'LOM Business Solutions t/a Set LK Transcribers/

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 26476/06

DATE: 2007/02/15

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES (NO)
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

DATE 17/4/2007 SIGNATURE

10 In the matter between

H N KOTZE Applicant

and

A J SHEPHERD Respondent

JUDGMENT

WILLIS, J: The applicant's claim from the respondents payment of an amount of R872 000, which arises from, and is based upon a written settlement agreement concluded between the parties on 31 October
20 2005, and which was annexed to the founding affidavit marked "HMK1". The settlement agreement was prepared and drafted by Mr Hans Badenhorst, the respondent's attorney of record in these proceedings. The settlement agreement was in full and final settlement of all claims and disputes that existed between the applicant on the one hand, and the respondents on the other, on or about 31 October 2005. I refer to

clauses 1 and 8 of annexure HMK1.

The settlement agreement contains a non-variation clause (indeed there would appear to be more than one non-variation clause in the agreement), which clause is itself entrenched against any waiver not in writing, and signed by both parties. (See clause 6 of HMK1). The abovementioned non-variation/non-waiver clause provides that the written agreement between the parties could not be altered, varied, deleted or cancelled and "no waiver, whether specifically, implicitly or by conduct shall be effective unless reduced to writing and signed by both parties, and further prohibits any variation or waiver of any rights unless reduced to writing and signed by the parties".

It is important also to note that clause 6 further records:-

> "It is recorded that there exists no collateral and or other agreements, and that this is the sole agreement entered into by and between the parties".

In addition to the abovementioned non-variation and non-waiver clause (clause 6), the settlement agreement also contains other clauses which prohibit any variation or waiver of any rights unless reduced to writing and signed by the parties. (See clauses 7.9 and 10 of HMK1).

The crux of the applicant's claim which deals with the issue of payment is contained in clause 3 of the settlement agreement, which clause provides for payment to the applicant by the respondent as follows in respect of and in settlement of the agreement dated 12 January 2005:-

1. R60 000 which was payable to the applicant by the

respondents in three instalments of R20 000 each. (Clause 3.1 of HMK1).

2. An amount of 35% of the debtors are Mega Super Cement, which debts of which debtors were stated as amounting to R3,8 million (clause 3.2 of HMK1).

The real nub of the disputes relates to clause 3.2, the relevant portions are which I shall record as follows:-

"An amount of 35% of the debtors of Mega reflected in the report of Húbner Commercial and Financial Accountants, and the schedule (annexure "V"), the aggregate of which outstanding debtors amounts to R3,8 million, and which shall be payable upon

1. Recovery, payment compromise or reduction of the claims against the aforesaid debtors of Mega, from its previous owner Mr Frans Petrus Stafelberg, whether by way of settlement as a result of litigation, arbitration or otherwise, as and when such individual claims against the debtors become settled or abandoned or "written off" by Shepherd and or Mega".

Clause 3.2.2 of the agreement provides that the applicant shall assist the respondents in resolving the dispute between the respondents and Stafelberg in respect of the Mega debtors. The respondents paid the sum of R60 000 to the applicant in accordance with clause 3.1 of the settlement agreement.

A settlement agreement settling the debt as between Mega Super Cement CC and Frans Petrus Stafelberg was concluded between those parties in December 2005. It records the settlement amount as being R2 750 000 (i.e. considerably less than the figure of R3,8 million recorded in clause 3.2 of the main agreement upon which the applicant relies). The agreement between Stafelberg and Mega Super Cement similarly contains non-variation clauses.

The respondents performed in terms of the settlement agreement, albeit partially, and by 31 January 2005 had paid an amount of R458 000 to the applicant in terms of this agreement. The nub of the dispute really turns on two issues. The first is that clause 3.2 in HMK1 refers to an annexure B, which was not in fact annexed to the document that the parties signed. The second is that there was an oral agreement between the parties to vary the written agreement of settlement, and to settle overall for an amount of R300 000.

I can easily dispose of the second issue, and shall give my reasons for this first. As against the absolutely clear and entrenched, and perhaps overemphasised non-variation clauses requiring any variation amendment et cetera, to be in writing, the respondent's defence that there was an oral agreement varying the obligations clearly must fail.

The second question is whether the reference to annexure B (which is common cause was not annexed to the agreement), presents the applicants with difficulties. In my view it does not. It clearly was not a material term of the agreement, simply by reason of the fact that the

aggregate of the outstanding debtors was clearly recorded as having been R3,8 million. The respective debtors and creditors were clearly identified, and the amounts which the respondents were due to pay, namely 35% was clear and understood by all the parties. In other words that the respondents knew right from the beginning that they would be liable to pay 35% of the debtors of Mega, which outstanding debtors were set with a ceiling of R3,8 million. That payment was conditional upon, in effect, "settlement" as between Mega and Stafelberg. The amount was settled at considerable less than R3,8 million, namely the figure of 2,75 million to which I have already referred.

Accordingly I am satisfied that there is no real, genuine or *bona fide* dispute of fact in this matter, and the applicant accordingly succeeds. The following order is made:-

1. The respondents are to pay the applicant the amount of R872 000, together with interest thereon, calculated at the rate of 15,5% per annum from 31 January 2006 to date of payment.
2. The respondents are to pay the applicant's costs in this application.
3. The liability of the respondents in terms of this order is joint and several, the one paying the other to be absolved.

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ATTORNEYS FOR THE APPLICANT: VAN NIEUWENHUIZEN KOTZE AND ADAM

COUNSEL FOR THE RESPONDENTS: J G DOBIE

ATTORNEYS FOR THE RESPONDENTS: T G BOSCH BADENHORST

DATE OF HEARING: 15 FEBRUARY 2007

DATE OF JUDGMENT: 15 FEBRUARY 2007