

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : MAKHANDA

Case No: CA 196/2021

In the matter between:

PHEIFER VAN ONSELEN N.O. 1st Appellant

SUSARA LOVINA VAN ONSELEN 2nd Appellant

and

WERNER DE JAGER N.O. 1st Respondent

SEAN MARION JOHNSON N.O. 2nd Respondent

FULL BENCH APPEAL JUDGMENT

GRIFFITHS J:

[1] The appellants are the trustees of Ozzies Besigheid Eindoms Trust (“the trust”) and the respondents are the trustees of the insolvent estate of Mr. Andrew

Michael Rose (“Rose”). The appellants have appealed against a judgment of the High Court in terms of which the appellants were ordered to pay the amount of R2 136 405.53 to the insolvent estate.

[2] The matter had its genesis in a sale by Rose of his farms¹ to the trust in terms of a written deed of sale dated 23 June 2006. In terms of the agreement the aggregate purchase price was the sum of R3 million. As to the manner of payment of the purchase price the agreement contained an imprecise term which was apparently drafted in this fashion as Rose was financially strained. Because of its importance to this matter, this clause is set out below:

“2. Koopprys

Die koopprys van die eiendom is in die som van R2 515 000.00 (twee miljoen vyf hundred and vyftien duisend rand) en die koop prys van die toerusting en oes op land is in die som van R485 000.00 (vier hundred vyf en tagtig rand).

Betaalbaar deur die koper aan die Verkoper as volg:-

2.1 die koper en die Verkoper kom ooreen dat die koper die uitstaande bedrae verskuldig aan die Verkoper se skuldeisers soos per Aanhangsel A, direk aan die skuldeisers sal betaal na datum van ondertekening van hierdie ooreenkoms. Die bedrae verskuldig aan die twee verbandhouders, Landbank en ABSA, sal vereffen word op datum van registrasie van die transaksie;

2.2 die Verkoper sal aan die Koper 'n lening verskaf vir die balans van die koopsom betaalbaar op terme en voorwaardes soos deur hulle ooreengekom sal word”.

¹ Together with farm equipment and standing crop.

[3] Roughly translated, this clause reads as follows:

2. PURCHASE PRICE:

The purchase price of the property is in the sum of R2 515 000.00 (two million five hundred and fifteen thousand rand) and the purchase price of the equipment and crop on the land is in the sum of R485 000 (four hundred and eighty-five thousand rand).

Payable by the purchaser to the seller as follows:

“2.1 The purchaser and the seller agree that the purchaser shall pay directly to the seller’s creditors all outstanding amounts owed by the seller to his creditors as per annexure A after the date of signature of this agreement. The amounts owing to the two bondholders, Landbank and ABSA, will be paid on registration of the transaction.

2.2 The seller will afford the purchaser a loan for the balance of the purchase price payable on terms and conditions as will be agreed by them.

[4] Thus, from a practical point of view, the purchase price of R3 million was to be paid/settled in the following manner:

1. The trust was to settle the amounts due to Rose’s creditors and the sum thereof would be deducted from R3 million;
2. The balance remaining after this exercise would be loaned by the trust to Rose on terms and conditions to be agreed between them.

[5] The farms were registered in the name of the trust on 5 July 2007. On 15 December 2011, Rose’s estate was sequestrated, and the respondents were appointed as the trustees in his insolvent estate. On 20 February 2013, the trustees instituted action against the trust² in which they sought an order that the appellants render a full accounting, supported by vouchers, of all payments made by them

² As represented by the appellants.

in respect of the purchase price together with a debatement thereof and an order for the payment of the difference between the amounts paid by the appellants and the purchase price, together with ancillary relief.

[6] The trust pleaded specially that the claims had become prescribed. The special plea was adjudicated as a separate issue and was upheld. On appeal to the full bench of this court, that order was reversed and the special plea of prescription was dismissed.

[7] The remaining allegations in the particulars of claim germane to the issues raised on appeal read as follows:

“6C. Defendants have failed, despite having been requested to do so, to provide proof of the alleged indebtedness of Mr. Rose or the alleged payments reflected in the list, annexure “B”³.

7. By the terms of the Agreement of Sale Defendants impliedly, alternatively tacitly, undertook to render an accounting to Seller of such payments made by them to the Seller’s creditors supported by proof thereof.

