THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 98/06
Reportable

In the matter between :

PCL CONSULTING (PTY) LTD t/a PHILLIPS CONSULTING SA APPELLANT

and

TRESSO TRADING 119 (PTY) LTD RESPONDENT

CORAM : HARMS ADP, CLOETE, JAFTA, CACHALIA JJA *et* SNYDERS AJA

HEARD : 2 MARCH 2007

DELIVERED : 15 MARCH 2007

Summary: Summary judgment : Rectification : If the allegations made by a plaintiff justifying rectification of a written agreement are not in dispute, summary judgment can be granted for a claim based on the agreement as rectified.

Neutral citation: This judgment may be referred to as *PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd* [2007] SCA 9 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The respondent, Tresso Trading 119 (Pty) Ltd, as the plaintiff, sued the appellant, PCL Consulting (Pty) Ltd, as the defendant, in the Johannesburg High Court for payment of amounts totalling R396 188,35 allegedly due in terms of a written lease. It would be convenient to refer to the parties as they were in the court of first instance. The defendant entered appearance to defend and the plaintiff applied for summary judgment in terms of uniform rule 32, which was opposed by the defendant in an affidavit filed on its behalf. The court of first instance granted summary judgment for the amount of the claim, interest and costs, and an appeal by the defendant, with the leave of this court, to the full court was unsuccessful. Special leave to appeal to this court was subsequently granted.

[2] The primary issue in the appeal turns on the fact that in its particulars of claim the plaintiff has alleged that due to a common error the written lease relied upon by it misdescribed the premises as 'office, 6th floor, Fedsure Towers' in Sandton, whereas (the plaintiff has also alleged) it was the common continuing intention of the parties that the lease should have referred to 'office, 4th floor, Fedsure Towers'. In its affidavit resisting summary judgment the defendant did not deal with the merits of the rectification but contented itself with the allegation that a claim for rectification is not competent in terms of rule 32. It does appear from the defendant's affidavit that the defendant was in occupation of 'offices in Fedsure Towers', although the defendant studiously refrained from identifying the offices in question.

[3] Rule 32(1) reads:

'Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only ─

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment,

together with any claim for interest and costs.'

A prayer for rectification does indeed fall outside the provisions of rule 32. It does so not because it is a claim impliedly excluded by that rule, but because it is not, in the true sense, a claim at all. The plaintiff's claim properly so called is for payment of arrears due in terms of a lease. In order to succeed on that claim at a trial, the plaintiff would have to allege and prove inter alia that it let premises to the defendant in terms of an agreement. The written agreement signed by the parties and annexed to the plaintiff's particulars of claim refers to what the plaintiff alleges were the wrong premises. The plaintiff was therefore obliged to seek rectification of the written agreement in order to enable it to lead evidence that what it alleges were the correct premises were let to the defendant ─ for, in the absence of rectification, such evidence would be inadmissible both because of the parol evidence or integration rule and the rule that no evidence may be given to alter the clear and unambiguous meaning of a written contract.[1] But the plaintiff's claim remains a claim for arrears owing in respect of the lease of the 4th floor office and rectification, although essential to enable the plaintiff to prove its claim, is not part of that claim.

[4] I therefore, with respect, agree with the judgment of Coetzee J in *Malcomess Scania (Pty) Ltd v Vermaak*[2] to the extent that it holds that a plaintiff who alleges that a written contract should be rectified is confined to what the plaintiff alleges is the true agreement between the parties, and cannot (in the absence of an express indication to the contrary) rely in the alternative upon the terms of the written agreement as they stand; but I am constrained to disagree with that judgment to the extent that it suggests that summary judgment is incompetent, even where both parties are *ad idem* as to the respects in which their written contract does not correctly reflect the agreement between them.

[5] In summary judgment proceedings a plaintiff is required, in terms of rule 32(2), to 'verify the cause of action' ─ not to verify that it will be able to prove the cause of action. The cause of action in the present matter is that the defendant hired

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[1] *Rand Rietfontein Ests Ltd v Cohn* 1927 AD 317 at 326-7.
[2] 1984 (1) SA 297 (W).

the 4th floor office in Fedsure Towers from the plaintiff, in consequence of which it became obliged to pay amounts totalling R396 188,35 to the plaintiff, which it has failed to do. There was no dispute as to the terms of the agreement and in particular, the identity of the premises let. The plaintiff was therefore not obliged to cross the evidential hurdle of proving that despite the provisions of the written lease which referred to the 6th floor office, it was the 4th floor office which was in truth let to the defendant. Had the defendant placed in issue what the terms of the agreement were, the plaintiff would have been obliged to prove its version of the agreement at a trial, and summary judgment would have had to have been refused. But the defendant did not do this. The question then becomes: Should the court of first instance have been satisfied that the defendant had a bona fide defence to the claim for the arrears pursuant to the agreement alleged by the plaintiff (the terms of which are not disputed)? I turn to consider this question.

