THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 654/12
Reportable

In the matter between:

KNOX D'ARCY AG **First Appellant**

KNOX D'ARCY LIMITED **Second Appellant**

and

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA **Respondent**

Neutral citation:	*Knox D'Arcy AG v Land and Agricultural Development Bank of SA* (654/12) [2013] ZASCA 93 (05 June 2013)
Coram:	LEWIS, MAYA, PETSE JJA, ERASMUS and SWAIN AJJA
Heard:	7 May 2013
Delivered:	05 June 2013
Summary:	Contract – interpretation – whether appellants proved compliance with the provisions of a written agreement entitling them to a cession of book debts by respondent – issue arising not pleaded – necessity and purpose of pleadings restated.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoba J sitting as court of first instance):

The appeal is dismissed with costs that include the costs of two counsel.

JUDGMENT

MAYA JA (LEWIS, PETSE JJA, ERASMUS and SWAIN AJJA concurring):

[1] This appeal is the latest step in various, protracted court skirmishes between the parties. The appellants appeal against a judgment of the North Gauteng High Court, Pretoria (Makgoba J) which dismissed their claim for a cession of book debts worth R123 million and payment of all funds received from debtors in respect of those debts, alternatively payment of the sum of R123 million and interest. The appeal is with the leave of the court below.

[2] The two appellants are part of the Knox D'Arcy Group of companies which conducts business as profit improvement implementation consultants worldwide. The first appellant is a Swiss company that carries on business as an international management consultant. The second appellant was incorporated according to the company laws of South Africa and has its principal place of business in

Johannesburg. It provides administration and marketing services to and carries out its consultancy assignments in South Africa through the first appellant. The respondent (the Land Bank) is a State owned corporate entity. It is mainly concerned with promoting and facilitating access to ownership of land for the development of farming enterprises for agricultural purposes and provides financial services and assistance therefor.

[3] The relationship between the parties commenced on 25 June 2002 when they concluded a written agreement in terms of which appellants would perform certain services for the Land Bank. Disputes arose and the Land Bank refused to pay the balance owing for the services rendered. The Land Bank further refused to have the disputes referred to arbitration as provided for in the agreement. The appellants then launched court proceedings, which the Land Bank opposed, for a declaration that the disputes were subject to arbitration. Subsequently, the appellants brought contempt proceedings and other interlocutory applications against the Land Bank. The parties ultimately settled all this litigation in terms of a written agreement of settlement dated 7 March 2006, which was made an order of court on 19 April 2006.

[4] The material terms of the settlement agreement read:

> '1. The respondent shall pay to first [appellant] the sum of R32 million … plus VAT on date of signature hereof.
>
> 2.
>
> 2.1 On date of signature, and thereafter for a period not exceeding two months, the parties shall, in the utmost good faith, use their best endeavours to identify to the reasonable satisfaction of both parties,

R123 million … worth of commercial debt in the medium to high and in the low to medium risk categories, as defined by the respondent's Arrears Management System which meet the following criteria:

2.1.1 either the respondent has made a 100 percent provision in its accounting books on the specific loan, in accordance with the AC 133 accounting standard; or

2.1.2 the respondent will not be required, in terms of the AC 133 accounting standard, to make additional provision as a result of ceding to the first [appellant] any of the loans identified;

and the customers' respective accounts shall have been in arrears for twelve months or more. ("the identified debt");

2.2 Notwithstanding the provisions of 2.1 above, the Parties may agree other alternative criteria or other commercial debt for purposes of determining the identified debt, which for the sake of clarity, shall thereupon be incorporated in and form part of the identified debt.

2.3 … in determining what is reasonable, the respondent shall not be seen as having acted unreasonably if it disagrees with a determination of an account if such a determination would result in the respondent being required to make additional provision in its accounting books in order to comply with AC 133 accounting standard.

2.4 the identified debt shall be ceded and assigned by respondent to first [appellant] in terms hereof.