8. Defendants and A M Rose did not, after the conclusion of the Agreement of Sale, Annexure “A”, agree to terms as to the loan by A M Rose to Defendants in respect of the unpaid balance of the purchase price of the farm properties, farming equipment and the standing crops and, accordingly, the balance of the unpaid purchase price constitutes a loan by A M Rose to the Defendants (and) is repayable on demand together with interest thereon calculated in accordance with the prescribed rate of interest of 15.5% per annum from date of registration of transfer to date of payment.”

³ Annexure "B" to the particulars of claim was an alleged reconstruction of annexure "A" to the initial agreement which, it was common cause, had been lost. It became common cause during the trial that indeed annexure "B" did not reflect the true position as to the creditors of Rose at the time of the conclusion of the sale.

[8] To these allegations, the trust pleaded as follows:

“5. Ad Paragraph 6C

The Defendants deny that they needed to prove any alleged indebtedness of Rose, as Plaintiff in the action bears the onus to prove his case.

6. Ad Paragraph 7

The Defendants deny the contents of this paragraph and deny that Rose, for a period of more than five years, ever requested Plaintiff for proof of payment of those amounts which were specifically set out in the annexure to the written Agreement.

7. Ad Paragraph 8

The Defendants deny the contents of this paragraph and in particular deny that there was any unpaid balance in respect of the purchase price or that Rose ever demanded payment of an alleged outstanding balance.” (My underlining).

[9] The net effect of these pleadings appears to have been that the trust denied the existence of the tacit term contended for by the respondents as to an accounting and debatement, or that it bore an onus to establish any “*indebtedness*” on its part. However, in the same breath, it pleaded a denial that there was any “*unpaid balance*” relating to the purchase price, which, to my mind, can only have amounted in the circumstances to a plea to the effect that whatever indebtedness the trust owed to Rose had been settled by the trust. This must be so bearing in mind that the very purpose of the action was to ultimately ascertain whether there was any indebtedness owed by the trust and, if so, the amount so owed.

[10] As regards the conduct of the trial, the evidence led therein, and the reasons for the conclusions she reached I can do no better than to quote the relevant portion of the judgment of Revelas J as follows:

“12. Two witnesses gave evidence at the trial. Mr. De Jager, the first plaintiff, gave evidence on behalf of the trustees of Rose’s insolvent estate. The plaintiffs also presented an affidavit in terms of Uniform Court Rule 38(2), deposed to by Ms Elmarie Coetzee, the attorney who attended to the transfer of the property. Mr Van Onselen gave evidence on behalf of the trust. He was called after the defendants’ unsuccessful application for absolution.

13. The application for absolution was premised on the general argument that the Defendants had no case to answer as the plaintiffs had instituted frivolous litigation against them, leading the court through a maze of mostly unsubstantiated debts for which the trust was not liable. The main argument was that the plaintiffs failed to establish any duty on the trust’s part to render an account, as the existence of such a duty was dependent on a fiduciary relationship between the parties obliging the person in a fiduciary position to provide an account, or else there had to be a contractual or statutory obligation to provide an account of payments made. In this regard counsel for the defendants stressed the plaintiff’s failure to call Rose as a witness, despite the fact that he was present in court while De Jager, who was not a party to the agreement between Rose and the trust, had testified. Without Rose’s testimony, it was argued, the plaintiffs failed to prove any tacit term with regard to an obligation to account and debate any sums paid, as set out in the particulars of claim. Accordingly, the plaintiffs were unable to prove any of the obligations referred to above and thus unable to prove a duty to account.

14. The defendants also referred to an affidavit deposed to by Rose, opposing the application for the sequestration of his estate, wherein he stated that all his creditors, except for the Humansdorp Cooperative and Rocklands Poultry, were paid in full. As it turned out this was not true. This discrepancy however, does not render the plaintiffs’ claim void. In my view, the evidence led in the sequestration proceedings does not carry the evidentiary weight in the present proceedings as the defendants would have it. The defendants still bear the burden of proving that these payments were made by them.

15. De Jager was cross-examined in depth. He was confronted with the fact that he was the attorney of record for the applicant (the Humansdorp Cooperative) in the application for sequestration and then became a trustee of the insolvent estate of Rose. De Jager did not agree that such a situation could cause a conflict of interests. Much was made of the fact that the amount claimed by the Humansdorp Cooperative and listed in annexure B, namely the amount of R7 18 466.84, was substantially more than the debt which gave rise to the application for sequestration R287 277.23 as being the amount owed by Rose to the applicant (the Cooperative). Clearly this is a drastic increase over a period of 5 years, notwithstanding the interest that may have accrued to the original debt. Certain discrepancies in De Jager’s testimony in the proceedings before Alkema J, and in the present proceedings were highlighted when De Jager was cross-examined by the defendants’ counsel. It was also submitted that De Jager was a poor witness.

