



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

No precedential significance

Case no: 345/11

HONEY & PARTNERS INC.

E F SAFFY

R J BRITZ

J J VAN ZYL

N J NAUDE

J M BURGER

N J G DREYER

C J POTGIETER

H L BUCHNER

J DU TOIT

G DE BEER

N H BARNASCHONE

D J J DE VILLIERS

S J LE ROUX

J J FEUTH

L B SAFFY

H E VAN DER WALT

A PRINSLOO

G S GOODES

First Appellant

Second Appellant

Third Appellant

Fourth Appellant

Fifth Appellant

Sixth Appellant

Seventh Appellant

Eighth Appellant

Ninth Appellant

Tenth Appellant

Eleventh Appellant

Twelfth Appellant

Thirteenth Appellant

Fourteenth Appellant

Fifteenth Appellant

Sixteenth Appellant

Seventeenth Appellant

Eighteenth Appellant

Nineteenth Appellant

and

QUINCE PROPERTY FINANCE (PTY) LIMITED

Respondent

Neutral citation: *Honey & Partners Inc v Quince Property Finance (Pty) Ltd*
(345/11) [2011] ZASCA 213 (29 November 2011)

BENCH: HARMS DP, PONNAN, SNYDERS, LEACH and SERITI JJA

HEARD: 15 NOVEMBER 2011

DELIVERED: 29 NOVEMBER 2011

SUMMARY: Contract – defence of rectification – witness – adverse credibility
findings of trial court not challenged on appeal - appeal
failing.

ORDER

On appeal from: Free State High Court, Bloemfontein (Ebrahim J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

PONNAN JA (HARMS DP, SNYDERS, LEACH and SERITI JJA concurring):

[1] All too often, according to the respondent, Quince Property Finance (Pty) Ltd, buyers and sellers of immovable property find themselves cash-strapped whilst awaiting the registration and transfer of the property sold. For it is usually only upon the occurrence of that event that funds standing to the credit of one or the other of the parties fall to be released to them by the conveyancing attorney. The respondent, in its previous incarnations Dynarc Bridge Finance (Pty) Ltd and ZS Rational Finance (Pty) Ltd, is a registered credit provider. The business model it had chosen for itself is to lend and advance moneys to such persons in that hiatus period on the understanding that once registration and transfer of the property sold had been effected, it would be repaid by the conveyancing attorney from monies standing to the credit of such party. The respondent, appreciating that bridging finance was an inherently risky business venture, perceived that its business model could only succeed if it secured guarantees from the conveyancing attorney instructed in each instance to effect registration and transfer of the property sold.

[2] Thus during 2004 the respondent approached the first appellant, Honey and Partners Incorporated (Honey Inc), a Bloemfontein firm of attorneys, for assistance in formalising its new business venture. As it was envisaged that a number of firms of attorneys would be involved in the venture, a standard master agreement to be concluded by the respondent with those attorneys willing to participate in the venture, was formulated by Mr Deon Rossouw, an attorney, who was then a professional assistant in the employ of Honey Inc.

[3] On 25 August 2004 Honey Inc itself became a party to the master agreement with the respondent. The preamble to the master agreement reads:

'WHEREAS the Attorney has received instructions to proceed with the registration of transfers of properties in terms of Deeds of Sale.

AND WHEREAS the funds for the payment of the transfer duty, transfer and bond costs and any other costs, related to the transfer, have been included in a bond to be registered in favour of a Financial Institution.

AND WHEREAS the purchasers wish to utilise the funds of DYNARC BRIDGE FINANCE to pay transfer duty and rates & taxes.'

To the further extent here relevant the agreement provided:

1. THE ATTORNEY'S OBLIGATIONS

The Attorney undertakes unto and in favour of DYNARC BRIDGE FINANCE that:

(i) The maximum capital sum will only be utilised for the purpose of obtaining a Transfer Duty Receipt and/or Rates and Taxes Certificate, as the case may be, and for no other purpose whatsoever, unless agreed thereto in writing between DYNARC BRIDGE FINANCE and the attorney.

. . .

3. THE ATTORNEY'S UNDERTAKINGS

The Attorney hereby irrevocably undertakes to:

(i) Use DYNARC BRIDGE FINANCE where possible as financier in a conveyancing transaction where the Attorney is the Conveyancer and where a purchaser or seller requires finance with regards to the payment of transfer duty and / or rates and / or taxes and to use no other financier for the currency of this agreement.