3. …

4. …

5. Once the first [appellant] and respondent *have identified to the respective parties reasonable satisfaction,* the identified debt in the full amount of

> R123 million … the first [appellant] will, within 7 (seven) days of the identified debt being ceded and assigned to the first [appellant] as contemplated herein, pay to respondent R2 300 000.00 …. To the extent that the parties may only be able to agree the identified debt at some lesser amount than the envisaged R123 million …, then in that event, the aforesaid payment to the Respondent shall be reduced proportionately (my emphasis).
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> 6. If the parties do not identify any accounts making up the identified debt, the first [appellant] shall be absolved from paying the amount of R2, 300,000.00 or any portion thereof to the Respondent.'

[5] The Land Bank duly paid the sum of R32 million on 16 March 2006 in compliance with clause 1 of the settlement agreement. It further furnished the appellants with a schedule (Annexure "B"), which reflected its itemised bad debt in the sum of R142 315 736.68 for consideration as debt to be ceded to the appellants (the identified debt).[1]

[6] However, the parties could not agree that they had identified debt which met the criteria prescribed in clause 2.1 of the settlement agreement.[2] The appellants took the view that they had. The Land Bank disagreed. This prompted the institution of the present suit, on 22 September 2006.

[7] But it transpired before the launch of the action that the Land Bank was in fact recovering the identified debt. Its rejection of the appellants'

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[1] Annexure B sets out three separate categories of outstanding loans, (a) 'Long Term Loans - Low to Medium - 1-2 years (excluding unwanted debt)', (b) 'Long Term Loans - Low to Medium - 2-3 or 3+ years' and (c) 'Long Term Loans - Medium to High 1-2 years (excluding unwanted debt)'.

[2] The dissension appears in a long trail of correspondence which flowed between the relevant officials which culminated in a meeting held on 31 May 2006.

request to secure the collected funds pending the resolution of the disagreement prompted yet another bout of litigation. The dispute was resolved by a court order dated 31 August 2006. The Land Bank was ordered, inter alia, to '[r]ing fence all payments and/or remittances [it] received … from debtors in respect of R142 million worth of identified debt detailed in [Annexure "B"], into a ring fenced interest bearing account to be held for the account of whichever party might ultimately be successful in the proceedings'. By the time the matter reached this court, the recovered, ring-fenced funds amounted to R155 227 275. And the appellants' claim, now accompanied by a tender to pay the sum of R2.3 million in terms of clause 6 of the settlement agreement, had also escalated from R123 million to the sum of the ring-fenced funds.

[8] At the trial, the court below identified the issues for adjudication as follows: (a) whether the parties identified debts which met the set criteria in clauses 2.1.1 and 2.1.2 on 31 May 2006; (b) whether the appellants proved that the identified debt described in Annexure "B" had been or should have been 100 per cent provided for or impaired (in common parlance, written off); (c) whether the Land Bank would be required in terms of the AC 133 accounting standard (the AC 133)[3] to make additional provision as a result of ceding any of the identified loans and (d) whether the Land Bank was in breach of the terms of the settlement agreement.

[9] The appellants led the evidence of four witnesses; Mr Richard Steele, Mr Willem Alberts, and two accounting experts, Professor Harvey

[3] The AC 133 accounting standard is the acronym of the 'IAS 39 (AC 133) Financial Instruments: Recognition and Measurement (revised January 2006)' which is a statement of generally accepted accounting practice issued by the Accounting Practices Board of South Africa. It is a standard applied by money lending companies when producing their financial reports and accounts.