16. The application for absolution from the instance was dismissed with costs. Even though certain aspects of de Jager’s evidence invited criticism, I had to accept that he indeed made several attempts to obtain information from the defendants regarding payments made by the trust, on behalf of Rose, in terms of the agreement of sale of the property. One of the responses to his requests for accounting was the delivery of a box full of bank statements and documents that were not helpful at all.

In another instance he was furnished with the bank statements of Ozzies Besigheids Trust which is a different trust from the trust under consideration although the first defendant is also a trustee of that trust. These statements were equally unhelpful and indicative thereof that the defendants were labouring under the misapprehension that the plaintiffs bore the onus of proving that the creditors of Rose were paid. During argument counsel for the defendants submitted that Ozzies Besigheids Trust should have been cited as a party and for their failure in that regard they only had themselves to blame. This is a rather misplaced assertion if one considers the defendants' own pleadings.

17. In my view, it was not fatal to the plaintiffs' case that Rose was not called as a witness. The terms of the contract were unambiguous with regard to the rather unusual manner of payment of the purchase price and the creditors that had to be paid by the trust, were identified. Rose could have taken matters no further. The same applies to the question of whether there was a tacit term in the agreement requiring the trust, or the defendants, to account to Rose which of his creditors were paid by the trust and how much.

18. A tacit term can be inferred from the express terms of the contract and the surrounding circumstances. In so inferring, "a court implies not only the terms which the parties actually had in mind but did not trouble to express, but also terms which the parties, whether or not they had them in mind, would have expressed if the question or situation requiring the term, had been brought to their attention"³ By undertaking to pay Rose's many creditors identified and listed in annexure A to the agreement, it must have been foreseen that the trust would act as Rose's agent and as such had a contractual obligation and a fiduciary duty to account and debate the payments made by it. "The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when the term is not necessary to render the contract fully functional."

19. It is hardly likely that the parties intended that firstly, the trust would have no obligation to pay the creditors listed in the annexure to the agreement despite its express provision therefore and secondly, to leave it solely up to Rose to find out whether his creditors have been paid by the trust without any accounting whatsoever to Rose. That would have been entirely impractical. Clearly there was an implied term that can be read into the agreement that the defendants, the first defendant in particular, had a fiduciary and contractual duty to account to Rose or to the trustees of his later insolvent estate, as to when, how much was paid, and to whom payment was made. The duty to account or to provide proof of payment flows from the provisions of clause 2.2 of the agreement which had the effect of establishing an agency agreement between the two contracting parties.

20. For all the aforesaid reasons it was found that the defendants had a case to answer and the application for absolution was dismissed with costs.

21. Mr Van Onselen was then called to testify. His testimony did not take the case for the defendants much further. In view of the several concessions made by him during cross-examination, he rather strengthened the plaintiff's case. In

addition, counsel for the plaintiffs, Mr De La Harpe, questioned Mr van Onselen in depth about those payments made to Rose's creditors by him and those payments not made. The result of this exercise was that an accounting was no longer necessary. With reference to certain documents in the trial bundles and certain payments made to Rose's creditors by the trust or by the first defendant, it became possible to arrive at a figure which represented the difference between the R3 million owed in terms of the agreement and the amounts paid to some of Rose's creditors. That amount came to R2 136 405.53.

22. Mr Van Onselen testified about Rose's great financial difficulties and the fact that he wished to assist him, mainly because his daughter was married to Rose's son and the couple were living on one of the farms. He said that when he bought the farm it was in a sad state, the farm equipment such as there were, were rusted and the only crop was a piece of land covered with dead lucern. However, it emerged during cross-examination that the property was sold some time after Rose went insolvent, for a purchase price of about four times the price that Rose was to be paid for it by the trust.