(ii) Make payment to DYNARC BRIDGE FINANCE of the financed amount within a period of 72 hours from the date of registration of transfer of the property.

(iii) Make payment to DYNARC BRIDGE FINANCE of the administration fee of 3% (minimum R300) and finance charges calculated at 2,3% on the amount advanced for a 30-day period within a period of 72 hours from the date of registration of transfer of the property.

(iv) In the event of cancellation of the transaction and where the loan amount is still in the possession of the attorney, to pay DYNARC BRIDGE FINANCE any balance of the capital amount advanced and also the administration fee within a period of 72 hours after cancellation. If the Attorney neglects or refuses to make payment of the balance held by the Attorney within 72 hours of cancellation, DYNARC BRIDGE FINANCE shall be entitled to recover from the Attorney all amounts due including the administration fee and finance charges. If the Attorney does not hold sufficient funds to pay the capital amount and administration fee, the Attorney undertakes to take all reasonable steps to recover the outstanding monies from the Purchaser and upon recovery to make payment thereof to DYNARC BRIDGE FINANCE. If the attorney has already made payment to the Receiver of Revenue and/or the relevant local authority, he undertakes to take all reasonable steps within a reasonable time to recover the money paid and shall immediately upon recovery of any money, make payment to DYNARC BRIDGE FINANCE of the money recovered. He does not however warrant this payment of this amount but warrants that he will assist DYNARC in all necessary litigation steps to recover the money from the party concerned.

...

7. **RESPONSIBILITY**

(i) Furthermore the warranties given by the Attorney in this agreement and furthermore the conditions of this agreement, the Attorney accepts that he is responsible for payment of all amounts due to DYNARC BRIDGE FINANCE by the borrower.

(ii) DYNARC BRIDGE FINANCE will cede its claim, against the borrower, to the Attorney, after payment thereof by the Attorney to recover the amount paid to DYNARC BRIDGE FINANCE in terms of this agreement.'

[4] On 9 March 2006 one of Honey Inc's clients, Bothma Diamante CC, concluded an agreement of purchase and sale with Joroy 0002 CC in respect of the latter's property erf 8995, Kimberley for the purchase price of R1.6 million. The agreement was subject to the suspensive condition that Bothma Diamante obtain a loan for the purchase price from a registered financial institution to be secured by the registration of a mortgage bond over the property.

[5] On 23 March 2006 Honey Inc concluded a further agreement with the respondent (the finance agreement). The finance agreement to the extent here relevant provided:

1. THE CONVEYANCING ATTORNEY WARRANTING HIS AUTHORITY UNDERTAKES THE FOLLOWING OBLIGATIONS:

THE CONVEYANCING Attorney undertakes unto and in favour of ZS RATIONAL FINANCE that:

- i) The maximum capital sum will only be utilized for the purpose of the Transfer Duty and/or Rates and Taxes, and/or advance on profit of sale and/or advance on proceeds of bond registration as the case may be, and for no other purpose whatsoever
- ii) The maximum capital sum from the bond Grantor shall be deposited directly into the attorneys trust account and no other
- iii) The attorney will furnish a certified copy of the transfer duty receipt of the South African Revenue Services on demand of ZS RATIONAL FINANCE

2. THE CONVEYANCING ATTORNEY'S WARRANTIES

The CONVEYANCING ATTORNEY unequivocally warrants to ZS RATIONAL FINANCE that:

- i) An agreement of Sale for the property . . . or a loan agreement between the Mortgagee and the bank has been concluded and signed and all suspensive conditions in relation thereto above have been fulfilled and waived
- ii) All material facts relating to the transaction are true and correct in every material aspect
- iii) That he is unaware of any impediment to this agreement
- iv) That his implied duties both under the contract and in terms of the Attorneys' Act and any other applicable statutory authority or common law hereto apply.

3. THE ATTORNEYS UNDERTAKINGS

The Conveyancing Attorney hereby irrevocably undertakes to:

- i) Pay ZS RATIONAL FINANCE the full and capital sum of the sum borrowed plus the interest described therein as at section c above within a period of 72 hours from the date of registration of transfer of the property or registration of the bond, as the case may be, as described above
- ii) Pay ZS RATIONAL FINANCE the application fee and service charges as set out above within a period of 72 hours from the date of registration of transfer of the property as described above
- iii) In the event of cancellation or the transaction or the borrower becoming deceased, to pay ZS RATIONAL FINANCE within 72 hours of demand by ZS RATIONAL FINANCE the full amount advanced as described in B above
- iv) Pay ZS RATIONAL FINANCE on demand all the amounts due including finance charges and fees in the event of the transaction being delayed, for whatever reason for a period of more than 90 days.'

