



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 359/03
REPORTABLE

In the matter between

FRANS JOHANNES JACOBUS GELDENHUYS APPELLANT

and

EAST & WEST INVESTMENTS (PTY) LTD RESPONDENT

Before: Harms, Navsa, Nugent, Conradie JJA and Comrie AJA

Heard: 9 September 2004

Delivered: 17 September 2004

Summary: Joint and several liability for partnership debt – effect where one former partner settles with creditor – other does not –

JUDGMENT

COMRIE AJA

[1] This is an appeal from the Transvaal Provincial Division sitting on appeal from the magistrate at Pietersburg, as it was then known. The appeal is with the leave of this court.

[2] After a lengthy trial the magistrate ordered the appellant, an attorney, to pay his erstwhile landlord, the respondent, the sum of R36 791,10 in respect of rent which was in arrear and admittedly unpaid. It was a partnership debt for which the appellant and his former partner, Britz, were liable jointly and severally.

[3] In the appellant's heads of argument two main contentions were advanced. The first related to a costs order made at an early stage of the proceedings, on 15 August 2000. In argument before us Mr du Plessis, for the appellant, abandoned this contention and accordingly no more need be said about it.

[4] The second contention arises in this way. Before the trial proper commenced, the respondent and Britz entered into a settlement agreement which was made an order of the court. It is evident from clause 7 of the agreement that this was a settlement by Britz of his liability in respect of a much larger claim, and that there was no intention to release the appellant from any joint and several liability which he might have to the respondent. This is so despite

the words 'in volle en finale vereffening' which appear elsewhere in the agreement. Those words operated solely in favour of Britz.

[5] The settlement recorded that Britz undertook to pay R45 000 on account of capital, part said to have been paid already, part still to be paid. On the strength of the settlement Mr du Plessis sought to argue that the appellant was in law released in respect of the first R45 000 of the partnership debt; and that since the amount found to be owing was less than R45 000, the action should have been dismissed. The authorities cited by counsel are not strictly in point. Here was not part payment prior to the institution of action which had the effect of reducing the quantum of the solidary debt. Compare *Dwyer v Goldseller* 1906 TS 126. The respondent was entitled to sue both partners, jointly and severally, for the full amount of the disputed debt. *Lee en 'n ander v Maraisdrif (Edms) Bpk* 1976 (2) SA 536 (A) at 543. The respondent was accordingly entitled to have judgment entered against both partners, jointly and severally – the one paying, the other to be absolved – for the amount admitted or agreed (in the case of Britz) or the amount proven (in the case of the appellant).

[6] The fact that neither order specified joint and several liability is by the way. The particulars of claim expressly prayed for an order in that form, and given the nature of the liability for partnership debts, it

seems to me that joint and several liability was implicit in the order granted against the appellant. The amount of capital eventually payable by the appellant will depend on how much Britz has actually paid. Thereafter, it will be for the former partners to exercise their respective rights of recourse *inter se*.

[7] Clause 27.8 of the lease, on a proper interpretation, obliged the appellant to pay attorney and client costs. That was a contractual stipulation which the respondent was entitled to enforce. *SA Permanent Building Society v Powell and others* 1986 (1) SA 722 (A); *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) from para 22. No grounds were advanced on appeal for us to exercise our residual judicial discretion against granting the costs of appeal on such scale.

[8] The appeal is dismissed with costs on the attorney and client scale.

R G COMRIE
ACTING JUDGE OF APPEAL

CONCUR

HARMS JA

NAVSA JA

NUGENT JA

CONRADIE JA