

Reportable
case no: 622/98

In the matter between:

DESMOND JAMES THOMPSON

Appellant

and

SOUTH AFRICAN BROADCASTING CORPORATION

Respondent

Coram: F H Grosskopf, Harms, Olivier, Zulman, JJ A and Mthiyane, A J A

Heard: 13 November 2000

Delivered: 29 November 2000

Summary: Claim for damages in delict - whether element of causation proved.

J U D G M E N T

F H GROSSKOPF JA:

[1] On 10 December 1993 the respondent and Houston Video & Film Distributors (Pty) Ltd entered into a written agreement (“the sponsorship agreement”) in terms whereof Houston Video & Film Distributors (Pty) Ltd undertook to sponsor a television programme entitled “Food for Life” (“the

television programme”) and to pay a sponsorship fee of R264 639,60 to the respondent by 26 January 1994 in consideration for exposure on the television programme.

[2] On the same day the same parties entered into a further written agreement called a television production commissioning agreement (“the production agreement”) in terms whereof the respondent commissioned Houston Video & Film Distributors (Pty) Ltd to produce the television programme for a total contract price of R240 581,04.

[3] Mr Robin Knox-Grant signed the two agreements on behalf of the respondent while the appellant signed them on behalf of Houston Video & Film Distributors (Pty) Ltd. It is common cause that to the knowledge of the appellant there never existed a company with the name of Houston Video & Film Distributors (Pty) Ltd. He therefore purported to act on behalf of a company which was in fact non-existent.

[4] The television programme was nonetheless duly produced by the appellant as if the production agreement were a valid agreement, and the

respondent duly paid the contract price of R240 581,04 at the request of the appellant to Houston Educational Distributors on 31 December 1993.

[5] It is further common cause that the respondent allowed the television exposure agreed to in terms of the sponsorship agreement. Payments totalling R63 825,00 were subsequently made to the respondent in reduction of the sponsorship fee of R264 639,00. The appellant however failed to cause any further payments to be made to the respondent in terms of the sponsorship agreement, leaving an outstanding balance of R200 814,60.

[6] The respondent brought an action in the Cape of Good Hope Provincial Division claiming payment of the outstanding balance of R200 814,60 from the appellant. The respondent's claim was based on the allegation that the appellant knew that Houston Video & Film Distributors (Pty) Ltd was non-existent, that he acted as agent for a non-existent principal and that he was consequently liable in law as principal. This claim failed in the court *a quo* and there is no cross-appeal by the respondent in respect of that order. It is accordingly not necessary to consider the alleged legal basis of that claim.

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[7] The respondent amended its particulars of claim prior to the hearing of the case by introducing a claim for damages arising from delict. This new cause of action was based on the appellant's alleged fraudulent, alternatively negligent, misrepresentations. The respondent relied in this regard on the appellant's representations that Houston Video & Film Distributors (Pty) Ltd was a duly registered company in existence and that he was authorised to act on behalf of such company. It was also alleged in the amended particulars of claim that these representations were material and that the respondent was induced thereby to enter into the two agreements and to make payment of the sum of R240 581,04 in terms of the production agreement. The amended particulars of claim concluded with the allegation that the respondent suffered damage in the said sum of R240 581,04 as a result of the appellant's alleged misrepresentations.

[8] The court *a quo* came to the conclusion that the appellant acted fraudulently and that his misrepresentations were material and intended to induce the respondent to enter into the agreements. The court *a quo* further held that had it not been for the appellant's fraudulent misrepresentations the respondent would not have entered into the agreements and would consequently

not have paid the R240 581,04 to the appellant. In the result the court *a quo* granted judgment in favour of the respondent for the sum of R240 581,04 plus interest. The judgment of the court *a quo* has been reported under the name of *South African Broadcasting Corporation v Thompson and another* [1998]3 All SA 586(C). Leave to appeal was refused by the court *a quo* but granted on application to the Chief Justice.