Wainer and Mr Mark Pinington. Steele testified as follows. He was seconded by the Knox D'Arcy Group to the first appellant between 2001 and 2006. His mandate was to carry out the performance improvement programme for the Land Bank which was struggling to recover loans from its debtors. The programme was three-pronged. The module relevant for present purposes was designed to improve the Land Bank's recoveries process and reduce its arrear debt.[4]

[10] In that process, he obtained intimate knowledge of the Land Bank's accounting and debt recoveries processes, some of which were designed by him. The systems implemented by the Land Bank comprised (a) the AC 133; (b) the doubtful debt provisions policy (the DDPP) which the Land Bank adopted by 2003 to comply with the AC 133 for the establishment of loan loss provision for irrecoverable debt and, during the same period, (c) the arrears management system (the AMS), a computer database programme which analysed the Land Bank's entire book loan in arrears by breaking down and quantifying the arrears into different categories to allow monitoring of progress and the measuring of the recoveries processes. Incidentally, the performance improvement programme was successful. With the aid of its new efficient recoveries processes, the Land Bank recovered a substantial number of loans it had written off as irrecoverable and saved an approximate sum of R501 million per annum.

[11] The effect of the DDPP was to classify all commercial long term, low to medium and medium to high risk loans overdue for at least 12 months as a loss. One hundred per cent provisioning or impairment was

[4] The other two modules redesigned the Land Bank's organization structure, improved its productivity, reduced its costs base, improved loans and designed new products that the Land Bank could supply to its customers.

applied to the loans unless they were well-secured and legal action had commenced for realisation of the collateral. The Land Bank's auditors, Deloitte, verified that provisioning of its accounts for the year ended in March 2005 complied with the AC 133. In Steele's view, the Land Bank could have so complied only by applying the DDPP to the debts because if 'they were not 100% provided for, then they did not comply with AC 133'. He believed that the provisioning percentages in Annexure "B", which were all less than 100 per cent, were not the specific provisions required by the DDPP but general provisions applied to the different loan categories in accordance with the auditors' model. He mentioned that the appellants' efforts to ascertain on which documents the audit was based from the Land Bank's auditors failed.

[12] He compiled a schedule which contained published accounts of the Land Bank for the years 2001 to 2009. For the year ended 2005 the total provision for long term loans amounted to R764 million. This meant that there was 'more than enough provisions in the [Land Bank's] accounts for the identified debt' as all long term debt was fully provided for. The loans in Annexure "B" fell squarely within that category despite the different percentages reflected in the schedule. The Land Bank would, therefore, not have to make additional provision for the debt in its account by ceding it to the appellants.

[13] Steele explained that the appellants initially claimed R42 million from the Land Bank. At a meeting he had with its directors on 18 January 2006, they offered to pay the appellants R29.7 million in cash. Through negotiations, the parties then agreed that the Land Bank would pay the amount it tendered and cover the R12.3 million shortfall by ceding to the appellants debts of the nature described in the settlement agreement worth

R123 million to which they ascribed the value of ten cents in the rand. The appellants would keep the profit if they collected more than was anticipated. And if they collected less, they would bear the loss. Steele testified that Mr Mukoki, the Land Bank's Chief Executive Officer, and its directors thought this a very good bargain as they considered the debt completely worthless.

[14] Mukoki undertook at the meeting that the Land Bank would cede to the appellants loans that were fully provided for and required no further provisions on the settlement agreement. Steele substantiated this claim with an extract of minutes of the Land Bank's board of directors held on 23 February 2006. The minute recorded that:

'In reply to a comment on the debtor's book to be handed to Knox D'Arcy, Mr Mukoki advised that it was a book that had been written off and the files closed. These debtors were normally handed over to debt collectors who took what they believed could be collected. In addition the amount to be paid to Knox D'Arcy had been provided for in 2005 year end so would not impact on the current year results.'

Mr Vallentgoed, the Land Bank's legal recoveries manager, did not dispute Mukoki's undertaking when he mentioned it to him subsequently.

[15] Alberts stated that he was employed by the Land Bank from 1981 to 2006. In 2004, he was appointed head of retail and managed the Land Bank's loan book which was then valued at R7 billion. He became acting general manager of operations in 2006 and assumed overall responsibility for the AMS. The official responsible for running the AMS reported to him directly and informed him that the DDPP was applied to all loans in the relevant categories. He saw the relevant supporting documents.