23. According to Van Onselen, he felt sorry for Rose and in that spirit, and because their children were married, he made several payments towards Rose directly and indirectly, such as paying for his municipal bills, having Rose and his son as beneficiaries on his medical aid and making other benevolent payments. As I understood Mr Van Onselen, he felt that his charitable acts and payments of which Rose and his family were the beneficiaries, rendered the trust exempt from payment of any amounts to Rose in terms of the contract. However, that was not the defendant's case as pleaded. Counsel for the defendants submitted that I ought to view the matter in the aforesaid context and find that the trust was not indebted to Rose's insolvent estate also because there was no reliable evidence before me to conclude what was allegedly owed to Rose's estate. The flaw in this argument is that it was the defendants who thwarted all attempts by the plaintiffs to establish which creditors were paid or not. Requests for this information was made in correspondence, in a request for further particulars for trial, and during a pre-trial conference where the defendants' legal representatives undertook to revert on this aspect but never did. I am also mindful of the fact that Rose did not do much himself to find out what payments were made, but it is the defendants who bear the onus of proving that they have discharged the trust's debts. As Davis AJA put the matter in *Pillay v Krishna*:

"[W]here there are several distinct issues, for instance a claim and a special defence, then there are several distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first had been discharged."

24. In Principles of Evidence⁶ at 573 the authors interpreted the above *dictum* in *Pillay v Krishna* thus:

"[I]n a claim for recovery of a loan it is for the plaintiff to prove that the loan was made, but a defendant who alleges that the loan has been repaid bears the burden of proving that fact in order for the defence to succeed. If at the end of the trial it is established that the loan was made, but it is unclear whether it was repaid the plaintiff will succeed" (emphasis added).

25. Whereas is most regrettable that both Rose and Van Onselen were neglectful with regard to keeping proper records of all payments made in terms of the contract, the fact that the larger portion of the purchase price of the property or loan, as it was structured, remains unpaid is a fact, even if the exact amount might not be a certainty in the defendants' view. The defendants therefore did not discharge the onus of proving that they have no further obligations under the agreement."

(Footnotes omitted)

[11] From the foregoing, and from the arguments made on behalf of the appellants, it appears that the issues on appeal were: whether the trial court was correct in finding that the tacit term existed; whether the defendant bore an onus to prove that there was no indebtedness under the agreement, and whether the failure to call Rose as a witness tilted the balance in favour of the appellants. In addition, and in argument before us, Mr. Joubert, who appeared on behalf of the appellants, advanced a new and novel argument to the effect that because there was some reference in the pre-trial conference to a loan having come into existence, and because Van Onselen testified about an agreement between himself and Rose to the effect that his continued support of Rose would be considered as a discharge of the debt, this should have been taken into account by the trial court despite it not having been pleaded.

The tacit term as to accounting and debatement

[12] An action for an account and a debatement thereof is well known in our law⁴. However, it is not available in every instance, and it is necessary for a plaintiff suing for such relief to allege and prove the existence of certain prescribed relationships between the parties. The circumstances in which it may be claimed have been described as follows:

⁴ *Doyle & Another v Fleet Motors P.E. (Pty.) Ltd.* 1971 (3) SA 760 (A) at p 762.

“The right at common law to claim a statement of account is, of course, recognised in our law, provided the allegations in support thereof make it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued the duty to give an account. Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account. *Erasmus v Slomowitz* (1), 1938 T.P.D. 236 at p. 239; *Maitland Cattle Dealers (Pty.) Ltd. v Lyons* 1943, W.L.D. 1 at p. 19. See also *Doyle and Another v Fleet Motors P.E. (Pty.) Ltd.*, 1971 (3) SA 760 (A.D)...”⁵

[13] In her judgment, as quoted above, Revelas J set out her reasons for finding that a tacit term existed to the effect that, in the event of a dispute, the seller (Rose) would be entitled to sue for an accounting and debatement. This she did at paragraphs 18 to 19 of her judgment. She found that the agreement itself would not have been commercially efficient had the term not been imported into the contract and that it would have been entirely impractical to have left it solely up to Rose to find out whether his creditors had been paid by the trust without any accounting whatsoever to him. She further found that clause 2.2 of the agreement “*had the effect of establishing an agency agreement between the two contracting parties.*”

[14] Whether indeed a relationship of principal and agent was created vis-à-vis Rose and the Trust by virtue of clause 2.2 of the agreement is debatable, as is the question as to whether a fiduciary relationship was created between them. In this regard, it is well-known that agency is not susceptible of a precise definition as exemplified in the following passage:

“III The defining characteristics of agency

As indicated above, agency is a complex and protean phenomenon, and the words 'agency' and 'agent' are used in a variety of ways and for different purposes. This motivated Nestadt J in *Truter, Crous, Wiggill & Vos v Udwin* to give judicial approval

