IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 587/2012

Date: 1 November2012

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

1/11/2012 Retorius
DATE SIGNATURE

In the matter between:

PORTER, DENNIS JOHN DIGBY Applicant

And

VAN RENSBURG, STEFAN Respondent

JUDGMENT

PRETORIUS J.

[1] The applicant claims the payment of an amount of R7,8 million from the respondent and interest on the sum of R7,8 million at the rate of 15,5% per annum from 1 December 2011 to date of payment.

[2] The respondent drafted and signed an undertaking and agreement on 21 October 2011. The wording of the document is:

"I hereby irrevocably agree and bind myself personally, this practice, my heirs, estate, and successors in title and/or administrators to payment of the following:

To DENNIS JOHN DIGBY PORTER, (Identity number . I shall pay or cause to pay the sum of R7 800 000.00 (Seven million eight hundred thousand Rand) by no later than close of business on 30th November 2011, into your account nominated in writing for that purpose;

To LUDWIG LLEWELYN STRYDOM (Identity number I shall pay or cause to pay the sum of R700 000-.00 (Seven hundred thousand Rand) by no later than close of business on 30th November 2011, into your account nominated in writing for that purpose."

[3] The basis for the irrevocable agreement and undertaking was that the applicant would pay R6,5 million into the respondent's trust account on 21 October 2011, the date of the undertaking. The respondent would then advance such monies under a bridging finance or monetizing agreement to his client, De Clerk Consulting CC.

[4] The respondent, who appeared in person, is an attorney. His defence is

that this application was launched prematurely, although the undertaking is unambiguous and states that the amount of R 7 800 000-00 would be paid by the respondent no later than close of business on 30 November 2011. It is quite clear that there were no conditions attached to this unequivocal undertaking by the respondent. His argument that he was merely the paymaster is untenable. He conceded, correctly in my view, whilst arguing the matter that there is nothing on the papers indicating that he was only the paymaster. It is common cause that the Applicant paid R6,5 million into the respondent's trust account on 21 October 2011.

[5] The respondent had to advance the amount to his client, De Clerck Consulting CC under a monetizing agreement. This was not part of the agreement between the applicant and the respondent.

[6] In ***Loomcraft Fabrics CC v Nedbank Ltd and Another*** **1996(1) SA 812 (AD)** the court held that in the case of a bank which advances irrevocable documentary credit there is a contractual obligation by the bank to pay the beneficiary which is wholly independent of the underlying contract. This instance is similar and should be adjudicated in a similar manner.

[7] The only defence to this would be if the respondent alleges fraud or misrepresentation, but that is not the defence that the respondent relies on. The wording of the undertaking belies the respondent's contention as set out in his opposing affidavit:

"The intention is not to belabour the point, but your deponent did not bind

himself 'unconditionally' or as 'a surety' or 'a co-principal debtor' or anything of that nature or effect. Such wording or intentions on my part is not to be found in there and it is humbly submitted that its absence proves the common intention and understanding between everybody concerned: I undertook to pay as and when such returns are received. The undertaking serves as a safeguard and no more."

[8] The respondent could not point to any provisions in the opposing affidavit or the undertaking which supports his argument.

[9] The alternative defence is *"one of insanity"*, which the court cannot entertain seriously and the respondent seems to be grasping at straws to avoid being held liable for the claim.

[10] It is common cause that the agreement and undertaking were drafted by the respondent and forwarded by him to the applicant and Mr Strydom. Mr Strydom was to receive R700 000 as commission.

[11] The respondent admits that he held collateral security of R8,5 million. He further admits:

"I do not have heirs, no dependants or anybody else that could be adversely affected by such a wording and I had reason to feel confident about the various transactions anyway."

He was under no obligation to provide the undertaking, but felt confident

about the transactions. He, in a way, admits that his intention was to give the undertaking.

[12] The court has carefully scrutinized the undertaking and the meaning of the words of the undertaking is clear, unequivocal and cannot be interpreted in any other manner. The respondent gave the undertaking in his personal capacity. It is disingenuous of the respondent as an attorney, who is an officer of the court, to try and attach another meaning to the clear and unequivocal words of the undertaking. The respondent could not point to any condition set out in the document and had to concede that the undertaking did not contain any conditional obligation when invited to do so during argument.

[13] The respondent's reliance on *"background"* facts and the underlying monetizing agreement is of no consequence when interpreting the words of the undertaking. Similarly the respondent could not direct the court's attention, when requested to do so, to any provision in the undertaking that he was only acting as a paymaster.

[14] It is clear that the applicant would not have deposited R6,5 million in the respondent's trust account, if the respondent had not given the clear, unequivocal and unambiguous undertaking.

[15] None of the so-called defences, which the respondent relies on in his affidavit, was conveyed to the applicant prior to the launching of this application. The respondent never replied to the letter of demand of 14

December 2011.

[16] Although the respondent relies on the parties' intention and motive, it was never recorded in the undertaking, neither were any conditions recorded in the undertaking.

[17] The recording of terms and conditions was not necessary as the respondent's irrevocable agreement and undertaking did not rely on it. The court cannot take cognisance of any extrinsic evidence to interpret the terms of the undertaking and therefore the respondent cannot rely on such evidence.

[18] It is clear that the respondent was not present at the meeting of 21 October 2011 and could not have a "common intention" with the applicant whom he had never met. The respondent did not rely, albeit in the alternative, on his defence of insanity, as set out in his affidavit. In any event there is no such evidence and the court rejects it.

[19] The respondent could not show any *bona fide* dispute of fact. Therefore there is no reason to refer the matter to oral evidence.

[20] **In Gusha v Road Accident Fund 2012(2) SA 371 SCA** Leach AJ held at para 13: "*In interpreting the agreement, counsel for the respondent submitted, correctly in my view, that the correct approach in accordance with the so-called 'golden rule of interpretation' is to have regard to the normal*

grammatical meaning of the relevant words, the context in which they were used, including the nature and purpose of the agreement, and the background circumstances which might explain the purpose of the agreement and the matters properly present to the minds of the parties when they concluded it."

The court finds that the undertaking made by the respondent is clear and the ordinary grammatical meaning of the words is clear. No other interpretation is possible when reading the document.

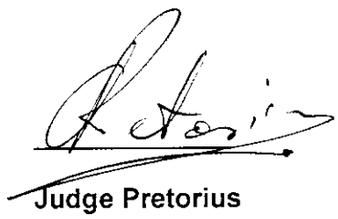
[21] The order is:

21.1 **That the respondent pays to the applicant the sum of R7 800 000.00 (Seven million eight hundred thousand rand);**

21.2 **That the respondent pays to the applicant interest on the sum of R7 800 000.00 (seven million eight hundred thousand rand) at the rate of 15.5% per annum, from 1 December 2011, to date of payment;**

21.3 **That the respondent pays the costs of suit.**

21.4 **That the Registrar of this court has to refer this judgment to the Law Society of the Northern Provinces.**



Judge Pretorius

Case number	:	587/12
Heard on	:	25 October 2012
For the Applicant	:	Adv Vaccaro
Instructed by	:	David Bayliss Attorneys
For the Respondent	:	In Person
Instructed by	:	
Date of Judgment	:	1 November 2012