[6] Pursuant to the finance agreement Honey Inc advanced to Joroy 0002 CC the sum of R300 000, which was described in the agreement as an advance on profits. Despite Honey Inc having warranted in terms of clause 2.1 of the finance agreement that all of the suspensive conditions had been fulfilled by Joroy 0002, it subsequently emerged that the latter had failed to secure a loan for the purchase price from a financial institution. In due course the first bondholder on the property, the subject of the

sale between Joroy 0002 CC and Bothma Diamante CC, caused it to be sold in execution. The loan from the respondent to Joroy 0002 not having been repaid, the respondent caused summons to be issued in the Free State High Court against Honey Inc as the first defendant and its directors as the second to nineteenth defendants.

[7] The summons alleged:

'22. On or about the 23rd of March 2006 and at Bloemfontein, Plaintiff [the respondent] as represented by Mario Nel, and Joroy 0002 CC, as represented by Mr L A Celliers and First Defendant [Honey Inc], as represented by Mr D P Rossouw (concluded a bridging finance agreement) and in terms of the aforesaid agreement the Plaintiff advanced an amount of R300,000.00 to Joroy 0002 CC on the 23rd March 2006. For full particulars of this agreement, see "QPF1" attached hereto.'

23. The salient relevant terms of the aforesaid agreement between [the respondent] and [Honey Inc] relevant to this case are that:

23.1 [Honey Inc] would pay to [the respondent] the full and complete sum of the sum borrowed by Joroy 0002 CC plus finance charges and a service charge thereon ... within 72 hours from date of registration of the transfer of the property or registration of the bond, as the case may be; and/or

23.2 Pay [the respondent] the application fee and service charge and finance charges as set [out] above within a period of 72 hours from the date of registration of transfer of the property as described; and/or

23.3 Pay [the respondent] on demand all the amounts due including finance charges and service fee in the event of the transaction [being] delayed for whatever reasons for a period of more than 90 days.

...

26. The transfer of the property in question has not taken place but a period of 90 days has expired since the money was lent and advanced to Joroy 0002 CC and consequently the amount due is now due and owing in terms of the above mentioned clause.

...

29. The Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth and Nineteenth Defendants are jointly and severally liable with [Honey Inc] in terms of Section 23 of the Attorneys Act, 53 of 1979 to pay the amount of R591 469.20 as set out above to [the respondent].'

[8] Although various defences were raised by Honey Inc in its plea to the respondent's summons only one still remains relevant. It is this:

- '(a) The finance agreement does not correctly record the agreement between [the respondent], [Honey Inc] and Joroy in that clause 3 thereof incorrectly purports to oblige [Honey Inc] to pay to [the respondent] R300 000,00 loaned to Joroy plus interest and administration costs in the event of the transaction being delayed for more than 90 days.
- (b) The continuing common intention of the parties was that the obligations of [Honey Inc] were to be as set out in clause 3 of the [master] agreement.
- (c) The incorrect description of [Honey Inc's] obligations was occasioned by a common error of the parties and the parties concluded the finance agreement in the *bona fide* but mistaken belief that it recorded the true agreement between the parties.
- (d) In the premises the finance agreement falls to be rectified by deleting clause 3 thereof and replacing it with terms identical to those in clause 3 of the [master] agreement.'

[9] The matter proceeded to trial before Ebrahim J who found for the respondent and accordingly granted judgment in its favour against all nineteen of the defendants jointly and severally in the agreed sum of R744 833.02 together with costs on the attorney and client scale. Leave to appeal was initially granted on 14 June 2010 by the learned judge against the whole of her judgment to the 'Full Bench' of the Free State High Court — no doubt a reference to the full court. On 23 May 2011, however, that order was amended to grant leave to the appellant to appeal to this court, ostensibly because the appellants are well known to most of the judges of the high court.

[10] In the main, the defence advanced by Honey Inc is to be sourced in the evidence of Mr Rossouw, who by the time of the trial had become one of its directors. He testified:

'You are aware of the fact that the finance agreement which you signed . . . it contains clauses which holds your firm liable for the debts of the borrower in the event of a default, is that fairly stated? --- No.

No? --- No.