⁵ *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W) at p 1963.

to De Wet's view that 'the expression "agency" is used in such a wide variety of meanings that it cannot be regarded as a term of art'. As a consequence, it is unsuitable to attempt some sort of thin definition of agency. It is instead preferable, as has become the norm internationally, to identify various *defining characteristics* of agency, with a view to extrapolating from these, or identifying certain extensions or qualifications, all with the purpose of constructing as complete a conceptual picture as is possible of agency law.”⁶ (footnotes omitted)

[15] However, in my view whether such a principal and agent relationship indeed came into existence by virtue of the agreement is neither here nor there. As found by Revelas J, it was a tacit term of the agreement that the seller (Rose) was entitled to sue for an accounting and debatement thereof in the event of there being a dispute as to the amount due. It was not necessary, once this conclusion was reached, to take the matter any further. The argument as advanced by the appellants to the effect that the context within which the agreement was concluded (namely Rose’s financial difficulties having been ameliorated by Van Onselen’s gesture of purchasing the farms) was of importance, was taken into account by the trial court in concluding that the tacit term existed. In any event, the familial relationship which apparently existed at the time of the conclusion of the agreement, does not negate the effect of the “*bystander*” or “*officious bystander*” test in the circumstances. The question which had to be asked at the time was as to whether, in the event of a dispute, the purchaser (Rose) would have been entitled to claim an accounting and debatement. In these circumstances the bystander would undoubtedly, in my view, have answered such question in the affirmative. As against these background circumstances, in my view, the trial court correctly concluded that this was indeed a tacit term of the agreement.

[16] As matters unfolded in any event, it seems to me that the entire question as to whether such a tacit term existed became somewhat of a red herring. I say this

⁶ Glover: Agency in South Africa: Mapping its defining characteristics. Acta Juridica, Volume 2021, No. 1

because the court *a quo* found, rightly in my view, that orders for an accounting and debatement were unnecessary because of the manner that the trial unfolded. Indeed, the purpose of such accounting and debatement was to determine the amount, if any, which was due and owing. When it became apparent that the evidence established this, the need for both the accounting and debatement thereof fell away.

The onus

[17] The trial court found on the pleadings that “*it is the defendants who bear the onus of proving that they have discharged the trust’s debts.*” Revelas J referred to the well-known case of *Pillay v Krishna and Another*⁷ and to *Principles of Evidence*⁸ in support of her conclusion⁹.

[18] As I understand the submissions made on behalf of the appellants in this regard, the onus remained on the respondents to establish who in fact the creditors were before there could have been a shifting of the onus to the appellants. I beg to differ. As dealt with in paragraph 9 above, although not a picture of clarity, the plea itself made it reasonably clear that the appellants’ case was that whatever debt may have existed had been discharged.

[19] This was taken further in the pre-trial conference of 20 July 2020 when in answer to a question as to whether the appellants admitted that they were liable to pay the difference between the purchase price in the sum of R3 million, and the aggregate of the sums paid to Rose’s creditors, they responded:

⁷ 1946 (AD) 946 at pp 952 -3.

⁸ Schwikkard and Van der Merwe *Principles of Evidence* 3rd ed (2009) at p 573.

⁹ See paragraphs 23-4 of the judgment of the trial court as quoted above.

“Defendants admit that the balance of the purchase price, after settlement of all outstanding debts as listed in annexure A to the Deed of Sale, would be converted to a loan granted by the insolvent to the defendants. Defendants have in the meantime settled the full amount of the loan. Evidence in this regard will be submitted at the trial.”

[20] In these circumstances, I cannot fault the conclusion reached by Revelas J to the effect that the plea as amplified by the further admissions had the result that the appellants bore the onus of establishing that the debt had been discharged.

The failure to call Rose as a witness

[21] As is reflected in the judgment of the trial court, the argument was made before it that the respondents’ failure to call Rose (who had been available) as a witness was fatal to the respondents’ case as it was only Rose who could testify as to the context within which the agreement was concluded. This argument was again pursued before us. Revelas J found that the terms of the contract were unambiguous regarding the unusual manner of payment of the purchase price and that Rose could have taken the matter no further. The court considered the context within which the agreement was concluded, namely the dire financial straits that Rose found himself in and the familial relationship between Van Onselen and Rose.¹⁰ No further “*context*” other than this was raised by Van Onselen when he testified, and it seems to me that the trial court was thus entirely correct in its finding that Rose could have taken the matter no further.