[6] In its affidavit resisting summary judgment the defendant said:

'8. Clause 32 of the . . . lease provides that save in respect of those provisions of the . . . lease which provide for their own remedies which would be incompatible with arbitration, a dispute which arises in regard to (*inter alia*) any of the rights and obligations of the parties arising from the . . . lease, . . . shall be submitted and decided by arbitration.

9. Defendant intends to apply, under section 6 of the Arbitration Act, to the above Honourable Court for a stay of the instant proceedings.

10. Plaintiff does not allege in its summons any facts or reasons why the Plaintiff's claims (and in particular the claim for rectification) should not be referred to arbitration.'

[7] The mere fact that parties have agreed that disputes between them shall be decided by arbitration does not mean that court proceedings are incompetent. If a party institutes proceedings in a court despite such an agreement, the other party has two options:

(i) It may apply for a stay of the proceedings in terms of section 6 of the

Arbitration Act 42 of 1965;[3] or

(ii) it may in a special plea (which is in the nature of dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration.

The definitive statement of the law in this regard is to be found in *The Rhodesian Railways Ltd v Mackintosh*[4] where Wessels ACJ said:

'All that sec.6(1)[5] lays down is that you cannot adopt the cheaper and speedier procedure therein provided when once you have delivered pleadings or taken any other step in the proceedings. If you have taken any step in the proceedings, then you can no longer adopt the speedier and less costly procedure of applying to the Court to stay proceedings but you must file your pleadings in the ordinary way. In pleading, however, you can raise the defence that the case ought to be decided by arbitration; this can be done by a special preliminary plea.'

In the present proceedings, the defendant has simply pointed out that the lease contains an arbitration clause in wide terms. That is not sufficient. The defendant was obliged to go further and set the terms of the dispute. As Didcott J succinctly pointed out in *Parekh v Shah Jehan Cinemas (Pty) Ltd*:[6]

'Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise. It includes *Re Carus-Wilson and Greene* (1887) 18 QBD 7 (CA); *London and Lancashire Fire Assurance Co v Imperial Cold Storage and Supply Co Ltd* (1905) 15 CTR 673; *King v Harris* 1909 TS 292.'

The passage just quoted was approved by this court in *Telecall (Pty) Ltd v Logan*[7] and Plewman JA went on to say:

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[3] '6(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.
(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.'

[4] 1932 AD 359 at 370-1.

[5] Of Act 8 of 1928 (Southern Rhodesia), quoted at pp 367-8 of the judgment, which is (for present purposes) to the same effect as s 6 of the current South African Arbitration Act quoted above, n 3.

[6] 1980 (1) SA 301 (D) at 304E-G.

[7] 2000 (2) SA 782 (SCA) para 11.

'[12] I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there can not be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute. It also follows that some care must be exercised in one's use of the word 'dispute'. If, for example, the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered upon.'

I would merely emphasise that a failure to pay does not without more imply that there is a dispute as to liability.

[8] The defendant's counsel submitted in argument that the mere fact that the defendant had entered appearance to defend, was sufficient to raise the existence of a dispute which could be formulated at a later stage in the proceedings. The submission ignores the provisions of rule 32(3)(b) which in peremptory terms require the defendant in an affidavit resisting summary judgment not merely to 'disclose fully the nature and grounds of the defence' but also to disclose 'the material facts relied upon therefor'.

[9] No arbitrable dispute has been raised by the defendant justifying a stay of the proceedings. The only other defence raised by the defendant in its affidavit resisting summary judgment was a counterclaim. That defence was not persisted in before the full court, and counsel representing the defendant in this court expressly disavowed any reliance on it ─ correctly so, as it is without merit.

[10] It follows that the orders made by the court of first instance and the full court were correct. The appeal is dismissed, with costs.

T D CLOETE
JUDGE OF APPEAL

Concur: Harms ADP
Jafta JA
Cachalia JA
Snyders AJA