have occurred to Evans as an afterthought cannot be excluded.

The otherwise careful judgment of the trial Judge does not reveal that the features outlined above, which cast doubt upon the reliability of Evans and Alcock, received due consideration. In addition, the plaintiff's confusion and vagueness in testifying to events which occurred nearly three years earlier seems to have assumed undue importance in the mind of the learned Judge. In all the circumstances the present case appears to me to be one which, despite the advantages normally enjoyed by a tribunal of first instance, calls for a re-assessment of the evidence. I find myself unable to agree with the finding of the Court below that the evidence of Evans and Alcock was to be preferred to that of the plaintiff. In my judgment having regard to what has been set out above and for the further reasons that follow, there is a strong balance of probability that the plaintiff's account is true and is to be preferred wherever it conflicts with that of Evans and Alcock.

The decision of the trial Court that the authority of Evans and Alcock to contract on behalf of defendant was not established on a preponderance of probability flowed largely from the acceptance of their express denial that they were clothed with the requisite authority. This being an issue in respect of which, in the nature of things, the plaintiff has no direct knowledge, the denial of Evans and Alcock stands uncontradicted on the record. The unsatisfactory nature of their testimony in regard to the letter of the 17th October and the other features referred to above cast substantial doubt on the truthfulness of their denial and renders it unsafe, in my view, to place reliance on it, more especially as the defendant was content to stand or fall by these denials and found it unnecessary to adduce authoritative evidence from a member of its board of directors within whose knowledge the true position relative to the authority of officers would peculiarly reside.

The following factors, either not in dispute or proven by the acceptable evidence of the plaintiff, were relied upon by the plaintiff as being indicative of Evans at all

material/.....

material times being clothed with authority to bind the defendant to provide performances by the group: -

1. Shortly before 19th June, 1967 Evans, a senior employee of defendant of some 24 years service, persuades his fellow employee Alcock - the part-time manager of the group - to provide a free show at the plaintiff's theatre and binds the defendant to provide posters and thereafter to reward the group by extending to them a free recording session. It was at no stage disputed that he had authority so to bind the defendant.

2. On the 19th June, 1967 and in his capacity as the sales manager of the defendant's record division, Evans directs a written request to the plaintiff on behalf of the defendant and not on his own behalf to arrange future performances by the group through his office at defendant's premises and confirms in writing on behalf of the defendant that posters for the free show will be provided by the defendant. At no stage during the trial was any suggestion made that Evans exceeded his authority in making the request or the confirmation on behalf of the defendant.

3. On the 19th August, 1967 Evans in his abovementioned capacity and at the defendant's business premises assures the plaintiff that "from now onwards there will be no difficulty" with the group and purports to bind the group in respect of the disputed dates.

4. On the 13th October, 1967 Evans assures the plaintiff that he will dissuade Alcock from putting into effect a threat to withhold performances on the disputed dates.

5. The defendant manufactures and distributes gramophone records inter alia of performances by the group. As such, it was conceded, the public image of the group is a matter of concern to the defendant. Participation in public performances aids publicity of the group and, according to Evans, the non-fulfilment of public performances by the group is potentially harmful to the record label assigned to it by the defendant. In these circumstances it seems highly unlikely that he would not possess authority on behalf of the defendant to contract on behalf of the group in respect of public performances.

The abovementioned factors in their cumulative effect point very forcibly to the inference that Evans at

all material times possessed authority, express or implied, to bind the defendant in concluding agreements providing for performances by the group. In the absence of credible evidence negativing this inference I hold that the plaintiff has established on a preponderance of probability that Evans was so authorised. This conclusion is fortified by the form of defendant's plea which does not in express terms place in issue the question of Evans's authority and thus suggests that the issue might well have been resorted to by the defendant as an afterthought. It is, as a result of the finding, not necessary to consider the question of Alcock's authority.

The second disputed issue concerns the question of the conclusion of the contract. The acceptance of the plaintiff's evidence in preference to that of Evans and Alcock resolves this issue in the plaintiff's favour.

In respect of the third and final issue this Court is without the benefit of any assessment of damages by the learned Judge. That the group failed to appear on the disputed dates is common cause. The amount claimed is made up

of R500-00 in respect of special damages and R4,500-00 in respect of general damages to the plaintiff's business reputation.

No substantial dispute exists in regard to the special damages. The plaintiff established that but for the breach of contract his theatre would have been filled to capacity on each of the disputed dates. Making due allowance for the income which he would have earned and for his pro rata expenditure per evening it was proved that net yields of R314-00 and R234-00 would have been produced in respect of the first and second disputed dates respectively and that these yields were lost by reason of the non-appearance of the group. The claim was limited to the total sum of R500-00 and the plaintiff is entitled to an award in that figure in respect of special damages.

In an attempt to establish his claim for general damages, the plaintiff vaguely testified that by reason of the failure of the group to render performances on the disputed dates, some of his patrons lost confidence in his ability to produce advertised theatrical performances. No clear attempt was made to evaluate this loss. In the absence of

clear/.....

clear evidence that both the plaintiff and the defendant contemplated injury to the business reputation of the plaintiff as a probable consequence of a breach of contract, this portion of the claim for damages cannot be sustained. See Lavery and Co. Ltd. v. Jungheinrich, 1931 A.D. 156 at 169.