[22] In this regard there is no hard and fast rule to the effect that the failure to call a witness who was available to testify should result in an adverse inference

¹⁰ Rose was married to Van Onselen's daughter.

against the party failing to do so. Every case must depend on its own facts and circumstances. Generally speaking, the failure to call an eyewitness to an event (such as a motor vehicle accident) in issue may result in such an adverse inference. However, this is not always necessarily so. The situation was well described by Didcott J in *Magagula v Senator Insurance Company (Ltd)* ¹¹ *albeit* dealing with a motor vehicle accident case as follows:

“In the present litigation, I believe, one may safely say of the two conceivable explanations for the collision that they are ‘more or less equally open on the evidence’, to borrow SCHREINER JA’s terminology, and that neither is likelier than the other, by a margin worth speaking of, to translate the language of JANSEN JA. It is therefore the sort of case which qualifies for the inference in question. Whether one should be drawn in all its circumstances is, however, another matter altogether. No hard and fast rule governs that enquiry. Having authorised the inference in such a situation, JANSEN JA added immediately (at 40E):

“Of dit egter in ‘n bepaalde geval behoort gemaak te word, en of die gewig daarvan inderdaad deurslaggewend is, sal egter van die bepaalde omstandighede afhang.”

To similar effect was the following passage from the judgment of CORBETT AJA, also delivered in *Van der Schyff’s* case (at 49F - G):

“Dit is, mi, nòg wenslik, trouens nòg moontlik, om die omstandighede waaronder die *Galante*- beginsel toepaslik is met noukeurigheid te probeer omskrywe. Die toepassing daarvan moet egter afhang van die aard van die geskille wat deur die besondere geval opgewerp word en die bewyskrag van die getuienis wat deur die eiser aangevoer word.”

Drawing the line between legitimate inference and mere surmise, CORBETT AJA went on to say (at 49G - H):

“Oor die algemeen moet daar - soos in die *Galante*- saak - ‘n redelike mate van sekerheid wees in verband met die basiese feite van die botsing, welke sekerheid voldoende is om die Hof in staat te stel om verskillende verduidelikings aangaande die oorsaak van die botsing te bepaal of af te lei. In sodanige gevalle kan die versuim van die verweerder om ‘n teenbewys aan te bied die deurslag gee, in die sin dat die Hof geregtig is om, ingevolge die *Galante*- beginsel, daardie verduideliking te verkies wat ten gunste van die eiser is. Maar die beginsel kan nie behoorlik toegepas word waar die saak van die eiser so vaag en ontoereikend tov die basiese feite is dat die enigste feite-bepalings of afleidings wat gemaak kan word as blote bespiegeling bestempel moet word en, nadat alles inaggeneem is, die Hof dus nie in staat is om te bevind dat nalatigheid op ‘n oorwig van waarskynlikhede bewys is nie.”

¹¹ 1980 (1) SA 717 (N) at pp721-2.

CORBETT AJA's voice, it is true, was a dissenting one, But I do not construe the judgments of RUMPF JA and JANSEN JA, who spoke for the majority, as having clashed with the part of his which I have quoted. CORBETT AJA disagreed with them not so much in his approach to the enquiry as in his evaluation of the facts then before the Court.

I have in this case, as I see things, just that dearth of information which CORBETT AJA considered too marked for a decisive inference to be drawn from the driver's silence. There is no real measure of certainty about the basic facts of the accident which killed the plaintiff's wife. The evidence concerning them is so sparse that, even when account is taken of the defendant's failure to call the driver as a witness, the all important point of impact remains wholly conjectural."

Should the trial court have taken into account an agreement testified to by Van Onselen but not pleaded?

[23] As dealt with in paragraphs 22 and 23 of the trial court's judgment, it was argued that certain evidence of Van Onselen regarding a verbal agreement between him and Rose to the effect that the remaining loan would be offset by Van Onselen's benevolence in financially supporting Rose, should have been taken into account by the court. The essence of the alleged agreement as I understood the evidence was that it was concluded in satisfaction of the requirements of clause 2.2 in that these were the "*terms and conditions as will be agreed upon by them*".

[24] The difficulty with this argument as pertinently pointed out by Revelas J is that it was never pleaded. Accordingly, it was not an issue before the parties and the evidence of Van Onselen in this regard was entirely irrelevant to the proceedings.