Sorry, then I have misunderstood the last ten minutes of your evidence because I have understood you to have been saying that the finance agreement does place a liability on the attorneys as it stands but that was not your intention . . . Now are you now detracting from that evidence? --- No it was

stated to me that the financing agreement that Honey attorneys signs has got certain warranties and undertakings by the attorney that will apply to that attorney and I do not agree with it, although it has got those warranties and undertakings in the standard wording and in the standard format, it was never the intention that that applies to Honey attorneys.

No no no, I made my question to you very clear, let us talk about the finance agreement as it stands. --- Okay.

I referred you to the fact that it is a document that you yourself drafted, correct? --- Correct.

So you were aware of its terms, surely? --- Yes.

And were you aware that its terms contained undertakings in terms of which the attorney as defined in the contract . . . would be liable in terms of that contract . . .? --- Yes.

Thank you. Now I come back to my question. When you signed this contract you signed it on behalf of Honey & Partners? --- Correct.

You are aware that it contains terms which holds Honey & Partners liable in event of a default but you do not take the trouble of simply drawing a line through clause 3 just before you append your signature. Is that your evidence? --- M'lady, it is not necessary to draw a line through that clause because I have got another document that regulates that clause. We have got a signed agreement.

Okay. Show me where the master agreement . . . regulates this specific transaction that involves bridging finances being granted to Joroy with the intervention of Honey & Partners. Show me in the contract if you can at page 4 any reference to that specific transaction. --- It is necessary then at this point in time to explain how the master agreement has come about. When my office received instructions ... (intervenes)

Can I first get you agreeing with me there is no reference to this specific transaction . . . I am referring to . . . the transaction whereby bridging finances is awarded to Joroy and it is a transaction to which Honey & Partners is a co-signee. That is not referred to in the master agreement. Do you concede that? --- No, no it is not referred to in the master agreement.

Sorry, then you can proceed with the rest of your answer. --- All right. When the business started up and when they, when Dynarc ventured into this type of business the original idea was that they will only be financing certain types of property transactions being rates and taxes and ...

Transfer duty. --- Transfer duty. Now the nature of such a transaction there must be a deed of sale, the borrower will always be a purchaser because, well it can also be a seller in the instance of rates and taxes but that is where the business idea originated from and at that point in time when this master agreement was drafted that was the type of financing that they would entertain.

Correct, that is 100% correct I agree with you 100% as actually has been pointed out and if you look at the terms of the master agreement, you were in court when Mr Le Roux went through those various terms, the preamble, al[[]] that shows that is the contract, this master agreement refers to that type of transaction. Would you agree with that? --- Ja I agree.

And indeed it goes further at clause 1(i) it goes further and says:

"The maximum capital sum will only be utilised for the purpose of pertaining a transfer . . . and or rates and taxes as the case would be and for no other purpose whatsoever unless agreed with in writing between Dynarc Bridge Finance and the attorney."

You do not have any complaint or objection to that clause. That clause is as it stand[s] and you agree with that clause, that is what it is. --- Yes.

So what is required in any other case such as an advance on profit is a separate written agreement, correct? --- On the interpretation of this master agreement, correct.

...'

[11] As emerges from the quoted excerpt, the following significant concessions were made by Rossouw under cross-examination: first, that he had drafted the finance agreement; second, that he had signed the agreement on behalf of Honey Inc; third, that he was aware of its terms and in particular that Honey Inc would be liable; fourth, that he could - but had failed to - delete what he considered to be the offending clause; fifth, that the master agreement only applied to transactions involving advances on rates, taxes and transfer duty; sixth, the master agreement does not refer to a transaction such as the Joroy transaction; and, seventh, the master agreement envisaged a further written agreement in respect of a transaction such as one encounters here, namely an advance on profits.

[12] The cumulative effect of all of those concessions may well be wholly destructive of Honey Inc's defence of rectification. But it is unnecessary to make any firm finding in that regard. For, on the view that I take of the matter, the appeal falters at a more fundamental and less profound level. Of Rossouw as a witness, the learned trial judge stated *inter alia*: 'I reject out of hand the testimony of . . . Rossouw . . . on this crucial aspect, as being so highly improbable that it is incapable of any credence whatsoever'; '[the] evidence in this regard is unconvincing and improbable' and '[r]egrettably though for [Honey Inc], I am unable to find in their favour, that, on the probabilities, either of these witnesses were credible witnesses'. Those adverse credibility findings were not challenged on appeal before us. Nor could they be given that a perusal of the record supports them. And for as long as those findings remain undisturbed – as indeed they must – the appeal cannot succeed.

[13] In the result the appeal is dismissed with costs.

V M PONNAN
JUDGE OF APPEAL

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