[16] He said he was present at a board meeting of the Land Bank's directors where Mukoki confirmed that the debt to be ceded was fully

provided for and needed no further provisions in the books. He was certain that the loans in Annexure "B" were fully provided for in accordance with the Land Bank's policy. He believed Annexure "B" to be an inaccurate summary, 'cut and pasted' from the global operational report of all the Land Bank's loans and spread sheets indicating 100 per cent provisioning for the relevant debt that he reviewed on a monthly basis. He surmised that the schedule was prepared by the legal department, and not the operations department that was qualified to do so, 'to prepare themselves for the agreement' with the appellants. The figures reflected in the schedule were contrary to the Land Bank's policy.

[17] The appellants' accounting experts were called to explain whether the requirements of clause 2.1 of the settlement agreement were met. According to Wainer, whose mandate was confined to an examination of clause 2.1.2, the latter provisions were superfluous and 'made no accounting sense' because they sought to make provision for a debt that no longer existed in the Land Bank's books of account. He would not venture an opinion on whether the loans were fully provided for because he had no access to the relevant underlying documentation.

[18] Pinington's evidence did not go beyond confirming that the Land Bank's approach to calculating provision or impairment for its debt complied with the AC 133 and supporting Wainer's view on the value of clause 2.1.2. He said that the provisions on Annexure "B" were average based. It transpired during his cross-examination that he had recourse only to Annexure "B" and based his opinion that the debt it reflected was fully provided for on the assumption that the DDPP had been applied to it. He did not know if any of the debt was secured and, if it was, whether the realisation processes would have commenced against its collateral. He

ultimately conceded that he was unable to conclude that the loans were or ought to have been fully provided for without that information.

[19] The Land Bank called one witness, Ms Ntsietso Mofokeng. She was the Land Bank's legal services and recoveries general manager during 2006 until she left the Land Bank in 2008. She believed that Annexure "B" was prepared by the Land Bank's AMS unit at the request of her department. She had no insight into its compilation. She knew about the AMS, the DDPP and the AC 133 but disavowed any knowledge of the manner in which the Land Bank made provision for its loans. She thought that the percentages allocated to the different loans in the schedule were not specific provisions but rather general provisions made on an average basis.

[20] She understood the settlement deal to mean that the Land Bank would cede to the appellants its irrecoverable debt which had no value to it, in respect of which it had exhausted its recoveries processes, and would not affect its results by requiring additional provisioning. She recalled the board meeting of 18 January 2006 which she said she attended. According to her, Mukoki meant that whilst the debt to be ceded would be fully provided for, it nonetheless still had to be identified. The debt in Annexure "B" did not meet the relevant criteria and that was the core of the dispute. Agreement was never reached in that respect and Steele was not amenable to her proposal to explore other criteria to resolve the impasse as the settlement agreement allowed.

[21] The court below made adverse credibility findings against Steele and Alberts and rejected their evidence. It found Steele unimpressive for being long-winded, defensive and incoherent. Alberts' evidence was

jettisoned as unreliable hearsay because 'he relied … on information acquired from Mr Mukoki and also … a certain individual that reported to him'. The court concluded that his entire evidence was false because he wanted it to believe that the provisioning percentages in Annexure "B" 'were thumb-sucked' by the Land Bank's legal department and failed to provide an acceptable explanation for different percentages reflected in the schedule. Regarding Pinington, the court found that his opinion was based on wrong assumptions and that he 'correctly admitted that the entire basis of his report that the debts in annexure "B" should have been fully provided for was wrong'.

[22] Mofokeng, who is shown by the record to have had limited independent recall of the relevant events and mostly gave vague answers, on the other hand, made a strikingly favourable impression on the court below. The court accepted her evidence without hesitation because in its view she 'gave evidence in a very relaxed and confident manner … was in good spirit … was very lucid … impressed as a person of intelligence [and] displayed an excellent recall of her own evidence.'

[23] The court below considered the evidence of Steele and Mofokeng vital for deciding what it considered to be the appellants' cause of action ie, whether the parties identified debts which met the relevant criteria as alleged by the appellants. It then found that there were 'two irreconcilable versions' in light of the 'stark differences', in that evidence. It proceeded to resolve the 'dispute' merely by pitting the respective versions against each other and rejecting Steele's evidence, for being 'very poor', unless it corresponded with that given by Mofokeng.