[25] Not so, argued the appellants. It was argued that indeed this aspect was raised at a pre-trial conference and that the respondents were thus not ambushed

as they were made aware of these facts. It was submitted that the question of a loan having come into existence was raised obliquely as has been quoted in paragraph 19 above. It was further argued that because the appellants answered certain questions put by the respondents in the same pre-trial conference as to whether they admitted that certain payments were made by the appellants to Rose for his month-to-month maintenance, or on his behalf to his creditors, and the respondents replied that these questions were irrelevant to the issues, the issue as to whether the loan had indeed been settled in this manner had become a “*non-issue*”. It was submitted that the court *a quo* therefore erred in not finding that van Onselen’s evidence on this score was not only acceptable but provided a complete answer to the claim for payment of the balance of the purchase price.

[26] There are several problems with this argument. It is trite law that particularly where a party bears the onus of proof, that party must plead his case clearly and concisely. Where, as in this instance, a debtor maintains that it has settled an outstanding purchase price, or loan, either by direct payment or by novation of the underlying agreement which formed the substratum of the debt, it must plead the *facta probanda* thereof.¹² By parity of reasoning, where in a case of unlawful arrest the defendant admits the arrest and thereby attracts an onus to justify it, the defendant is obliged to plead the lawful basis upon which it claims such justification.

¹² Rule 18 (4) and (6) of the Uniform Rules of Court reads as follows:

“(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

...

(6) A party who in his pleading relies upon a contract shall state whether the contract is [a] written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”

See further Erasmus: Superior Court Practice-commentary on the above sub-rules and rule 22.

[27] In the present matter, there is not a mention of such agreement in the appellants' plea. The fact that it may obliquely have been mentioned in a preceding pre-trial conference simply cannot be elevated to a pleading which determines the issues between the parties. Because it was not raised in the plea, the respondents quite correctly took it no further. Indeed, should the trial court have accepted the appellants' contention, and accepted Van Onselen's evidence in this regard, the respondents would have been ambushed to the extent that they would not have been able to prepare a response thereto and/or to investigate these contentions fully and properly by, *inter alia*, requesting further particulars for trial. They may also have wished to replicate for one reason or another to raise further issues relating to the alleged agreement. They may even, upon proper investigation, have conceded the point. None of this could they do as it was not pleaded.

[28] The argument that the alleged agreement to maintain Rose became a non-issue because it was unchallenged in some way likewise cannot hold any weight. Had the respondents indeed accepted this and created a "*non-issue*", the result would have been that the respondents would have had to concede the case and pay costs. A concession on their part that a loan agreement had been concluded, and that it had been satisfied, was clearly not what was intended by the responses at the pre-trial conference to the effect that the questions referred to were irrelevant to the issues between the parties.

[29] Furthermore, the evidence of Van Onselen in this regard was extremely vague. I gained the distinct impression that the facts relating to the agreement and

the statement that the agreement was intended to be in satisfaction of the requirements of clause 2.2 of the agreement, had to be dragged out of him.

[30] In my view therefore the trial court was correct in rejecting this argument as well.

[31] Certain further arguments were raised regarding whether the respondents had proved the precise amount due taking into account the documentation, the interrogation which took place pursuant to the insolvency and the evidence of Van Onselen. In my view, bearing in mind that the appellants bore the onus in this regard, the trial court was correct in accepting the evidence of the parties in so far as it established indeed that certain of the creditors were paid, and the total amount so paid by the trust. The respondents, under cross examination of Van Onselen, accepted several other contentions made as to payments to Rose's creditors and added those amounts to the settled debts as ascertained by them. In my view, the trial court cannot be faulted in this regard either.

[32] For these reasons I am of the view that the following order should issue:

The appeal is dismissed with costs such costs to include the costs which were reserved in the application for leave to appeal.

R E GRIFFITHS

JUDGE OF THE HIGH COURT

RUSI J. : I agree

JUDGE OF THE HIGH COURT

MAJALI AJ. : I agree

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANTS : Mr Joubert SC

: with Mr Du Toit

INSTRUCTED BY : AC Greyling & Associates

COUNSEL FOR RESPONDENTS : Mr De La Harpe SC

INSTRUCTED BY : **Grevenstein Inc.**

HEARD ON : **23 MAY 2022**

DELIVERED ON : **2 August 2022**