[9] The appellant's case was that the company which entered into the two agreements was incorrectly described as Houston Video & Film Distributors (Pty) Ltd instead of Hauston Distributors (Pty) Ltd (a registered company controlled by the appellant), alternatively that Houston Video & Film Distributors (Pty) Ltd was actually the trading name of Hauston Distributors (Pty) Ltd. The appellant accordingly denied making any fraudulent misrepresentations. For the purposes of this case I shall assume in favour of the respondent that the appellant did in fact make the aforesaid representations fraudulently. *Non constat* that these misrepresentations were material. (Cf *Service v Pondart-Diana* 1964(3) SA 277(D) *per* Miller J at 279 A-C.) It is unnecessary however to pursue this aspect any further inasmuch as the respondent, who is claiming damages in delict, in my view failed to prove both

causation and damage. I shall first deal with the question whether the respondent has proved that the fraudulent misrepresentation was the cause of its alleged loss.

[10] The respondent's claim for damages for fraudulent misrepresentation is a claim in delict and not contract (*Trotman and Another v Edwick* 1951(1) SA 443(A) at 449 B-C; *Ranger v Wykerd and Another* 1977(2) SA 976(A) at 991 B-G). In claiming delictual damages the respondent had to prove the causal connection between the fraudulent misrepresentation and the alleged patrimonial loss (*Trotman's case supra* at 450 C-F). In dealing with the question whether the fraudulent misrepresentation caused any loss, Trollip JA remarked as follows in *Ranger's case supra* at 991 F:

“One of the problems sometimes encountered in seeking to apply the measure [i.e. the basic measure of damages claimable for delict] is whether or not the fraud complained of did occasion, as cause and effect, the alleged patrimonial loss. This involves ascertaining whether the fraud influenced the claimant's mind and conduct in entering into the contract in question or his agreeing to particular terms thereof and, if so, to what extent.”

[11] Ms Human, who was responsible for the production of educational programmes on behalf of the respondent, met the appellant through a certain Ms

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Myers who had produced a number of successful programmes for the respondent in the past. Ms Human explained that she was willing to negotiate with the appellant because she knew and trusted Ms Myers. The respondent was dealing with artists, and productions were often done on the basis of a “gentleman’s agreement”. Although the respondent required such agreements to be concluded in the name of a company it was of no consequence to the respondent with which company it contracted. The witnesses who testified on behalf of the respondent conceded that it would have made no difference if the name of the other contracting party in this case had in fact been Huston Distributors (Pty) Ltd instead of Houston Video & Film Distributors (Pty) Ltd. The respondent did not even take the trouble to enquire whether the other contracting party was an existing and viable company which would be able to perform its obligations in terms of the agreements. The production of the television programme had in fact commenced even before the agreements were signed and it was conceded that the signing was regarded as a mere formality. It appears therefore that the respondent placed no reliance on the identity of the company but looked to the appellant as the true contracting party who had to perform in terms of the agreements. There is accordingly no evidence in my opinion to show that “the fraud influenced the claimant’s mind and conduct in

entering into the contract in question.” (*Ranger’s case supra* at 991F). I am therefore of the view that the respondent failed to establish a causal connection between the fraudulent misrepresentation complained of and the damages claimed. (*Scheepers v Handley* 1960(3) SA 54(A) at 59 A-B).

[12] A related aspect is the assessment of damage and proof of the quantum thereof. (See generally Neethling Potgieter and Visser *Law of Delict* 2nd ed par 3.5 at 205-206.) In my judgment the respondent failed to prove that it suffered damage in the amount awarded by the court *a quo*, i.e. R240 581,04. That was the amount paid by the respondent in consideration for the production of the television programme, as explained in [4] above. By ordering the appellant to pay that amount as damages the court *a quo* in effect allowed the respondent to retain the television programme for no consideration at all. There is no evidence to suggest that but for the fraud the terms of the production agreement would have been any different. There appears to have been proper performance by both parties in terms of the production agreement and in my view there is no reason to set aside the result of the production agreement. (Cf *Wilken v Kohler* 1913 AD 135 at 144.)

[13] For these reasons the court *a quo* should in my judgment have granted absolution from the instance.

[14] There is one further aspect that should be mentioned. The court *a quo* found the appellant to be “a very unreliable and dishonest witness”. (See [16] p 593-594 of the reported judgment.) I fully agree with that conclusion. The appellant committed fraud and then relied on spurious defences. In my view this court should indicate its displeasure by making no order as to costs in the court *a quo*.

The following order is accordingly made:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and replaced by the following order:
“Absolution from the instance is granted, but no order is made as to costs.”

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F H GROSSKOPF
Judge of Appeal

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Harms, JA)
Olivier, JA)
Zulman, JA)
Mthiyane, AJA) concur