[24] The court below found that (a) the Land Bank had no duty to prove the percentage provisions in Annexure "B", (b) the appellants failed to prove that the Land Bank fully provided for the loans set out in Annexure "B", (c) clause 2.1.2 was void for vagueness and therefore unenforceable and (d) the evidence adduced by the appellants was insufficient to prove their pleaded case that the parties identified debts which met the relevant criteria.

[25] On appeal before us, it was contended on the appellants' behalf that the court below erroneously made credibility findings without having regard to the probabilities. It is so that that court made credibility findings which it based solely on the demeanour of the witnesses. Its assessment of the evidence was, in turn, based wholly on such credibility findings. In that exercise, it completely ignored the general probabilities of the matter and the proven facts which it ought to have also considered. That approach, from which counsel for the Land Bank prudently dissociated themselves, is wrong and constitutes a material misdirection.[5] And that apart, its impressions of the witnesses are simply not supported by the evidence. But more importantly, the court plainly did not grasp the import of Mofokeng's evidence as it would otherwise have realised that she did not refute the appellants' version. There was, essentially, no factual conflict to be resolved between the respective versions. It thus had no reason to engage in the enquiry upon which it embarked.

[5] *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979B-I; *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) paras 5 and 6; *ABSA Bank v Bernet* 2011 (3) SA 74 (SCA) para 12; *Stellenbosch Farmer's Winery Group Ltd & another v Martel et Cie & others* 2003 (1) SA 11 (SCA).

[26] But this finding does not assist the appellants' case. Their main contention was that they proved on a balance of probabilities that full provision was made or should have been made by the Land Bank for the debt on Annexure "B", regardless of the fact that the schedule recorded that the debt had been provided for in percentages lower than 100 per cent as these were not specific but general provisions and the Land Bank did not rebut their evidence that the debts were fully provided for. It was submitted further that the criterion in clause 2.1.2, which was not void for vagueness but was unnecessary, was met, in compliance with the AC 133, as no additional provision as a result of the cession of the debt would be required.

[27] There is a fundamental difficulty with the main proposition. It is rooted in the party's pleadings. The key allegations in the appellants' particulars of claim read:

'7 Consequent upon the conclusion of the agreement:

7.1 During or about March 2006 the [Land Bank] made payment to the [first appellant] of R32 million.

7.2 On or about 31 May 2006 the parties identified R142 315 736.68 worth of debt that met the criteria set out in the agreement. The schedule recording such identified debt as defined in the agreement is attached marked "B".

8 The R142 315 736.68 worth of debt set out in Annexure "B" meets the criteria set out in [clause 2.1 of the settlement agreement].'

[28] In its plea, the Land Bank denied the allegations in paragraphs 7.2 and 8. It averred that Annexure "B" reflected all the loans in its books of account and that they did not meet the criteria in clause 2.1 of the

settlement agreement. This was because it had not made 100 per cent provision for them in accordance with the AC 133. It would thus be required to make additional provision in its books of accounts as a result of ceding any or all of the loans to the first appellant.

[29] These issues remained in contention up to trial stage as evidenced by counsel's opening addresses. In that court, counsel for the appellants defined their case as follows:

'The issue in the case is whether there are debts which meet the requirements, the criteria which the written agreement provides they were to be. They had to be of a certain type and a certain class and they had to comply with certain criteria and that is the dispute in this matter. … The parties had to get together and within two months identify the debt. … The parties did get together and agreed everything in relation to the loans except [the] two criteria [in clause 2.1].'

[30] The Land Bank's counsel dismissed this statement as a misidentification of the issues between the parties that was not supported by the cause of action pleaded by the appellants. He reiterated the Land Bank's stance that the parties never identified debt which satisfied the relevant criteria and that this was the real issue that the court below had to adjudicate. The court below then captured the arguments as follows:

'But Mr Burman, the defendant's case is that the parties never identified such a debt. You operate on the premises that such debt was identified, all what was thought agreed upon was the criteria … they say that even the identification never took place let alone criteria, so you people are not with each other ….'