The appeal is allowed and the judgment of the Court a quo is altered to one in favour of the plaintiff for R500-00. In regard to costs I have read the judgment of VAN BLERK, J.A. and agree with the order as to costs therein proposed.

KOTZÉ, A.J.A.

JANSEN, J.A.
DIEMONT, A.J.A.
MILLER, A.J.A.
} Concurred.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA.

(APPÈLAFDELING)

In die saak tussen:

HESEKIAH MOTHIBE PITJE .....Appellant

teen

GALLO AFRICA BEPERK .....Respondent

Coram:VAN BLERK, JANSEN A.RR., DIEMONT, MILLER et

KOTZÉ Wnd.A.R.

Verhoor:2 Maart 1971 Gelewer: 22 Maart 1971

U I T S P R A A K.

VAN BLERK A.R.:

Ek het die uitspraak van my kollega Kotzé gelees en stem saam om die redes verstrek dat die appèl toegestaan word en n toekenning van R500 gemaak word. Wat die kostebevel betref, is dit die onaangename taak van hierdie Hof, wat hom genoodsaak ag, om in hierdie geval n amptenaar van die Hof n deel van sy koste te ontsê omrede van sy verontagsaming van Reël 5(7) van die Reëls van hierdie Hof, gelees met die woordomskrywing van "getikte" in Reël 1, wat vereis dat die

stukke...../2

stukke van die saak wat by die griffier ingedien word duidelik getik of gedruk moet wees. Die afskrifte van die stukke, wat aldus ingedien is en aan die vyf lede van die Hof wat die saak moes aanhoor oorhandig is, is, wat iets meer as die helfte van die bladsye daarvan betref, so dof gedruk dat dit slegs met groot moeite gelees kon word. Van die twaalf bewysstukke is sommige gevlek en die letters in die afdrukke so geklad dat dit kwalik leesbaar is. Van die bewysstukke is verbeterde eksemplare in die bundel ingevoeg, maar die bedorwe afdrukke is nie daaruit verwyder nie en kan alleen dien as bewys van die slordigheid van die voorbereiding en versorging van die stukke.

As die betrokke prokureur vooraf vasgestel het, soos hy verplig was om te doen, dat die stukke so voorberei is dat dit aan die Reëls voldoen dan moes dit vir hom baie duidelik gewees het dat die stukke wat hy ingedien het nooit vir indiening aangebied moes gewees het nie. Een van die vyf Regters het deur die griffier twee keer versoek dat sy eksemplaar van die stukke verbeter moet word, maar selfs

nadat...../3

nadat by twee geleenthede verbeterings aangebring is, was die betrokke kopie nog geheel en al onbevredigend.

Die feit dat een van die Regters versoek het dat sy afskrif verbeter moet word, moes hom op sy hoede geplaas het dat die ander vier afskrifte moontlik ook nie ooreenkomstig die betrokke Reël gemaak en voorberei is nie; en die feit dat die ander vier lede van die Hof nie besware geopper het nie, verskoon hoegenaamd nie die nie-nakoming van die betrokke Reël nie.

Hierdie Hof het by so vele geleenthede - sommige gevalle blyk uit die gerapporteerde gewysdes waarvan 'n aantal gemeld is in die onlangse uitspraak van Die Prokureur-Generaal van die Oranje Vrystaat v. Haarmeyer, gelewer op 16 deser - sy ontevredenheid en misnoë te kenne gegee oor die slordigheid en laksheid wat aan die dag gelê word by die voorbereiding en versorging van stukke, maar desondanks is die vermaning nie deur almal vir wie dit bedoel is ernstig opgeneem nie. As aan dié laksheid nie 'n end kom nie sal 'n herhaling van gedrag soos in die onderhawige geval niks anders as 'n bespotting van die betrokke Reël van die Hof

wees...../4

wees nie.

Die Hoofregter en al die ander Appèlregters teenwoordig tydens die huidige sitting het van die eksemplare wat aan die Regters in hierdie saak oorhandig is, gesien en is dit almal eens dat die eksemplare klaaglik kortskiet aan die vereistes van die betrokke Reël.

Die kostebevel wat in hierdie appèl gemaak word, is dat die respondent die koste van die verhoor in die hof a quo, asook die koste van die appèl, moet betaal met uitsondering van een helfte van die uitbetalings en honoraria ten opsigte van die voorbereidings en maak van die stukke van appèl, en van die ~~xxx~~ ondersoek en nasien daarvan. Dit word ook beveel dat die prokureur ~~xxx~~ van appellant die helfte van die uitbetalings en honoraria onder genoemde hoofde nie van die appellant, sy kliënt, mag verhaal nie; dit volg dat vir sover betaling ~~x~~ aan hom reeds geskied het die nodige verrekening gedoen sal word.

JANSEN A.R.
) STEM SAAM
DIEMONT Wnd.A.R.
MILLER Wnd.A.R.

P.J. van Blerk

P.J. VAN BLERK.