To this summation, the appellants' counsel responded 'Yes, yes, you are entirely correct, M'Lord'. The case then proceeded on that basis. And this, obviously, is the reason for the Land Bank's subsequent failure to

call its proposed expert witnesses who were to testify on whether the criteria in clause 2.1 were met.

[31] Counsel for the appellants was constrained to concede in argument before us that there was no evidence of a vital element of the appellants' cause of action – that the parties *agreed* on the identified debt as pleaded in paragraph 7.2 of their particulars of claim. The concession was proper in light of the evidence in which the appellants' own witnesses impeached even Annexure "B", the very foundation of their case as pleaded in paragraph 7.2.

[32] Realising the grave problem this posed, appellants' counsel then argued that the appellants could still rely on the allegations in paragraph 8 of the particulars of claim successfully as they constituted a separate and distinct cause of action that had been an issue at the trial. The Land Bank did not meet its end of the bargain by ensuring that suitable debt was identified as contemplated in the settlement agreement, continued the argument. On that basis, counsel urged, we should find in the appellants' favour that, despite the lack of agreement between the parties on that issue, there was nevertheless, 'objective compliance with or objective fulfilment of the criteria in clause 2.1'.

[33] I venture to say that there are strong hints in the undisputed evidence that the conduct of the Land Bank in its dealings with the appellants, and in this particular regard too, may easily be construed as obstructive. In addition to all the parties' other skirmishes often brought

about by the Land Bank's resistance, which have kept our courts very busy, the appellants told of its unyielding refusal to produce documents that formed the basis of the perplexing Annexure "B" and would explain the computation of the percentage provisions it reflected. The source documents were not produced on the basis that they were confidential or privileged. When confronted with a court order obtained in a hard fought application that compelled it to discover the documents, the Land Bank raised an incredible excuse that the documents did not exist or were no longer available.

[34] Be that as it may, however, the appellants' contention for a finding of a 'deemed agreement' is beset by its own problems. First, even assuming that the allegations in paragraph 8 of their particulars of claim encompass a cause of action that is separate from the one set out in paragraph 7.2, as contended, the requirement in clause 2.1 for the parties to identify suitable debt, which was not met, remains a hurdle. But the real obstacle is the manner in which the appellants couched their cause of action. From the onset of the proceedings until trial, the appellants' case was simply that the parties identified the relevant debt which was reflected in Annexure "B" and disagreed only in respect of the question whether such debt met the criteria in clause 2.1 of the settlement agreement. Now they seek to rely on a radically mutated version of that case: one that is akin to a claim based on the equitable doctrine of fictional fulfilment which prevents a party from taking advantage of its own default to the loss or injury of another.[6]

[6] *East Asiatic Co Ltd v Hansen* 1933 NPD 297; *Koenig v Johnson & Co Ltd* 1935 AD 262; *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C) at p 996D-H; *Du Plessis NO & another v Goldco Motor Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) paras 22-27; RH Christie and GB Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 156.

[35] It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet.[7] And a party may not plead one issue and then at the trial, and in this case on appeal, attempt to canvass another which was not put in issue and fully investigated.[8] The Land Bank (and the trial court for that matter) was never put on notice that it would answer a case that it had frustrated, deliberately or otherwise, the performance of the obligation imposed by clause 2.1 of the settlement agreement. Clearly, we cannot now, on appeal, decide issues that have neither been raised nor fully ventilated previously.[9]

[36] For these reasons the appeal cannot succeed and the following order is made:

'The appeal is dismissed with costs that include the costs of two counsel.'

MML MAYA

JUDGE OF APPEAL

[7] See, for example, *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 102A; *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082; *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H.

[8] *Middleton v Carr* 1949 (2) SA 374 (A) at 386.

[9] *Ras NNO v Van der Meulen* 2011 (4) SA 17 (SCA) para 16.

APPEARANCES

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